# Herrin, Edward

## 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**

| | | |
|---|---|---|
| **IN RE: EDWARD D. HERRIN** | **)** | **DOCKET NO. 853448** |
| | **)** | |
| **CLAIM NO. S-658246** | **)** | **DECISION AND ORDER** |

APPEARANCES:

Claimant, Edward D. Herrin, by
Leonard W. Moen and Associates, per
David S. Heller and Randolph F. Jones

Self-insured Employer, Snohomish County, by
Prosecuting Attorney, Seth R. Dawson, per
Wallace Murray and Marya J. Silverdale, Deputies

Department of Labor and Industries, by
The Attorney General, per
David Swan and Bruce Clement, Assistants

This is an appeal filed by the self-insured employer on November 15, 1985 from an order of the Department of Labor and Industries dated October 22, 1985 which required the distribution of a $25,000.00 third party recovery as follows:

1. The attorneys fee of $8,333.33 is to be paid and $294.75 in unrecovered litigation costs are to be reimbursed, leaving a balance of $16,371.92;
2. Edward Herrin is to be paid 25% of the balance, $4,092.98;
3. The employer, Snohomish County, is entitled to the remaining balance of $12,278.94 less their contribution towards the litigation costs, $4,238.11, or $8,040.83.

   Formal demand is hereby made upon Edward Herrin to reimburse Snohomish County, $8,040.83."

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 employer to a Proposed Decision and Order issued on August 20, 1986 in which the order of the Department dated October 22, 1985 was affirmed.

The issue presented by this appeal is whether, pursuant to RCW 51.24.060(1) as amended in 1984, the Department was correct in its method of computing the self-insured employer's proportionate share of attorneys' fees and costs and in its method of deducting that amount from the employer's share of the third party recovery.

The parties submitted this appeal on a stipulation of facts. Claimant sustained an industrial injury due to the negligence of a third party on November 15, 1983. The workers' compensation claim was closed on May 31, 1985, with the self-insured employer having expended a total of $25,608.57 in benefits and compensation. Claimant had elected to seek damages from the responsible third party and in August, 1985, that action was settled for $25,000.00. On October 22, 1985, the Department issued the order which is the subject of this appeal, setting forth the distribution of that $25,000.00 recovery pursuant to the provisions of RCW 51.24.060(1). This statute as amended in 1984 provided:

> "(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:
>
> (a)The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer;
>
> (b)The injured worker or beneficiary shall be paid twenty-five percent of balance of the award: . . .
>
> (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 compensation and benefits paid;
>
> > (i)The department and/or self insurer shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary to the extent of the benefits paid or payable under this title: . . .
> >
> > (ii)The sum representing the department's and/or self-insurer's proportionate share shall not be subject to subsection (1) (d) and (e) of this section.
>
> (d)Any remaining balance shall be paid to the injured worker or beneficiary;
>
> (e)Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person." (Emphasis added).

RCW 51.24.060 is not a model of clarity. It is difficult to decipher the legislative intent from the language of the statute itself. The directive that attorneys' fees and costs be shared proportionately appears in both RCW 51.24.060 (1)(a) and (c)(i). It is not clear whether the first charge of attorneys'

fees and costs is part of the claimant's gross recovery. Furthermore, the statute is inherently ambiguous in that it does not establish a specific formula for computing the distribution of a third party recovery, but simply sets forth a basic framework, requiring the Department to flesh in the details. Because of these ambiguities, we must look behind the statutory language and review the legislative history to ascertain legislative intent. Paulson v. Pierce County, 99 Wn. 2d 645 (1983); Department of Transportation v. SEIB, 97 Wn. 2d 454 (1982). In so doing, we are mindful that "[w]here a statute is ambiguous, construction placed upon it by the officer or department charged with its administration is not binding . . . but is entitled to considerable weight in determining the legislative intention . . . ." Bradley v. Dept. of Labor and Industries, 52 Wn. 2d 780, 786 (1958).

When the Industrial Insurance Act was originally enacted, the injured worker had to elect between pursuing his remedy at law against a third party tortfeasor or pursuing his workers' compensation claim. Laws of 1911, Ch. 74, ] 3. The worker could not receive workers' compensation benefits during the pendency of the third party action and was solely responsible for the litigation expenses incurred, regardless of the outcome. Lowry v. Dept. of Labor and Industries, 21 Wn. 2d 538 (1944).

