

Smotherman, Johnny

SCOPE OF REVIEW

Compromise of lien against third party recovery (RCW 51.24.060(3))

THIRD PARTY ACTIONS (RCW 51.24)

Compromise of lien

Board's review of the Department's discretionary decision regarding the compromise of its lien pursuant to RCW 51.24.060(3) is limited to determining whether or not the Department has abused its discretion. Department's decision not to compromise its lien because the industrial insurance fund was "not at risk" was not arbitrary and capricious, nor did it constitute an abuse of discretion. ...***In re Johnny Smotherman, BIIA Dec., 87 0646 (1989)*** [Editor's Note: Compare, *Hadley v. Department of Labor & Indus.*, 116 Wn.2d 897 (1991). The Board's decision was appealed to superior court under King County Cause No. 89-2-07005.]

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

1 **IN RE: JOHNNY R. SMOTHERMAN)** **DOCKET NO. 87 0646**
2)
3 **CLAIM NO. H-677912)** **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Claimant, Johnny R. Smotherman, by
8 David A. Kohles

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10 Employer, Mohawk Northern Plastics, Inc.,
11 None

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13 Department of Labor and Industries, by
14 The Attorney General, per
15 Thornton Wilson, Assistant

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17 This is an appeal filed by the claimant on February 20, 1987 from an order of the Department of
18 Labor and Industries dated February 12, 1987 which set aside and held for naught Department orders
19 dated July 24, 1984 and October 3, 1984, recited the factors the Department considered in reaching a
20 determination of whether to grant the claimant's request to compromise the Department's lien,
21 declined to compromise the Department's lien, and ordered the proceeds from the third party recovery
22 distributed pursuant to RCW 51.24.060 as follows: \$12,971.97 to the attorney for the claimant;
23 \$11,629.78 to the claimant; and \$10,398.25 to the Department. The order made a formal demand for
24 reimbursement from the claimant in the amount of \$10,398.25. **AFFIRMED.**
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29 **DECISION**

