Taylor, Lowell

RETROACTIVITY OF STATUTORY AMENDMENTS

Underinsured motorist insurance recovery (RCW 51.24.030)

THIRD PARTY ACTIONS (RCW 51.24)

Underinsured motorist insurance policy owned by employer

The 1986 amendments to RCW 51.24.030 were clarifying amendments, at least insofar as they explicitly stated that the Department or self-insured employer has a lien against a worker's recovery under the employer's underinsured motorist coverage. Thus, the 1986 amendments are retroactive, as a legislative interpretation of the original Act, and the Department or self-insurer has a lien against the worker's recovery under the employer's underinsured motorist policy. **….*In re Dale Goers*, BIIA Dec., 88 0661 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-02137-2.]**; *In re Lowell Taylor*, BIIA Dec., 87 3817 (1989)** [*Editor's Note*: *Contra*, *Department of Labor & Indus. v. Cobb*, 59 Wn. App. 360 (1990) *review denied* 116 Wn.2d 1031 (1991). *Cf. O'Rourke v. Department of Labor & Indus.*, 57 Wn. App. 374 (1990) *review denied* 115 Wn.2d 1002 (1990).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LOWELL E. TAYLOR	)	**DOCKET NO. 87 3817**
	)	
	)	**ORDER SETTING ASIDE PROPOSED**
	)	**DECISION AND ORDER, DENYING MOTION**
	)	**FOR SUMMARY JUDGEMENT, AND**
CLAIM NO. J-144422	)	**REMANDING APPEAL FOR HEARING**

APPEARANCES:

Claimant, Lowell E. Taylor, by
Calbom & Schwab, P.S.C., per
G. Joe Schwab, Kathleen Kilcullen and
Janis M. Whitener-Moberg

Employer, Lee & Eastes Tank Lines, Inc.,
None

Department of Labor and Industries, by
The Attorney General, per
Jeffrey Boyer, Assistant

This is an appeal filed by the claimant, Lowell E. Taylor, on November 19, 1987 from an order of the Department of Labor and Industries dated October 28, 1987. The order determined that the claimant had recovered an unknown amount and, pursuant to RCW 51.24.060, it set forth a distribution of the recovery as follows: (1) net share to attorney for fees and costs, (amount unknown); (2) net to claimant (amount unknown); and (3) net share to Department, $83,471.62. The order declared a statutory lien in favor of the Department against the recovery in the sum of $83,471.62; demanded reimbursement in that amount; and further determined that no benefits or compensation would be paid to or on behalf of the claimant until the excess recovery (total amount unknown) had been expended by the claimant for costs incurred as a result of the conditions covered under the claim. **REMANDED FOR HEARING**.

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 Department of Labor and Industries to a Proposed Decision and Order issued on August 19, 1988 in which claimant's motion for summary judgment was granted and the Department order dated October 28, 1987 was reversed.

The claimant filed a Motion for Summary Judgment on June 27, 1988. The Department declined to cross-move. Thus the sole issue before us is whether, as a matter of law, the Department

is entitled to a lien against the claimant's recovery under the underinsured motorist coverage (UMC) provisions of his employer's policy, pursuant to RCW 51.24.030.

We begin with an overview of the historical framework of this issue, both in the case law and in legislation. On March 15, 1985, the Board issued a Decision and Order in In re Michael Morrissey, BIIA Dec., 66,831 (1985), with then Chairman Michael Hall and Board Member Frank E. Fennerty signing the majority opinion, and Phillip T. Bork dissenting.

The third party statute applicable in Morrissey read as follows:

> "If the injury to a worker is due to the negligence or wrong of a third person not in the same employ, the injured worker or beneficiary may elect to seek damages from the third person."

Laws of 1977, 1st ex. sess., ch. 85, § 1, p. 364. The Board majority concluded in Morrissey that the Department did not have a lien against the claimant's recovery under his employer's UMC policy provisions. The Department appealed, the Superior Court granted summary judgment in claimant's favor, and the Department appealed to the Court of Appeals.