In 1957, the statutory scheme was dramatically changed to allow the claimant to receive workers' compensation benefits while pursuing a third party action. Laws of 1957, Ch. 70, ] 23; RCW 51.24.010. Because of the potential concurrent recovery under the Industrial Insurance Act and from the third party tortfeasor, the 1957 amendments gave the Department, as the workers' compensation benefit provider, a right to be reimbursed from the third party recovery and a lien against that recovery.

In 1961, RCW 51.24.010 was again amended to require the Department to share the third party suit litigation expenses with the injured worker to the extent that its trust funds benefited from the recovery in the third party action. Laws of 1961, Ch. 274, § 7. The requirement that the Department share the litigation expenses increased the claimant's net recovery by the amount of the litigation expenses that the Department was required to bear. However, when the Department's lien equaled or exceeded the gross recovery, it would take the entire recovery, leaving the claimant with only the benefits provided under his workers' compensation claim.

In 1977, the Legislature repealed RCW 51.24.010 and enacted a new third party suit statute, including RCW 51.24.060 to govern the distribution of third party recoveries where the worker or beneficiary elects to sue the third party rather than assigning the action to the benefit provider (either the Department or a self-insurer, as the case may be). Laws of 1977, 1st Ex. Sess., Ch. 85, § 4.

Under the new statute, attorneys' fees and costs were a first charge against the third party recovery. For the first time, claimants were guaranteed 25% of the net recovery, after the deduction of litigation expenses. Thus, the benefit provider was prevented from claiming the entire net recovery in satisfaction of its lien, eliminating a disincentive to a claimant's pursuit of a third party action. However, at the same time, the 1977 statutory amendment deleted the requirement that attorneys' fees and costs be shared proportionately by the claimant and the benefit providers.

In 1983 the proportionate sharing of litigation expenses was restored to the statutory scheme. Laws of 1983, Ch. 211, § 2. However, it was simply tacked onto the distribution framework which had been enacted in 1977, thus engendering the statutory interpretation problems which now face us.

While the statutory language itself is far from crystal clear, one overriding legislative purpose emerges from the legislative history. In successive amendments, the Legislature has steadily increased the claimant's ultimate share of the third party recovery. In 1986, the Legislature continued this trend by eliminating the benefit provider's lien entirely if the employer or co-employee is at fault. Laws of 1986, Ch. 305, § 403. By maximizing the claimant's ultimate share, the Legislature clearly intends to encourage claimants to pursue third party actions.

The question, then, is whether the Department's distribution formula comports with this legislative intent. The Department computed the third party distribution as indicated in its worksheet (Appendix A, which accompanied claimant's brief and is attached hereto). The Department first subtracted the $8,628.08 in attorneys' fees and costs from the total recovery of $25,000.00, leaving a net recovery of $16,371.92. RCW 51.24.060(1)(a). Claimant's 25% share of the $16,371.92 balance was computed to equal $4,092.98. RCW 51.24.060(1)(b). The employer's recovery was arrived at by subtracting $4,092.98 from $16,371.92, yielding the $12,278.94 figure. RCW 51.24.060(1)(c).

The self-insured employer has no quarrel with the Department's The self-insured employer has no quarrel with the Department's computation up to this point, but argues that process should have stopped there and that the employer should have been reimbursed the entire $12,278.94. Instead, the Department went further and divided that figure by the $25,000.00 total recovery figure, arriving at 49.12% for the employer's proportionate share of the attorneys' fees and costs. 49.12% of the total attorneys' fee and cost figure of $8,628.08 equals $4,238.11. The Department deducted that amount from the employer's recovery of $12,278.94, arriving at the employer's net recovery of $8,040.83. RCW 51.24.060(1)(c)(i).

The Department's formula assumes that the third party recovery belongs to the claimant, not to the employer under a subrogation theory. To counter that interpretation, the employer argues at length for the primacy of its so-called "equitable subrogation" interest. However, the Supreme Court in Rhoad v. McLean Trucking Company, 102 Wn. 2d 422 (1984) rejected that characterization of the benefit provider's interest, stating:

> "Appellant's equitable arguments fail to take into consideration that the Department's right to reimbursement from the third party recovery, set out in RCW 51.24.060(1)(c), is a statutory right. That right is enforceable as a statutory lien rather than an equitable subrogation interest ╒RCW 51.24.060(2)σ. "Equitable principles cannot be asserted to establish equitable relief in derogation of statutory mandates." Department of Labor & Indus. v. Dillon, 28 Wn. App. 853, 855, 626 P.2d 1004 (1981)." Rhoad at 427-428.

