

Wilson, Bruce

THIRD PARTY ACTIONS (RCW 51.24)

Distribution of recovery

Under RCW 51.24.060, the Department must pay a proportionate share of the reasonable attorneys' fees and costs incurred by a worker in obtaining a third party recovery. The numerator of the proportionate share calculation is the actual amount which the Department has, or will, benefit from the recovery. The Department benefits from the recovery to the extent of the balance remaining after deducting fees and costs and the worker's 25 percent share, or the benefits "paid and payable", whichever is the lesser. *...In re Bruce Wilson, BIA Dec., 86 4043 (1987) [concurrence]*

Scroll down for order.

1 Department. Mr. Wilson appealed, maintaining that the Department overstated the portion of the third
2 party recovery it is entitled to receive because it understated its proportionate share of attorney fees
3 and costs.
4

5 The statutory scheme for distributing a third party recovery by an injured worker has undergone
6 many changes since the passage of the Industrial Insurance Act. As of the date of Mr. Wilson's
7 recovery in October 1985, RCW 51.24.060(1), as then¹ last amended by Laws of 1984 Ch. 218, § 5,
8 read in relevant part:
9

10 If the injured worker or beneficiary elects to seek damages from a third
11 person, any recovery made shall be distributed as follows:
12

13 (a) The costs and reasonable attorneys' fees shall be paid proportionately
14 by the injured worker or beneficiary and the department and/or
15 self-insurer;
16

17 (b) The injured worker or beneficiary shall be paid twenty-five percent of
18 the balance of the award; Provided, That in the event of a compromise
19 and settlement by the parties, the injured worker or beneficiary may agree
20 to a sum less than twenty-five percent;
21

22 (c) The department and/or self-insurer shall be paid the balance of the
23 recovery made, but only to the extent necessary to reimburse the
24 department and/or self-insurer for compensation and benefits paid;
25

26 (i) The department and/or self-insurer shall bear its proportionate share of
27 the costs and reasonable attorneys' fees incurred by the worker or
28 beneficiary to the extent of the benefits paid or payable under this title;
29 Provided, That the department or self-insurer may require court approval
30 of costs and attorneys' fees or may petition a court for determination of the
31 reasonableness of costs and attorneys' fees.

32 (ii) The sum representing the department's and/or self-insurer's
33 proportionate share shall not be subject to subsection (1)(d) and (e) of this
34 section.

35 (d) Any remaining balance shall be paid to the injured worker or
36 beneficiary;
37

38 (e) Thereafter no payment shall be made to or on behalf of a worker or
39 beneficiary by the department and/or self-insurer for such injury until the
40 amount of any further compensation and benefits shall equal any such
41 remaining balance. Thereafter, such benefits shall be paid by the
42 department and/or self-insurer to or on behalf of the worker or beneficiary
43

44
45
46 ¹ RCW 51.24.060 was amended by Laws of 1986, Ch. 305, § 403. That amendment involved provisions which are
47 not relevant to this appeal.

1 as though no recovery had been made from a third person. (Emphasis
2 added)
3

4 The Department calculated the distribution of Mr. Wilson's third party recovery as follows:2

5 A. DISTRIBUTION OF GROSS RECOVERY

6
7 \$ 145,000.00 Gross Recovery
8 \$ -48,333.33 Less Attorney's Fees
9 \$ - 5,018.05 Less Litigation costs incurred
10 \$ 91,648.62 Net Recovery
11 \$ -22,912.16 Less Claimant's 25% Share of Net Recovery
12 \$ 68,736.46 Balance
13 \$ 69,827.04 Less DLI And/Or SIE Lien
14 \$ -- Excess Subject to Offset

15 B. DLI/SIE PROPORTIONATE SHARE OF ATTORNEY'S FEE(S) AND COSTS

16 1. Entitlement:

17
18 \$ _____ Benefits and Compensation Paid (Lien)
19 \$ _____ Plus Benefits and Compensation To be Paid
20 \$ _____ Entitlement

