

Cloyd, John

THIRD PARTY ACTIONS (RCW 51.24)

Distribution of recovery

The Department was correct in requiring the self-insured employer to pay, at the time of distribution of the third party recovery, its share of attorneys' fees and costs based on benefits paid and payable. Since the amount of the recovery paid to the worker subject to offset against future benefits was less than his entitlement, the employer will benefit from the offset and must, therefore, pay fees and costs on such amount. In evaluating the share of fees and costs, it was also appropriate for the Department to reduce the structured settlement amount to present cash value. ...*In re John Cloyd*, BIIA Dec., 87 0203 (1988) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Chelan County Cause No. 88-2-04533-1.]

Scroll down for order.

1 claimant and the Department of Labor and Industries to a Proposed Decision and Order issued on
2 November 30, 1987 in which the order of the Department dated November 26, 1986 was reversed and
3 the claim remanded with orders to recalculate the proportionate share of attorneys' fees and costs and
4 the net shares for distribution in accordance with the provisions of the Proposed Decision and Order.
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7 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
8 prejudicial error was committed and said rulings are hereby affirmed.
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10 John Cloyd was injured during the course of his employment with the Gilbert Corporation. His
11 injury was caused by a third party, and Mr. Cloyd made a structured recovery with a present cash
12 value of \$ 523,748.94 (Exhibit 2).
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14 The Gilbert Corporation had paid \$ 51,240.01 in benefits as of April 30, 1986. Mr. Cloyd's
15 litigation costs were \$ 179,954.46. Given these figures, the Department calculated the distribution of
16 the recovery pursuant to RCW 51.24.060 as follows:
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- 18 1. From the \$ 523,748.94 recovery, the attorney for Mr. Cloyd was paid his
19 fees and costs. The remainder was \$ 343,794.48.
- 20 2. From the \$ 343,794.48, Mr. Cloyd received 25%, or \$ 85,948.62. The
21 remainder was \$ 257,845.86, the "balance" amount.
- 22 3. From the \$ 257,845.86, the Gilbert Corporation was able to be paid its lien
23 of \$ 51,240.01 in full. After subtracting the lien, \$ 206,605.85 remained.
- 24 4. The \$ 206,605.85 was paid to John Cloyd "subject to offset" against future
25 benefits and compensation to which Mr. Cloyd will be entitled under his
26 workers' compensation claim.
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30 The Department next calculated the Gilbert Corporation's share of the attorneys' fees and
31 costs. Because Mr. Cloyd had been very seriously injured, the sum of the benefits paid and payable in
32 the future -- in other words, the "entitlement" -- exceeded \$ 257,845.86, which was the amount
33 available to the Gilbert Corporation to lessen its liability under the claim. This amount reflects the total
34 benefit the Gilbert Corporation will obtain from the recovery, including both the lien and the future
35 benefits it will not be required to pay on Mr. Cloyd's claim.
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38 \$ 257,845.86 is 49.23% of the \$ 523,748.94 recovery. Thus, the Department required the
39 Gilbert Corporation to bear 49.23% of the \$ 179,954.46 attorneys' fees and costs. This is equal to \$
40 88,591.58.
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43 The order under appeal thus required the Gilbert Corporation to pay to Mr. Cloyd \$ 37,351.57,
44 which is the \$88,591.58 minus the \$ 51,240.01 lien the Gilbert Corporation had on the recovery.
45 Gilbert Corporation appealed the Department's distribution order.
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1 The Proposed Decision and Order reversed the Department's order, but not on any ground
2 raised or argued by Gilbert Corporation or any party. It did so because the Industrial Appeals Judge
3 believed that Exhibit 2, the Worksheet showing the Department's calculations, was erroneous on its
4 face because it did not show a calculation for Mr. Cloyd's future entitlement.
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7 In its Petition for Review, the employer renews its legal argument as presented in its opening
8 and rebuttal briefs. The employer's contentions can best be summarized as follows: (1) that the
9 employer's proportionate share of attorneys' fees and costs should be computed in a manner
10 consistent with the dissenting opinion of Board Member Phillip T. Bork in In re Steven J. McGee, BIIA
11 Dec., 70,119 (1987) and In re Edward D. Herrin, BIIA Dec., 85 3448 (1987); (2) that because this is a
12 structured settlement, and payments will come to the claimant in the form of "spikes" or lump sum
13 payments at five year intervals, the employer should be permitted to suspend payments for the period
14 covered by each spike payment; and (3) that in any event the employer should not have to pay any
15 sum to the claimant at this time, but rather, that the amount it is liable for as its proportionate share of
16 costs and attorneys' fees should be deducted from the remainder subject to offset, resulting in the
17 resumption of the payment of benefits to the claimant at an earlier point in time.
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24 Since the employer has not directly raised the question of whether it should be required to pay
25 attorneys' fees and costs on the \$ 206,605.85 remainder subject to offset, that question is not, strictly
26 speaking, before us. However, because we disagree with language in the Proposed Decision and
27 Order which seems to relieve the employer of its obligation to pay attorneys' fees and costs to the