According to the court, the benefit provider has a "statutory compensation lien" not a "subrogation right". Rhoad at 428. Thus, the employer's argument of "equitable subrogation" is without merit. The only basis for any reimbursement out of the claimant's third party recovery is a statutory compensation lien and then only to the extent provided by the Legislature. If the Legislature chooses to eliminate the lien entirely, as it did in 1986 in situations where the employer or a co-employee is at fault, it is free to do so.

The second prong of the employer's attack is the contention that the Department's formula requires the employer to pay attorneys' fees and costs twice. That is, the employer argues that the amount available to satisfy the employer's lien is reduced initially by the deduction of attorneys' fees and costs from the gross recovery, and those same litigation expenses are subtracted again from the employer's ultimate reimbursement. It is quite true that the "pot" is reduced by the first charge of attorneys' fees and costs. But that first charge reduces the amount available for both the claimant's and the employer's shares.

Furthermore, the Department's formula precisely follows the statutory priorities for the payment of shares -- the attorneys' fees and costs are deducted, [RCW 51.24.060(1)(a)]; the claimant's 25% share is computed [RCW 51.24.060(1)(b)]; the balance is paid to the benefit provider, to the extent of its lien RCW 51.24.060(1)(c)σ; and the provider's proportionate share of attorneys' fees and costs is deducted from its share [RCW 51.24.060(1)(c) (i)] and reimbursed to the claimant.

We acknowledge that the repetition of the directive that attorneys' fees and costs be shared proportionately in Subsection (1)(a) and Subsection (1)(c)(i) is somewhat problematic. However, if

attorneys' fees and costs are not deducted from the provider's recovery, then, in an excess recovery situation[1], the benefit provider will recover its entire lien without paying any attorneys' fees and costs.

This is precisely what happened in Rhoad, under the 1977 version of the statute. However, as the court indicated in dictum, the 1983 statute changed the computation so that the Department and the self-insured employer would bear a proportionate share of attorneys' fees and costs. Rhoad at 424. By amending RCW 51.24.060 in 1983 and 1984, the Legislature obviously meant to change the method of distribution and reinstate the pre-1977 requirement that the Department (or the self-insured employer) bear its proportionate share of attorneys' fees and costs. If the same method of distribution were used after the 1983 and 1984 amendments as before, which is precisely what is urged by the employer, then the new provisions explicitly providing for apportionment of attorneys' fees and costs would be nullified.

Arguably, in remedying the problem of proportionate sharing of litigation expenses in the excess recovery situation, the Legislature has created a new set of problems in the deficiency recovery situation. For when, as here, there is a deficiency recovery, the benefit provider's share of the recovery is indeed decreased under the Department's formula. However, it is precisely in the deficiency recovery context that claimants must have a greater incentive to pursue the third party action. The Department's method of distribution is consistent with the legislative intent of creating this incentive; and obviously any third-party recovery resulting from this additional incentive benefits, in the end, the provider as well as the claimant.

The proper computation for distribution of a third party recovery is a complex problem. The very complexity of the problem lends itself to a solution at the legislative or administrative agency level. In our role of appellate review, we are not in a good position to second-guess either body, or to substitute our judgment for the expertise of the Legislature and the Department. Thus, in interpreting RCW 51.24.060 we have given considerable weight to the Department's interpretation of that statute. Bradley, supra. We find that the Department's formula for distributing a third party recovery comports with the legislative purpose of encouraging claimants to pursue third party actions by maximizing the claimant's ultimate share of the recovery.

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[1], We use the term "excess recovery" to describe the situation where the balance after litigation expenses and the claimant's guaranteed 25% share have been deducted equals or exceeds the benefit provider's lien. A "deficiency recovery" describes the situation where the balance after the deduction of litigation expenses and the claimant's guaranteed 25% share is insufficient to satisfy the provider's lien.