21 2. Proportion:

22
23 47.40 % = (Entitlement of Balance, whichever is less)
24 \$68,736.46 divided by (Gross Recovery)

25 \$145,000.00

26 3. Proportionate Share:

27 (Proportion) 47.40% X \$53,351.38 (Atty. Fees & Costs) =
28 \$25,288.55
29

30 C. DISTRIBUTION OF NET SHARES

31 1. DLI/SIE Net Share for Distribution:

32 \$ 68,736.46 (Lien or Balance, whichever is Less)

33
34 \$ 25,288.55 Less (Proportionate Share of Attorney's
35 Fee(s) & Costs)

36 \$ 43,447.91 (DLI/SIE Net Share of Recovery)

37
38 2. Claimant's Net Share for Distribution:

39 \$ 22,912.16 Claimant's 25%
40 25,288.55 Plus DLI/SIE Share of Attorney's Fees and Costs
41 \$ - Plus Excess Subject to Offset
42 48,200.71 Net Share of Recovery
43
44
45
46
47

1 The benefits paid to Mr. Wilson by the Department as of March 17, 1986 totalled \$69,827.04.
2
3 The parties stipulated that the benefits "paid and payable" under this claim are greater than the third
4 party recovery, after deducting attorney fees and costs and the claimant's 25% share under RCW
5 51.24.060(1)(b). Hence, it is agreed that the \$68,736.46 "balance" is insufficient to satisfy the
6 Department's lien, let alone create any right of offset by the Department against predicted future
7 benefits otherwise payable under the claim. See RCW 51.24.060(1)(e).
8
9

10 The Department calculates its proportionate share of attorney fees and costs in a third party
11 recovery by dividing the lesser of the balance or the benefits paid and payable ("entitlement"; See
12 RCW 51.24.090(1)) by the gross recovery, and multiplying the resulting percentage by the total
13 attorney fees and costs. In this case, since the balance was less than the benefits "paid and payable"
14 (in fact, less than benefits already "paid"), the Department divided the balance of \$68,736.46 by the
15 gross recovery of \$145,000.00, thereby determining that it was responsible for only 47.4% of the
16 attorney fees and costs. That percentage was multiplied by the total attorney fees and costs
17 (\$53,351.38) to arrive at the \$25,288.55 figure which the Department determined to be its
18 proportionate share of attorney fees and costs.
19
20
21
22
23

24 Mr. Wilson contends that RCW 51.24.060(1)(c)(i) mandates that the numerator the Department
25 should use in calculating the percentage of attorney fees and costs for which it is liable must be the
26 amount of benefits "paid and payable" under the Act. He argues that the language of RCW
27 51.24.060(c)(i) is clear and unambiguous and supports his position. In addition, Mr. Wilson maintains
28 the Industrial Insurance Act is to be liberally construed in favor of the injured worker, and therefore,
29 any ambiguity in the statutory scheme should be construed in his favor.
30
31
32

33 We admit that RCW 51.24.060 is not a model of clarity, in that it is difficult to discern the overall
34 legislative intent from the language of the statute itself. The word "proportionately" and the phrase
35 "proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary
36 to the extent of benefits paid or payable" as used in RCW 51.24.060(1)(a) and (c)(i), respectively, are
37 confusing and possibly inconsistent. It is simply not clear from the language of the statute whether the
38 Department's method of determining its proportionate share of attorney fees and costs or Mr. Wilson's
39 method is what the Legislature contemplated. When faced with ambiguous statutory language, it is
40 appropriate for us to look to the legislative history surrounding the statute in question in order to
41 ascertain the Legislature's intent. See Paulson v. Pierce County, 99 Wn.2d 645, 664 P.2d 1202
42
43
44
45
46
47

1 (1983) and State Board of Transportation v. State Employees Insurance Board, 97 Wn.2d 454, 645
2 P.2d 1076 (1982).
3