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31 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
32 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
33 issued on October 21, 1988 in which the order of the Department dated February 12, 1987 was
34 affirmed.
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37 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
38 prejudicial error was committed and said rulings are hereby affirmed.
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40 The issues presented by this appeal and the evidence presented by the parties are adequately
41 set forth in the Proposed Decision and Order. While we agree with the factual determinations made
42 by the Industrial Appeals Judge and concur in the ultimate result reached in the Proposed Decision
43 and Order, we disagree with the Industrial Appeals Judge's analysis and conclusions regarding this
44 Board's authority to review discretionary acts of the Department of Labor and Industries.
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1 We have previously stated our authority to review discretionary acts of the Department. In re
2 Gary J. Manley, BIIA Dec., 66,115 (1986). Additionally, we note that RCW 51.24.060(7) expressly
3 grants to this Board the authority to review Department orders regarding third-party-suit awards and
4 settlements, which necessarily includes the Department's decision on lien compromise.
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7 The Department's decision regarding compromise of its lien is discretionary pursuant to the
8 provisions of RCW 51.24.060(3). Our review is limited to determining whether or not the exercise of
9 that authority was an abuse of discretion.
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11 An abuse of discretion involves arbitrary and capricious conduct. Farrell v. Seattle, 75 Wn.2d
12 540, 452 P.2d 965 (1969). On a number of decisions the Washington Supreme Court has stated that
13 arbitrary and capricious conduct is:
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16 "Willful and unreasonable action, without consideration and a disregard of
17 facts or circumstances. Where there is room for two opinions, action is not
18 arbitrary and capricious when exercised honestly and upon due
19 consideration, though it may be felt that a different conclusion might have
20 been reached.
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22 See, e.g., Buell v. Bremerton, 80 Wn.2d 518, 526, 495 P.2d 1358 (1972).
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24 Our review of the record indicates that the Department's decision regarding the request for a
25 lien compromise involved a review of the statutory criteria set forth in RCW 51.24.060(3), as well as
26 other valid considerations, as discussed in the Proposed Decision and Order. The record also reflects
27 that the claimant had decided to settle with the third party tortfeasor prior to seeking a lien compromise
28 from the Department. While we agree with the Industrial Appeals Judge's analysis of the facts
29 regarding the Department's decision, we believe it is also appropriate to comment on the underlying
30 policy considerations which form the basis of the Department's decision.
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32 The Department's policy on lien compromise is at the heart of the conflict between the claimant
33 and the Department in this matter. The Department ranks protection of the state industrial insurance
34 fund as one of its primary responsibilities in applying its discretionary authority to compromise. The
35 policy, simply stated, is that the Department will not generally compromise its lien if the industrial
36 insurance fund "is not at risk." If the Department is able to recover monies on the lien without making
37 a compromise, then generally speaking the Department will not make a compromise. The fund is not
38 at risk. However, if the Department perceives a genuine risk that, should it fail to assist in a third party
39 settlement it may recover no money, then the industrial insurance fund is at risk, and a compromise
40 would be appropriate.
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1 A clear example of this approach is seen in the situation where a settlement occurs first and the
2 Department then is approached for a compromise of its lien. Under the Department policy, the
3 Department would likely decide not to compromise the lien in that instance, since the "fund is not at
4 risk." In essence, the Department knows it is going to be paid the amount due on its lien without
5 compromise. Should the Department agree to a compromise, it would return additional monies to the
6 claimant for no reason. The policy provides that the Department will not compromise the lien merely
7 to enable the claimant to recover a larger amount of money by way of the third party settlement.
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9 While the claimant perceives this policy as producing an opposite effect than intended by the
10 legislation, it should be noted that RCW 51.24.060 merely provides the Department with the authority
11 to enter into a lien compromise. The statute does not require the Department to enter into the lien
12 compromise nor does the statute purport to place the monetary interest of the claimant above the
13 Department's duty to preserve the integrity of the industrial insurance fund.
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15 The policy of the Department regarding the lien compromise is neither arbitrary nor capricious,
16 but represents a reasoned decision that there is no need to compromise the lien if settlement between
17 the claimant and the third party tortfeasor is going to occur, regardless of whether the Department
18 compromises. We agree with the factual determinations of the Industrial Appeals Judge which find
19 that the Department's decision not to compromise was an individualized determination and involved a
20 weighing of the appropriate criteria set forth in RCW 51.24.060(3), as well as other appropriate factors.
21 The Department's decision was not arbitrary and capricious, nor did it constitute an abuse of
22 discretion.
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24 After consideration of the Proposed Decision and Order and the Petition for Review filed
25 thereto and a careful review of the entire record before us, we are persuaded that the Department
26 order denying the request for lien compromise is correct and should be affirmed.
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28 We adopt the proposed Findings of Fact Nos. 1 through 4 and Conclusions of Law Nos. 1, 2, 3,
29 and 5 as our final findings and conclusions. Proposed Conclusion of Law No. 4 is deleted and the
30 following Conclusion of Law is entered in its stead:
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32 CONCLUSIONS OF LAW

- 33 4. The Board of Industrial Insurance Appeals has jurisdiction to review the
34 discretionary decision of the Department of Labor and Industries regarding
35 whether to compromise the Department's lien pursuant to RCW
36 51.24.060(3). This review authority is expressly granted by RCW
37 51.24.060(7). The Department's decision to not compromise its lien
38 against Mr. Smotherman's third party recovery was based on a reasoned
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1 policy and on proper consideration of the statutory criteria of RCW
2 51.24.060(3)(a)(b) and (c), as well as other appropriate factors, and the
3 decision was not arbitrary or capricious and was not an abuse of
4 discretion.
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6 It is so ORDERED.

7 Dated this 23rd day of January, 1989.

8 BOARD OF INDUSTRIAL INSURANCE APPEALS
9

10 /s/
11 SARA T. HARMON Chairperson
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13 /s/
14 FRANK E. FENNERTY, JR. Member
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16 /s/
17 PHILLIP T. BORK Member
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