We note in passing that prior versions of this statute have withstood compelling court challenges on behalf of claimants. See Rhoad and Lowry, supra. If, indeed, there is an inequity to the workers' compensation benefit providers in the distribution method established by the current version of RCW 51.24.060, that matter should be addressed to the Legislature. Rhoad, supra. In our view, however, the Department has correctly interpreted the current version of RCW 51.24.060. The Department order of October 22, 1985 should therefore be affirmed.

## FINDINGS OF FACT

1. On January 10, 1984, claimant filed an accident report alleging the occurrence of an industrial injury on November 15, 1983, while in the course of employment with Snohomish County, a self-insured employer.

   After allowance and appropriate administrative action, the Department issued an order on September 17, 1985, closing the claim with time loss compensation as paid to May 31, 1985 inclusive, and with a permanent partial disability award equal to 10% unspecified. On October 22, 1985, the Department of Labor and Industries issued an order stating:

   > "Whereas a recovery of $25,000.00 has been made from the party responsible for the injuries of Edward Herrin, the recovered funds are to be distributed in the following manner pursuant to RCW 51.24.060:
   >
   > 1. The attorneys fee of $8,333.33 is to be paid and $294.75 in unrecovered litigation costs are to be reimbursed, leaving a balance of $16,371.92;
   >
   > 2. Edward Herrin is to be paid 25% of the balance, $4,092.98;
   >
   > 3. The employer, Snohomish County, is entitled to the remaining balance of $12,278.94 less their contribution towards the litigation costs, $4,238.11, or $8,040.83.
   >
   > Formal demand is hereby made upon Edward Herrin to reimburse Snohomish County, $8,040.83."

   On November 15, 1985, the employer filed a notice of appeal from the Department order of October 22, 1985. That appeal was assigned Docket Number 85 3448 by the Board of Industrial Insurance Appeals. On December 4, 1985, the Board issued an order granting the appeal and directing that proceedings be held on the issues raised by the appeal.

2. On November 15, 1983 claimant sustained an injury in a vehicular collision when a third party ran into the side of the Snohomish County truck he was operating during the course of his employment.

3. Claimant filed a claim for workers' compensation benefits with the self-insured employer which was allowed, and that claim was closed on May 31, 1985 with the self-insured employer having expended a total of $25,608.57 in benefits and compensation.

4. Claimant filed suit against the third party responsible for the accident of November 15, 1983 and recovered $25,000.00 in a settlement of that action in August, 1985.

5. Attorneys' fees of $8,333.33 and costs of $294.75 were incurred by the claimant in the third party action.

## CONCLUSIONS OF LAW

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

2. The employer's proportionate share of attorneys' fees and costs was correctly computed as $4,238.11 and properly deducted from the employer's recovery of $12,278.94 pursuant to the provisions of RCW 51.24.060(1).

3. The Department order of October 22, 1985 which distributed the claimant's $25,000.00 third party recovery pursuant to RCW 51.24.060(1) is correct and is affirmed.

It is so ORDERED.

Dated this 27th day of March, 1987.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
GARY B. WIGGS Chairperson

/s/
FRANK E. FENNERTY, JR. Member

## DISSENTING OPINION

The Board majority's review of the history of legislative changes which have occurred over the years in our third-party statutes is instructive and accurate, and for the most part, probably a correct interpretation of overall legislative intent. However, I do not have the trouble the majority seems to have in discerning the intent of the 1983 and 1984 amendments to RCW 51.24.060(1), albeit they may not be perfect "models of clarity."

As the majority notes, the statute as it existed from 1977 to 1983 provided that (1) third-party-suit attorney fees and costs were a "first charge" against, and deduction from, the gross

recovery; (2) claimants were guaranteed 25% of the net recovery, after that deduction of litigation expenses; and (3) proportionate sharing of attorney fees and costs between the claimant and the benefit providers was not allowed. These observations were confirmed by the Court in Rhoad, supra.

In 1983, the proportionate sharing of litigation expenses was restored to the distribution formula. But the 1983 amendments were intended to do more than that, namely, to remove the attorney fees and costs as a first charge, and deduction from, the gross third-party recovery. The majority says that this result is "not clear," but it is clear enough to me. The pre-1983 wording of RCW 51.24.060(1)(a) simply said that these litigation costs, as the first step in distribution, "shall be paid." If this was not to be changed, no amendment to (1)(a) was necessary. However, it was amended, to provide that these costs be paid "proportionately" by the claimant and the benefit provider. To give reasonable effect to this change, I look to the rest of RCW51.24.060(1) to determine both the distribution of the gross recovery, and allocation of the proportionate shares of attorney fees and costs to that distribution, to arrive at the parties' net "in hand" shares. All subsections, treated as a whole, can thus be harmonized and applied.