4 As originally enacted, the Industrial Insurance Act provided that an injured worker must elect
5 between pursuing his remedy at law against a third party tortfeasor or pursuing a claim for worker's
6 compensation benefits. Laws of 1911, Ch. 74,] 3. The worker could not receive worker's
7 compensation benefits during the pendency of the action at law and was solely responsible for any
8 litigation expenses incurred, regardless of the outcome. See, Lowry v. Department of Labor and
9 Industries, 21 Wn.2d 538, 151 P.2d 822 (1944). This strict election of remedies requirement
10 constituted a major disincentive to the worker's pursuit of a possible third party action.
11

12 In 1957, the statutory scheme was dramatically changed to allow an injured worker to receive
13 worker's compensation benefits and at the same time pursue a claim against the third party. Laws of
14 1957, Ch. 70, § 23; RCW 51.24.010. The Department's interest, as the worker's compensation
15 provider, was protected by the creation of a statutory lien and right of reimbursement from the third
16 party recovery for benefits it had paid.
17

18 In 1961, RCW 51.24.010 was again amended to require the Department to share in the
19 litigation expenses incurred by the injured worker in bringing a successful third party suit. Laws of
20 1961, Ch. 274, § 7. The requirement that the Department share in the litigation expenses increased
21 the claimant's net recovery by the amount of the Department's contribution to attorney fees and costs.
22 However, when the Department's lien (i.e., benefits paid) equaled or exceeded the gross recovery, the
23 Department was entitled to the entire recovery. The worker, who had assumed the risk of bringing the
24 third party litigation, was left with only the benefits provided under the Industrial Insurance Act.
25

26 In 1977, the Legislature repealed RCW 51.24.010 and enacted a new third-party-action statute.
27 Laws of 1977, 1st Ex. Sess., Ch. 85, § 4. Under this new scheme, which included RCW 51.24.060,
28 attorney fees and costs were a first charge against the third party recovery. Rhoad v. McLean
29 Trucking Company, 102 Wn.2d 422, 686 P.2d 453 (1984). For the first time, a worker was guaranteed
30 25% of the recovery (after the deduction of litigation expenses). This prevented the benefit provider
31 from claiming the entire net recovery in satisfaction of its lien, thus removing the disincentive to a
32 worker's pursuit of the third party action. However, the 1977 amendment also deleted any requirement
33 that attorney fees and costs be shared proportionately by the benefit provider.
34

35 In 1983, the requirement that the Department and/or the self-insured employer share
36 proportionately in litigation expenses was restored to the statutory scheme. Laws of 1983, Ch. 211, §
37
38
39
40
41
42
43
44
45
46
47

1 2. However, the proportionate sharing requirement was simply tacked onto the 1977 distribution
2 framework. The priorities of the various statutory shares remained unchanged.
3

4 The legislative purpose which emerges from this legislative history is that the Department is to
5 pay its proportionate share of the reasonable attorney fees and costs incurred by a worker in obtaining
6 a third party recovery. We believe the Department's proportionate share can only be calculated by
7 using as the numerator in that calculation the actual amount which the Department has, or will,
8 benefit from the recovery. The Department benefits from a third party recovery to the extent of the
9 balance or the benefits "paid and payable", whichever is the lesser. Since, in the instant case, the
10 balance available to satisfy past and future claim costs is insufficient to satisfy worker's compensation
11 benefits paid to date, the balance (\$68,736.46) is the proper numerator to be used in calculating the
12 percentage of attorney fees and costs for which the Department is liable to Mr. Wilson.
13
14