28 extent it benefits from the third party recovery, we will address that question briefly.
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31 At first consideration, it would appear that the self-insured employer is being required to pay
32 costs and attorneys' fees greatly in excess of the amount of benefit it will receive from the third party
33 recovery. However, because additional workers' compensation benefits are payable to Mr. Cloyd and
34 because the amount of these future payments has not been challenged by the self-insured employer,
35 the employer will eventually have the benefit of payment of its lien for amounts already paid plus a
36 right of offset against future benefits payable in the amount of \$ 206,605.85. No future workers'
37 compensation benefits will be payable until the amount to be paid exceeds that sum. While at the time
38 the Department computed the proportionate share of costs and attorneys' fees, there was a third party
39 recovery by the claimant which exceeded the lien of the self-insured employer, it is also clear,
40 considering sound insurance and actuarial principles, that at some point in the future the benefits to
41 which Mr. Cloyd is entitled will exceed the present excess recovery subject to offset.
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1 This Board has considered the statutory requirements applicable to proportioning attorneys'
2 fees and costs among the parties in three prior Decisions and Orders which validated the method
3 applied in this claim. In re Steven J. McGee, BIIA Dec., 70,119 (1987); In re Edward D. Herrin, BIIA
4 Dec., 85 3448 (1987); In re Bruce Wilson, Dckt. No. 86 4043 (December 21, 1987). In each of these
5 cases the majority of the Board determined that the method used by the Department in determining
6 the proportionate share of costs and attorneys' fees was consonant with the provisions of RCW
7 51.24.060. Because the Department's calculation method in this case as set forth above, is consistent
8 with the method which we approved in McGee, Herrin and Wilson, we conclude, once again, that the
9 Department's method of computing the parties' proportionate shares of attorneys' fees and costs is
10 correct.
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12 In Ravsten v. Department of Labor and Industries, 108 Wn.2d 143 (1987) the Supreme Court
13 dealt with the effects of a structured settlement on the determination of the proportionate share of
14 costs and attorneys' fees to be borne by the parties. While Ravsten dealt with the application of a
15 statute which has been repealed to a substantially different fact pattern, it does set forth the Court's
16 opinion that in computing proportionate shares of costs and attorneys' fees in a case involving a
17 structured settlement, the present value of the settlement is to be used rather than the gross amount
18 of future payments. This method was employed by the Department in this case in determining the
19 claimant's twenty-five percent share, the amount of benefits subject to offset, and the parties'
20 proportionate shares of costs and attorneys' fees.
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22 It is also incongruous for the self-insured employer to argue that considering the structured
23 settlement at present cash value is somehow unfair and imposes a greater liability to pay benefits,
24 when under RCW 51.24.090(1) the self-insured employer had to provide written approval of the
25 settlement. Any questions which the self-insured employer had regarding its future liability to pay
26 benefits to Mr. Cloyd occasioned by the effect of a structured settlement, should have been resolved
27 prior to giving written approval of the structured settlement as required by RCW 51.24.090(1).
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29 In its Petition for Review, the self-insured employer contends that it should not be required to
30 pay the \$ 37,351.51 difference between its lien (\$ 51,240.01) and its proportionate share of attorneys'
31 fees and costs (\$ 88,591.58) in cash to the claimant at the present time. Rather, the employer asks
32 that this amount be deducted from the excess recovery which is subject to offset, which would result in
33 the reinstatement of benefits at an earlier time. Because RCW 51.24.060(1)(a) places costs and
34 reasonable attorneys' fees as the first charge against the third party recovery, this amount must be
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1 paid at the time the award is distributed. RCW 51.24.060(1)(c) provides that the self-insured employer
2 shall bear its proportionate share of the costs and reasonable attorneys' fees to the extent of "the
3 benefits paid or payable under this title...." (RCW 51.24.060(1)(c)(i)) and that the balance of the
4 recovery after payment of costs and reasonable attorneys' fees and the claimant's twenty-five percent
5 shall be distributed to the self-insured employer "but only to the extent necessary to reimburse the . . .
6 self-insurer for compensation and benefits paid." (Emphasis added.) Because the self-insured
7 employer's proportionate share of the costs and reasonable attorneys' fees is based upon benefits
8 paid and payable, it may be, as it was in this case, a different and larger amount than the amount
9 payable to the self-insured employer from the recovery for compensation and benefits paid. In order
10 to assure the present determination and distribution of the third party recovery, RCW 51.24.060
11 requires that the costs and reasonable attorneys' fees be paid -- at the time of distribution --
12 proportionally by the claimant and the self-insured employer. Since the employer's share of attorneys'
13 fees and costs is greater than the payment allowed to the self-insured employer under RCW
14 51.24.060(c), this represents a remaining obligation which must be paid by the employer to the injured
15 worker.