Per (1)(b) and (c), the claimant's 25% guaranteed share (measured against the gross recovery, since the litigation costs are no longer a mandatory first change) is $6,250.00; and the self-insurer's share is the balance of the gross recovery, or $18,750.00, since that is less than the total compensation benefits which were paid. This proportionate distribution of third-party recovery (25%/75%), is obviously also the proportion by which costs of obtaining that recovery should be borne. 25% of the attorney fees and costs of $8,628.08 is $2,157.02. Therefore, claimant's proper net recovery is $6,250.00 less $2,157.02, or $4,092.98. 75% of the attorney fees and costs is $6,471.06. Therefore, the self-insurer's proper net recovery is $18,750.00 less $6,471.06, or $12,278.94.

Lastly, I note the Board majority's concern that, if attorney fees and costs are not deducted from the benefit provider's recovery, then in an "excess recovery" situation (as distinguished from the "deficiency recovery" situation here) the benefit provider would recover its entire lien without paying any attorney fees and costs. I disagree. In the first place, my version of the distribution method does subtract proportionate attorney fees and costs from the provider's recovery. Secondly, the result envisioned would be prevented by the operation of subsections (i) and (ii) of RCW 51.24.060(1)(c). I will not unduly lengthen this dissent with a hypothetical excess recovery situation to show why this is so.

In conclusion, I would reverse and remand the Department's order of October 22, 1985, to direct reimbursement by claimant to Snohomish County of $12,278.94.

Dated this 27th day of March, 1987.

/s/_____
PHILLIP T. BORK, Member

Appendix A --Calculation as the Department always does it, and as the Department did in this case.2

OPTION A (RCW 51.24.060(1)) WORKSHEET

A. VALUE OF CLAIMANT'S 25%, "BALANCE", AND EXCESS SUBJECT TO OFFSET

| | |
|---|---|
| $ 25,000.00 | GROSS RECOVERY (PRESENT CASH VALUE) |
| - 8,628.08 | ATTORNEYS FEES AND COSTS |
| 16,371.92 | NET RECOVERY |
| - 4,092.98 | CLAIMANT'S 25% OF NET RECOVERY |
| 12,278.94 | "BALANCE" |
| - 25,608.90 | DLI AND/OR SIE LIEN |
| $ -0- | EXCESS SUBJECT TO OFFSET |

B. DLI/SIE PROPORTIONATE SHARE OF ATTORNEY'S FEES AND COSTS

1. ENTITLEMENT:

| | |
|---|---|
| $25,608.90 | BENEFITS AND COMPENSATION PAID |
| + -0- | BENEFITS AND COMPENSATION TO BE PAID (PRESENT VALUE) |
| $25,608.90 | ENTITLEMENT |

2. PROPORTION:

49.12 % = (ENTITLEMENT OR "BALANCE", WHICHEVER IS LESS)
12,278.94 ÷ 25,000.00 (GROSS RECOVERY)

3. PROPORTIONATE SHARE:

(PROPORTION) 49.12 % X $ 8,628.08
(ATTORNEY'S FEES & COSTS) = $4,238.11

C. DISTRIBUTION OF GROSS RECOVERY - BY NET SHARES

1. DLI/SIE NET SHARE FOR DISTRIBUTION:

| | |
|---|---|
| $ 12,278.94 | LIEN OR "BALANCE", WHICHEVER IS LESS |
| - 4,238.11 | PROPORTIONATE SHARE OF ATTORNEY'S FEES & COSTS |
| $ 8,040.83 | DLI/SIE NET SHARE OF RECOVERY |

2. CLAIMANT'S NET SHARE FOR DISTRIBUTION

| | |
|---|---|
| $ 4,092.98 | CLAIMANT'S 25% |
| + 4,238.11 | DLI/SIE SHARE OF ATTORNEY'S FEES & COSTS |
| -0- | EXCESS SUBJECT TO OFFSET |
| $ 8,331.09 | NET SHARE OF RECOVERY |

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