15 Mr. Wilson relies upon the language in RCW 51.24.060(1)(c)(i) which provides that the
16 Department and/or the self-insurer shall bear its proportionate share of attorney fees and costs "to the
17 extent of benefits paid or payable". He suggests that, regardless of the amount actually available to
18 the Department or self-insurer to satisfy past and future claim costs, the Department and/or
19 self-insurer should pay a percentage of fees and costs based on a calculation in which "benefits paid
20 or payable" is the numerator of such calculation. We cannot accept this construction of RCW
21 51.24.060. We believe the language "to the extent of benefits paid or payable" means that the
22 Department, when it determines its share of attorney fees and costs, must take into consideration not
23 only the benefits which have been paid on the claim but also any benefits which are, at the time of
24 settlement, estimated to be payable in the future. However, when, as in the instant case, the benefits
25 "paid or payable" exceed the balance available to the Department after deducting attorney fees and
26 costs and the worker's 25% share, it is the balance figure which must be used since that is the
27 maximum extent to which the Department can benefit from the third party recovery. If this were not
28 the case then the Department and/or self-insurer would bear a disproportionate share of the attorney
29 fees and costs as demonstrated by the following hypothetical:
30
31

32	1.	\$180,000.00	Gross recovery
33	2.	<u>-80,000.00</u>	Less attorney's fees and costs (RCW 51.24.060(1)(a))
34	3.	100,000.00	Net recovery
35	4.	<u>-25,000.00</u>	25% of net recovery to the worker (RCW 51.24.060(1)(b))
36	5.	75,000.00	<u>Balance</u>

1	6.	100,000.00	Benefits paid
2			
3		<u>100,000.00</u>	Estimated benefits to be paid
4		200,000.00	Benefits paid or payable
5	7.	-0-	Excess to claimant (RCW
6			51.24.060(1)(d)) which would be
7			subject to offset under
8			(RCW 51.24.060(1)(e))
9			
10	8.	<u>Proportionate share of fees and costs</u>	
11		<u>Benefits paid or payable</u> = <u>200,000</u> = 111.1%/	
12		Gross Recovery	180,000

13 We cannot conceive that the Legislature could have intended that the Department and/or
 14 self-insurer would ever be obligated to pay 111.1% of the attorney fees and costs incurred in making a
 15 third party recovery.
 16

17 Mr. Wilson's argument that RCW 51.24.060(1)(e) supports his position is likewise without merit.
 18 If there were a recovery in which the balance exceeded the benefits "paid and payable" under the Act,
 19 then the Department would use as the numerator the benefits "paid and payable" when calculating its
 20 proportionate share of attorney fees and costs and not simply the benefits paid as of the date of
 21 distribution of the recovery. The benefits "paid or payable" under those circumstances would be the
 22 amount the Department has, and will, benefit from the third party recovery. It must, so to speak, pay
 23 the "freight" on any excess recovery which will likely inure to its benefit in the future. The Department
 24 would then be paying its share of the attorney fees and costs in proportion to the benefit it actually has
 25 or will receive from the recovery.
 26
 27
 28
 29
 30

31 The Department's position is further reinforced by Ravsten v. Department of Labor and
 32 Industries, 108 Wn.2d 143, 735 P.2d 265, (1987). Ravsten is not directly on point, as the issue in the
 33 instant case was not before the court and the statute there controlling, RCW 51.24.010, was
 34 subsequently repealed and replaced by RCW 51.24.060. However, RCW 51.24.010 did contain the
 35 following language:
 36
 37

38 In any action brought under this section wherein recovery is made by
 39 compromise and settlement or otherwise, the department . . . to the extent
 40 of the benefits paid or payable under this title, shall bear its proportionate
 41 share of attorneys fees and costs incurred by the injured workman. . .
 42 (Emphasis added)
 43

44 In determining the Department's proportionate share of attorney fees and costs in Ravsten, the court
 45 indicated that the Department is responsible for fees and costs only to the extent the third party
 46
 47

1 recovery can be applied to reduce the Department's obligation to pay compensation and benefits.
2
3 Ravsten, at 149-50.