16 We note, in passing, that the employer seems to feel that the \$ 37,351.51 will be added to the
17 remainder subject to offset, so that workers' compensation benefits will not be resumed until \$
18 206,605.85 plus \$ 37,351.51 has been expended by the claimant. RCW 51.24.060(1)(c)(ii) and (1)(e)
19 specifically preclude such a result. Thus the employer must resume payment of workers'
20 compensation benefits once Mr. Cloyd has expended \$ 206,605.85, not \$ 243,957.36.

21 Although much is made in the Proposed Decision and Order of the absence in Exhibit No. 2 of
22 entries in section B-1 "Entitlement", it is clear from consideration of the entire document and the
23 testimony of Alga Gabriel that the claimant's "entitlement" exceeded the "balance". As noted in the
24 claimant's and the Department's joint Petition for Review, Exhibit No. 2 is a "Third Party Recovery
25 Worksheet" and, as such, is simply a tool to assist Department personnel in calculating the appropriate
26 distribution of the third party recovery. There is no legal requirement that all portions of the form be
27 completed, particularly as in this case where the completion of a particular portion of the form would
28 not add, in any way, to the calculations required. While at the time the distribution of the third party
29 recovery was made, there were funds in excess of the costs, attorneys' fees, and the self-insured
30 employer's lien which were distributed to the claimant, ultimately this amount will be offset, to the
31 self-insured employer's advantage, against workers' compensation benefits which it would otherwise
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1 have had to pay to the claimant. Ultimately if this claim continues on its actuarially predicted path, the
2 self- insured employer will have benefited in the amount of \$ 257,845.86, including reimbursement for
3 benefits paid and a reduction of the future amounts that it will have had to pay over the course of the
4 claim, less, of course, its \$ 88,591.58 share of the costs and attorneys' fees. When this benefit to the
5 self-insured employer is compared to the monetary benefits received by the claimant, the
6 proportionate shares of costs and attorneys' fees assessed to the parties by the Department of Labor
7 and Industries appear to be appropriate and reasonable.

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12 After consideration of the Proposed Decision and Order, the self- insured employer's Petition
13 for Review, the joint Petition for Review filed by the claimant and the Department of Labor and
14 Industries, and a careful review of the entire record before us, we are persuaded that the Department
15 order dated November 26, 1986 providing for the distribution of third party settlement proceeds is
16 correct and must be affirmed.
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18 **FINDINGS OF FACT**

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21 1. On January 25, 1984, the Department of Labor and Industries received an
22 accident report from the claimant alleging an industrial injury on December
23 14, 1983, to the claimant's head and chest while in the employment of
24 Gilbert Corporation, a self-insured employer under the industrial insurance
25 laws. A Department order was issued on March 30, 1984, granting time
26 loss compensation and allowing the claim for medical treatment and such
27 other benefits as may be authorized or required by law.