In the meantime, during the very next legislative session, and apparently in response to the Board's Decision and Order in Morrissey, the Legislature amended Chapter 51.24 as follows:

> (1) If ((~~an injury to a worker~~)) a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title ((~~is due to the negligence or wrong of a third person not in the same employ~~)), the injured worker or beneficiary may elect to seek damages from the third person.
>
> . . .
>
> (3) Damages recoverable by a worker or beneficiary pursuant to the underinsured motorist coverage of an insurance policy shall be subject to this chapter only if the owner of the policy is the employer of the injured worker.

Laws of 1986, ch. 58, § 1, p. 189.

On October 5, 1987, the Court of Appeals, Division I, decided Morrissey, reversing the Superior Court's affirmance of the Board Decision and Order and concluding that, even under the statute as it read prior to the 1986 amendments, the Department was entitled to a lien on the claimant's recovery under his employer's UMC policy provisions. At that time, the Court of Appeals decided not to publish its decision. However, on October 12, 1988 the court determined that the Morrissey decision would be of precedential value and entered an Order Granting Motion to Publish. Thereafter, on November 1,

1988, the court reversed itself and entered an Order Withdrawing Publication. Thus, there is no binding reported appellate court decision on the issue which is before us.[1] See State v. Fitzpatrick, 5 Wn.App. 661, 668 (1971).

The Department argues that the 1986 amendments to RCW 51.24.030 clarified an ambiguous statute and are retroactive. The claimant argues that, under the statute as it read prior to the 1986 amendments and consistent with our prior Decision and Order in Morrissey, the Department has no lien against his recovery under his employer's UMC policy provisions.

As noted in the Proposed Decision and Order, the 1986 amendments are not explicitly made retroactive. However, if the 1986 amendments are considered to be clarifying amendments, then they are "effective from the date of the original act even in the absence of a provision for retroactivity." Overton v. Economic Assistance Authority, 96 Wn.2d 552, 558 (1981). Because Mr. Taylor settled his third party action on March 27, 1985, RCW 51.24.030 as amended in 1984 is applicable. See RCW 51.24.902. Thus, there are two questions before us: 1) whether, under RCW 51.24.030, as amended in 1984, the Department is entitled to a lien against Mr. Taylor's March 27, 1985 recovery under his employer's UMC policy provisions; and 2) whether the 1986 amendments are retroactive.

RCW 51.24.030(1) as amended in 1984 read as follows:

> (1) If ((~~the~~)) an injury to a worker for which benefits and compensation are provided under this title is due to the negligence or wrong of a third person not in the same employ, the injured worker or beneficiary may elect to seek damages from the third person.

Laws of 1984, ch. 218, § 3, p. 1105, effective June 17, 1984.

The Industrial Insurance Act is the exclusive remedy for workers injured during the course of employment. There is no remedy outside the Act for a worker who is entitled to workers' compensation benefits, except as specifically permitted by the Act. Bankhead v. Aztec Construction, 48 Wn.App. 102, 104-105 (1987). Indeed it is difficult to imagine more extensive exclusivity provisions than those contained in RCW 51.04.010 and RCW 51.32.010.

RCW 51.04.010 provides as follows:

> The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of

[1] The Supreme Court denied review at 110 Wn.2d 1015 (1988).

> the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

(Emphasis added). RCW 51.32.010 provides as follows:

> Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

(Emphasis added).

Given the exclusivity of the Act, the only source for Mr. Taylor's right to recover under the UMC provisions of his employer's policy must be pursuant to the provisions of Chapter 51.24, the "third party chapter". But, with that right, Chapter 51.24 also imposes a lien in favor of the Department. Mr. Taylor cannot, on the one hand, rely on Chapter 51.24 to permit him to recover under his employer's UMC policy provisions and, at the same time, contend that the lien set forth in Chapter 51.24 does not apply to the recovery.

The Proposed Decision and Order focuses on the fact that RCW 51.24.030, prior to the 1986 amendments, used the language "if an injury . . . is due to the negligence or wrong of a third person" the worker "may elect to seek damages from the third person." (Emphasis added). Because of this language, the Proposed Decision and Order concludes that Chapter 51.24 contemplated actions sounding in tort, not in contract. Arguing that the UMC carrier is not a third person tortfeasor within the meaning of RCW 51.24.030, the Proposed Decision and Order concludes that the Department has no lien against Mr. Taylor's recovery.