4 Mr. Wilson relies on language in Ravsten which approves a calculation of the proportionate
5 share of attorney fees and costs based on benefits "paid and payable". We believe, however, that his
6 reliance on Ravsten is misplaced, as the third party recovery involved in Ravsten was not a
7 "deficiency" recovery (i.e., one which resulted in less than the "entitlement" under the Act). In
8
9 Ravsten, the balance clearly exceeded any benefits "paid and payable" under the Act.

10
11 Our prior Decision and Order in the case of In re Steven J. McGee, BIIA Dec., 70,119 (1987)
12 also supports the Department's position. In McGee we stated:

13
14
15 The claimant also filed a proposed distribution plan. However, his plan is
16 incorrect . . . inasmuch as it would place the full burden of payment of
17 attorney's fees and costs on the benefit provider whenever the gross
18 recovery was equal to or less than the total benefits paid, a result
19 inconsistent with the "proportionate" language of RCW 51.24.060(1)(a)
20 and (c)(i).
21

22 We should note that in the instant case the balance available to the Department is insufficient to satisfy
23 its lien for benefits paid. Our decision assumes that if the balance exceeded the extent of benefits
24 "paid" but was less than the total amount of benefits "paid and payable", the Department would
25 nevertheless base its proportionate share of fees and costs on the entire amount of the balance. It is,
26 of course, unnecessary in this case for us to determine whether the Department has correctly
27 calculated the extent of benefits "paid and payable", or whether a worker, an employer or the
28 Department would be entitled to an adjustment in the liability for attorney fees and costs in the event
29 the Department's estimate of benefits "paid and payable" later proved to be incorrect.
30
31

32 After consideration of the Proposed Decision and Order and the Petition for Review filed
33 thereto, and a careful review of the entire record before us, we are persuaded that the Department
34 order distributing the third party recovery is correct and should be affirmed.
35
36
37
38

39 **FINDINGS OF FACT**

- 40 1. On April 13, 1981, the Department of Labor and Industries received an
41 accident report alleging that on April 10, 1981, claimant was injured during
42 the course of his employment with Haskell Corporation. The claim was
43 accepted, benefits were provided and on June 11, 1982, the Department
44 issued an order closing the claim with compensation as paid to October
45 31, 1981 and with no award for permanent partial disability. On July 1,
46 1982, the claimant submitted a protest and request for reconsideration.
47

1 On July 6, 1982, the Department issued an order setting aside its June 11,
2 1982 order and directing that the claim remain open.

3
4 On March 18, 1986 the Department issued an order stating that the
5 claimant received a third party recovery in the amount of \$145,000.00 and
6 directing distribution pursuant to RCW 51.24.060 as follows: (1) net share
7 to attorney for fees and costs \$53,351.38; (2) net share to claimant
8 \$48,200.71; and (3) net share to Department \$43,447.91. The order then
9 went on to declare a statutory lien against claimant's third party recovery in
10 the amount of \$69,827.04 and, made demand upon claimant to reimburse
11 the Department in the amount of \$43,447.91. On March 24, 1986, the
12 Department received a protest and request for reconsideration from
13 claimant from the March 18, 1986 Department order.

14 On October 20, 1986, the Department issued an order adhering to the
15 provisions of its order of March 18, 1986. On November 5, 1986, the
16 claimant filed an appeal from the Department order of October 20, 1986
17 with the Board of Industrial Insurance Appeals. On December 3, 1986,
18 the Board issued an order granting the appeal, assigning it Docket No. 86
19 4043 and directing that proceedings be held.