28 On April 25, 1986, a Department order was issued which held that the
29 claimant had recovered \$ 526,234.80 by means of third party litigation,
30 and that RCW 51.24.060 required distribution of settlement proceeds as
31 follows: (1) net share to attorney for fees and costs \$ 74,106.99; (2) net
32 share to claimant \$ 448,642.34; (3) net share to self-insured employer \$
33 3,485.47. The order further declared that the self-insured employer had a
34 statutory lien against the claimant's third party recovery for the sum of \$
35 51,240.01, made demand upon the claimant to reimburse the self-insured
36 employer in the amount of \$ 3,485.47 and further ordered that no benefits
37 or compensation would be paid to or on behalf of the claimant until such
38 time as the excess recovery totaling \$ 287,855.85 had been expended by
39 the claimant for costs incurred as a result of the conditions covered under
40 this claim.

41 Thereafter on April 30, 1986 a Department order was issued which
42 corrected and superseded the Department order of April 25, 1986 and
43 stated that the claimant had recovered \$ 523,748.94 and RCW 51.24.060
44 required distribution of the settlement proceeds as follows: (1) net share to
45 attorney for fees and costs \$ 179,954.46; and (2) net share to claimant \$
46 381,146.05. The order further declared that the self-insured employer had
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1 a statutory lien against the claimant's third party recovery for the sum of \$
2 51,240.01, directed the self-insured employer to remit to claimant \$
3 37,351.57 pursuant to RCW 51.24.060(c)(i) (sic) and ordered that no
4 benefits or compensation would be paid to or on behalf of the claimant
5 until such time as the excess recovery totaling \$ 206,605.85 had been
6 expended by the claimant for costs incurred as a result of conditions
7 covered under this claim.

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9 On November 26, 1986, a Department order was issued, in response to a
10 request for reconsideration, adhering to the provisions of the Department
11 order of April 30, 1986. A notice of appeal was received by the Board on
12 January 22, 1987, from the employer, in which it appealed the Department
13 order of November 26, 1986. On February 19, 1987 the Board entered an
14 order granting the appeal and directing that proceedings be held

- 15 2. As of April 30, 1986, the self-insured employer, Gilbert Corporation, had
16 provided \$ 51,240.01 in industrial insurance compensation benefits to
17 claimant.
- 18 3. Claimant commenced an action at law against the third parties responsible
19 for his injury of December 14, 1983 and recovered, as a result of a
20 structured settlement entered into on or about January 15, 1986, an
21 amount which as of April 30, 1986, had a present cash value of \$
22 523,748.94.
- 23 4. Attorneys' fees of \$160,148.27 and costs of \$ 19,806.19 were incurred by
24 the claimant in pursuing his third party action.
- 25 5. The gross third party recovery (\$ 523,748.94), less attorneys' fees (\$
26 160,148.27), less litigation costs (\$ 19,806.19), and less claimant's
27 twenty- five percent share of the net recovery under RCW 51.24.060(1)(b)
28 (\$ 85,948.62), leaves a remainder of \$ 257,845.86. From this amount, the
29 employer is entitled to the satisfaction of its lien of \$ 51,240.01. Claimant
30 is entitled to the remaining balance of \$ 206,605.85, subject to offset
31 against future benefits payable under this claim and the employer is not
32 required to reinstitute workers' compensation benefits until that amount (\$
33 206,605.85) has been expended.
- 34 6. The self-insured employer, Gilbert Corporation, has benefited or will
35 benefit from the claimant's third party recovery to the extent of \$
36 257,845.86, and its proportionate share of attorneys' fees and costs is,
37 therefore, 49.23% (\$ 257,845.86 divided by \$ 523,748.94) of the total
38 attorneys' fees and costs incurred in making the third party recovery. The
39 self-insured employer's proportionate share of the \$ 179,954.46 in
40 attorneys' fees and costs is \$ 88,591.58.

41 **CONCLUSIONS OF LAW**

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

- 1 2. The Department order of November 26, 1986, which adhered to the
2 provisions of an order dated April 30, 1986, constituted a correct
3 application of the provisions of RCW 51.24.060 and correctly ordered the
4 distribution of the funds received as the result of the third party recovery
5 herein.
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7 3. The November 26, 1986 Department order, which adhered to the
8 provisions of a Department order dated April 30, 1986, which corrected
9 and superseded an order dated April 25, 1986, is correct and should be
10 affirmed.