In our view, the focus must be broader. The underinsured motorist statute, RCW 48.22.030, requires that every vehicle insurance policy contain coverage "for the protection of persons insured

thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles." (Emphasis added). Thus, only those persons "legally entitled to recover" from the underinsured tortfeasor may recover under the UMC provisions of the insurance policy.

The UMC carrier may assert any defense available to the underinsured tortfeasor. The carrier "stands... in the shoes of the uninsured motorist." State Farm Mutual Auto Insurance Company v. Bafus, 77 Wn.2d 720, 724 (1970). If the injured person is statutorily barred from recovering damages from the underinsured tortfeasor, no recovery can be had against the carrier. Sayan v. United Services Automobile Association, 43 Wn.App. 148, rev. denied, 106 Wn.2d 1009 (1986). (Tortfeasor was an army officer and therefore was immune from suit; held: plaintiff could not recover under UMC provisions of policy.)

Mr. Taylor was only "legally entitled to recover" from the underinsured tortfeasor because RCW 51.24.030 specifically so provided. It is only because of that legal entitlement, created by RCW 51.24.030, that he was able to recover under his employer's UMC policy provisions. Had Chapter 51.24 not provided an exception to the exclusive remedy, Mr. Taylor would have been barred from recovering under his employer's UMC policy provisions. See Sayan. Thus, Mr. Taylor's UMC recovery was authorized by Chapter 51.24, and the concomitant lien in the Department's favor must also apply.

Furthermore, the purpose of the underinsured motorist statute is to allow an injured person to recover those damages that would have been recovered had the tortfeasor maintained liability insurance. Finney v. Farmer's Insurance Co., 92 Wn.2d 748, 751, 600 P.2d 1272 (1979). In this case, if the tortfeasor had maintained liability insurance, there is no question that any recovery made by Mr. Taylor would have been subject to the Department's lien. If Mr. Taylor is allowed to keep his underinsured motorist recovery without the reduction by the Department's lien, he will recover more than he would have if the tortfeasor had maintained liability insurance. Such a result would be contrary not only to the purpose of RCW Chapter 51.24, but also to the underinsured motorist statute. See Sayan.

In concluding that the statute as it read prior to the 1986 amendments permitted the Department to assert a lien against a worker's recovery under the UMC provisions of his employer's policy, we are essentially agreeing with the Department's argument that the 1986 amendments were clarifying and retroactive, at least insofar as they explicitly provided that the Department or self-insurer has a lien against a worker's UMC recovery under his employer's policy. Obviously, the amendments

also represent a change in the statute insofar as the lien is now limited to a UMC recovery under the employer's policy.

In determining that the 1986 amendments were "clarifying", we have considered a number of factors: 1. Ambiguity of RCW 51.24.030. Overton v. Economic Assistance Authority, 96 Wn.2d 552 (1981). RCW 51.24.030, prior to the 1986 amendments, was ambiguous, since it did not explicitly provide for a lien against a worker's UMC recovery under the employer's policy and since the statutory language was susceptible of more than one reasonable interpretation; 2. Legislative action in response to controversy over interpretation of the statute. Johnson v. Continental West, Inc., 99 Wn.2d 555 (1983). As detailed above, the 1986 amendments were in response to the controversy engendered by our decision in Morrissey. Thus, we regard the 1986 amendments as legislative interpretation of the original Act; 3. Conformity of the amendments to the administrative agency's interpretation of the statute. Ridder v. Department of Revenue, 43 Wn.App 21 (1986). The 1986 amendments conformed with the Department's prior interpretation of the statute; and 4. Conformity of the amendment to prior Supreme Court interpretation of the statute. Johnson. The 1986 amendments do not depart from any Supreme Court interpretation of the statute. To the contrary, the 1986 amendments are compatible with the interpretation placed on Chapter 51.24 by the Supreme Court in Lundeen v. Department of Labor and Industries, 78 Wn.2d 66 (1970).