- 20 2. On April 10, 1981, Mr. Wilson suffered injuries to his head and neck during
21 the course of his employment with Haskell Corporation.
- 22 3. As a result of his industrial injury of April 10, 1981, Mr. Wilson brought a
23 third party action against the General Electric Corporation and, in October
24 1985, received a total cash recovery of \$145,000.00.
- 25 4. Attorney fees of \$48,333.33 and costs of \$5,018.05 were incurred by the
26 claimant in pursuing his third party action.
- 27 5. The gross third party recovery (\$145,000.00), less attorney fees,
28 (\$48,333.33), less litigation costs (\$5,018.05), and less claimant's 25%
29 share of the net recovery under RCW 51.25.060(1)(b) (\$22,912.16), is
30 less than the industrial insurance benefits which have either been paid or
31 are payable to the claimant under this claim.
- 32 6. The Department of Labor and Industries benefits from claimant's third
33 party recovery to the extent of \$68,736.46, and its proportionate share of
34 attorney fees and costs is therefore 47.4% ($\$68,786.46 \div \$145,000.00$) of
35 the total attorney fees and costs incurred in making the third party
36 recovery. The Department's proportionate share of the \$53,351.38 in
37 attorney fees and costs is \$25,288.55.

40 **CONCLUSIONS OF LAW**

- 41 1. The Board of Industrial Insurance Appeals has jurisdiction over the subject
42 matter and parties to this appeal.
- 43 2. The Department of Labor and Industries order of October 20, 1986 which
44 adhered to the provisions of its order of March 18, 1986 was a correct
45
46
47

1 application of RCW 51.24.060 and correctly ordered the distribution of the
2 October 1985 third party recovery funds.

- 3
4 3. The Department of Labor and Industries' proportionate share of attorney
5 fees and costs under RCW 51.24.060 is \$25,288.55.
6
7 4. The October 20, 1986 Department order which adhered to the provisions
8 of the Department order of March 18, 1986 which disbursed funds from
9 the October 1985 recovery from a third party and further directed the
10 claimant to reimburse the Department \$43,447.91 is correct and should be
11 affirmed.

12 It is so ORDERED.

13 Dated this 21st day of December, 1987.

14
15 BOARD OF INDUSTRIAL INSURANCE APPEALS

16
17
18 /s/ _____
19 SARA T. HARMON Chairperson

20
21
22 /s/ _____
23 PHILLIP T. BORK Member

24
25 **SPECIAL STATEMENT**

26 I have signed the foregoing Decision and Order affirming the Department's order of October 20,
27 1986, distributing the funds from claimant's third-party-suit recovery in the manner and amounts set
28 forth therein. I have done so because I, like the Chairperson, do not agree with the claimant's
29 contention regarding some uncalculated additional proportion of the third-party-suit attorney fees and
30 costs for which he claims the Department should be liable. In this regard, it is noted that claimant's
31 counsel makes no argument as to how much, in specific monetary amount, the Department's
32 contribution to his attorney fees and costs should be. It is clear that RCW 51.24.060(1) contemplates
33 a one-time and final distribution of a third-party-suit recovery, and a one-time and final percentage
34 allocation of shares of attorney fees and costs, based on the known amounts of both the third party
35 recovery and the benefits provided under the Act at the time of distribution of the recovery.
36 Subsection (c)(ii). Claimant has not produced evidence that his contention is capable of meeting this
37 objective. Nor has he advanced any specific formula to arrive at a different percentage allocation of
38 attorney fees and costs between himself and the Department, and thereby what he claims his net
39
40
41
42
43
44
45
46
47

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

monetary share of the recovery should be, instead of that amount set forth by the Department. The burden was on him to do so.

Measured against the claimant's contention, which is the only issue before us by way of Petition for Review, the Department's decision must prevail and be affirmed.

My only further comment is that I believe, based on applying and harmonizing all subsections of RCW 51.24.060(1) treated as a whole, that the Department's implementation of the statute may not be correct either. My reasons for so believing, and the manner of distribution of the gross third-party-suit recovery and allocation of proportionate shares of attorney fees and costs to that distribution, in accord with my interpretation of the entirety of the statute's subsections, are set out in my dissenting opinion in In re Steven J. McGee, BIIA Dec., 70,119 (1987). That position, however, is not within the bounds of the issue framed and put before us here by this claimant's appeal.

Dated this 21st day of December, 1987.

/s/
PHILLIP T. BORK Member