11 It is so ORDERED.

12 Dated this 5th day of July, 1988.

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14 BOARD OF INDUSTRIAL INSURANCE APPEALS

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19 /s/
20 SARA T. HARMON, Chairperson

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24 /s/
25 FRANK E. FENNERTY, JR., Member

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27 **DISSENTING OPINION**

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29 In this case, the Board majority has again determined, as it did in In re Steven J. McGee, BIIA
30 Dec., 70,119 (1987) and In re Edward D. Herrin, BIIA Dec., 85 3448 (1987), that the method used by
31 the Department is determining the self-insured employer's proportionate share of third-party-suit
32 attorney fees and costs was proper under the provisions of RCW 51.24.060(1). I dissented in those
33 cases, and I do so again here.
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36 It is clear to me that RCW 51.24.060(1) contemplates a one-time and final distribution of a
37 third-party-suit recovery, and a one-time and final percentage allocation of shares of attorney fees and
38 costs, based on the known amounts of both the third party recovery (in this case the present value of
39 the structured settlement, Ravsten, supra, at 158-159) and the benefits paid under the Act at the time
40 of distribution of the recovery. Subsection (c)(ii).
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43 In order to explain my view of the proportional allocation of attorney fees and costs, it is
44 necessary to briefly note the legislative history of RCW 51.24.060(1).
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1 The statute as it existed from 1977 to 1983 provided that (1) third-party-suit attorney fees and
2 costs were a "first charge" against, and deduction from, the gross recovery; (2) claimants were
3 guaranteed 25% of the net recovery, after that deduction of litigation expenses; and (3) proportionate
4 sharing of attorney fees and costs between the claimant and the benefit providers was not allowed.
5 These observations were confirmed by our Supreme Court in Rhod v. McLean Trucking Company,
6 102 Wn.2d 442 (1984).
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10 In 1983, the proportionate sharing of litigation expenses was restored to the distribution
11 formula. But it is reasonably clear to me that the 1983 amendments were intended to do more than
12 that, namely, to remove the attorney fees and costs as a "first charge", and deduction from, the gross
13 third-party recovery. The pre-1983 wording of RCW 51.24.060(1)(a) simply said that these litigation
14 costs, as the first step in distribution, "shall be paid." If this was not to be changed, no amendment to
15 (1)(a) was necessary. However, it was amended, by adding further language that these costs be paid
16 "proportionately" by the claimant and the benefit provider. Reasonable effect must be given to this
17 change. To do so, we must look to all the rest of RCW 51.24.060(1) to determine both the distribution
18 of the gross recovery, and allocation of the proportionate shares of attorney fees and costs to that
19 distribution, to arrive at the parties' net "in hand" shares. By viewing all subsections, treated as a
20 whole, the statute can be reasonably harmonized and applied.
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24 Per (1)(b) and (c), the claimant's 25% guaranteed share (measured against the gross recovery,
25 since the litigation costs are no longer a mandatory "first charge") is \$ 130,937.24; and the
26 self-insurer's share is \$ 51,240.01, since that sum is the extent of the total compensation benefits
27 which were paid at the time of the third party action recovery. The remaining balance of the gross
28 recovery, \$ 341,571.69 is distributed to the claimant per subsection (1)(d). However, this sum cannot
29 be utilized in figuring the respective parties' proportionate share of attorney fees and costs, because to
30 do so would alter the self-insurer's proportionate share in contravention of subsection (1)(c)(ii). Thus,
31 the distribution of the gross third party recovery utilized to allocate the attorney fees and costs between
32 the parties is \$ 130,937.24 to the claimant, and \$ 51,240.01 to the self-insurer. This is a proportionate
33 distribution of 71.87% to the claimant, and 28.13% to the self-insurer. Obviously, this is also the
34 proportion by which costs of obtaining that recovery should be borne.
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38 71.87% of the attorney fees and costs of \$ 179,954.46 is \$ 129,333.27. Therefore, claimant's
39 proper net recovery is \$ 130,937.24 less \$ 129,333.27 or \$ 1,603.97, plus his \$ 341,571.69 remaining
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