In that case, the Supreme Court was faced with the question of whether a recovery under the Military Claims Act (under which relief is not predicated upon the negligence or wrong of another) constituted a third party recovery pursuant to RCW 51.24, and was therefore subject to the Department's lien. The statute in effect at that time contained essentially the same language that is at issue here under the 1984 version of RCW 51.24.030, i.e., "[i]f the injury to a workman is due to negligence or wrong of another not in the same employ . . . the injured workman . . . shall elect whether to take under this title or seek a remedy against such other . . . ." In Lundeen, the Supreme Court concluded that the Department did have a lien against the recovery even though the cause of action did not sound in tort. The 1986 amendments to Ch. 51.24 are therefore compatible with Lundeen.

For the foregoing reasons, we find no difficulty in concluding that the 1986 amendments were clarifying amendments, at least insofar as they explicitly stated that the Department or self-insured employer has a lien against a worker's UMC recovery under his employer's policy. Thus the 1986

amendments are retroactive to this claim and clearly provide for a Department lien against Mr. Taylor's UMC recovery.

Finally, while not dispositive, it is worth noting that the employer here has paid both industrial insurance premiums and premiums for UMC coverage. If there were no lien, then not only would the employer have provided two overlapping coverages, but the employer would also lose any benefit with respect to the impact of a third party recovery on the evaluation of actual losses under the claim pursuant to WAC 296-17-870(4).

For all of the above-stated reasons, we conclude that Mr. Taylor is not entitled to summary judgment. Since the Department did not cross-move, the matter must be remanded for further hearings on the merits. We take this opportunity to provide guidance to the parties on several issues.

Apparently the Department raised some question regarding the Board's jurisdiction to hear this appeal. We gather this from an elliptical remark made by the Assistant Attorney General during the hearing on claimant's Motion for Summary Judgment. Tr. 7/15/88 at 21. We surmise that the Department was referring to the fact that the claimant first protested and then appealed the Department order of November 12, 1982. The appeal was apparently granted by Board Order of January 17, 1983 and assigned Docket No. 63,600. The record does not disclose the disposition of that appeal.

Regardless, the appeal in Docket No. 63,600 does not in any way affect our jurisdiction to hear the current appeal. First, because the claimant had protested the Department order of November 12, 1982, we did not have jurisdiction to hear the subsequent appeal from that same order. In re Santos Alonzo, BIIA Dec. 56,833 (1981). Second, the October 28, 1987 Department order asserting a lien against claimant's third party recovery is entirely separate from the "chain" of Department orders with respect to the administration of the claim. If we had before us an appeal from the August 20, 1986 Department order closing this claim, then perhaps the Department's jurisdictional challenge might have some merit. However, in the context of this appeal from a third party lien order, the status of the prior appeal in Docket No. 63,600 is simply irrelevant.

The second issue of critical importance to the parties on remand is whether claimant's attorneys will be permitted to both represent him and testify with respect to issues going to the heart of this appeal. Like our Industrial Appeals Judge, we do not believe RPC 3.7 precludes the common motion practice of attaching supporting affidavits signed by the movant's attorneys. However, as we expressed in In re Kenneth Barber, BIIA Dec., 87 0334 (1988), RPC 3.7 does preclude claimant's

attorneys from both representing him and testifying on his behalf at hearing, at least insofar as that testimony relates to contested issues and does not come within one of the listed exceptions set forth in RPC 3.7. We therefore caution the parties to proceed accordingly on remand.

Pursuant to WAC 263-12-145(3), we hereby set aside the Proposed Decision and Order entered on August 19, 1988 and deny claimant's Motion for Summary Judgment. This matter is remanded to the hearings process for further proceedings as indicated by this order. The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. At the conclusion of the proceedings, the Industrial Appeals Judge shall, unless the matter is dismissed or settled by Board order, enter a Proposed Decision and Order containing Findings and Conclusions as to each contested issue of fact and law, based upon the entire record, and consistent with this order. Any party aggrieved by such further Proposed Decision and Order may petition the Board for review pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 10th day of March, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member