

## **Stamp, Edwin**

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### **THIRD PARTY ACTIONS (RCW 51.24)**

#### **Insurance guarantee association recovery**

The Department and the self-insured employer have a lien against a worker's recovery made from the Oregon Insurance Guarantee Association (OIGA). The OIGA prohibition against payments of subrogated interests being made to "insurers" only applies to "member insurers." Further, a "self-insured" employer is not an "insurer" within the meaning of the OIGA statute. ....*In re Edwin Stamp, BIA Dec., 88 1826 (1989)*

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1     **IN RE: EDWIN E. STAMP**                                 )  
2   )  
3     **CLAIM NO. S-714608**                                 )  
4   )  
   **DOCKET NO. 88 1826**  
   **DECISION AND ORDER**

5 APPEARANCES:

6  
7                 Claimant, Edwin E. Stamp, by  
8                 Schroeter, Goldmark and Bender, per  
9                 James D. Hailey

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11                Employer, Summit Timber Company, by  
12                Hall and Keehn, per  
13                Gary D. Keehn and Linda Bauer, Paralegal

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15                Department of Labor and Industries, by  
16                The Attorney General, per  
17                Barbara Gary and Pamela Morse, Assistants

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19                This is an appeal filed by the claimant on May 2, 1988 from an order of the Department of  
20 Labor and Industries dated April 7, 1988 which made demand upon the claimant to reimburse the  
21 self-insured employer in the amount of \$61,370.14 and the Department of Labor and Industries in the  
22 amount of \$1,195.75 and further ordered that no benefits or compensation would be paid to or on  
23 behalf of the claimant until such time as the excess recovery totaling \$45,987.00 has been expended  
24 by the claimant for costs incurred as a result of the conditions covered under this claim. **AFFIRMED.**

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28   **DECISION**

29                Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
30 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
31 issued on June 8, 1989 in which the order of the Department dated April 7, 1988 was sustained.

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33                The focus of the controversy in this matter is the third party recovery of the claimant, Edwin  
34 Stamp. Mr. Stamp was severely injured in the course of his employment with Summit Timber  
35 Company, a self-insured employer in the State of Washington, on February 24, 1984. Mr. Stamp was  
36 operating a machine known as "the little chipper". This machine was fed by a waste conveyor carrying  
37 excess lumber from the trim saws. One of Mr. Stamp's duties was to clear the periodic jams which  
38 would occur on the waste conveyor. Mr. Stamp had three middle fingers of his left hand ripped off and  
39 additional injuries to the thumb and fingers of his right hand when he was attempting to clear the  
40 conveyor, which he thought had been shut down.  
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1 Mr. Stamp brought an action in Federal District Court against Lumber Systems, Inc., the  
2 manufacturer of the machine which caused his injury. Lumber Systems, Inc. is an Oregon corporation  
3 licensed to do business in the State of Washington. Lumber Systems, Inc. had purchased primary  
4 liability insurance through Mission Insurance Company in an amount of \$500,000.00. Mission  
5 Insurance became insolvent and pursuant to the Oregon Revised Statutes, 734.510 et seq., the  
6 Oregon Insurance Guarantee Association (OIGA) stepped in to provide \$300,000.00 in coverage to  
7 Lumber Systems, Inc. for the potential liability to Mr. Stamp. The OIGA's limit of liability pursuant to  
8 statute is \$300,000.00. Lumber Systems, Inc. had also purchased excess insurance coverage.

9 Mr. Stamp settled his case against Lumber Systems, Inc. with payment of \$300,000.00 from  
10 the OIGA, \$25,000.00 from Lumber Systems, Inc.'s excess insurance carrier, and \$25,000.00 from  
11 Lumber Systems, Inc. Neither the Washington State Department of Labor and Industries  
12 (Department) nor the self-insured employer, Summit Timber, were parties to, or a part of, the  
13 settlement agreement.

14 The Department issued an order on April 7, 1988, subjecting the entire \$350,000.00 third  
15 party recovery to the distribution requirements of RCW 51.24.060, and made demand on the claimant  
16 to reimburse the self-insured employer in the sum of \$61,370.14 and to reimburse the Department in  
17 the amount of \$1,195.75.

18 The claimant contends that the \$300,000.00 paid by the OIGA and the \$25,000.00 paid by  
19 Lumber Systems, Inc. are not subject to the liens of the Department and self-insured employer, based  
20 on the application of Oregon law. The claimant concedes that the \$25,000.00 paid by the excess  
21 carrier is subject to the reimbursement liens of the self-insured employer and the Department.

22 While we agree with the result reached in the Proposed Decision and Order, which  
23 determined that the Department and the self-insured employer are entitled to reimbursement from the  
24 claimant's entire third party recovery, we are not in complete agreement with the analysis used by the  
25 Industrial Appeals Judge in reaching that determination.

26 The application of the OIGA provision prohibiting payment of the subrogated interest of  
27 insurers is at the center of this controversy.

28 The Industrial Appeals Judge relied upon Corvallis Aero Service Inc. v. Villalobos, 81 Or.App.  
29 137, 724 P.2d 880, review denied 302 OR 461, 730 P.2d 1251 (1986) in reaching his determination.  
30 He concluded that the Oregon court's decision in Villalobos was based on a determination that the  
31 Oregon State Accident Insurance Fund (SAIF) is a "member insurer" of the OIGA.

1 The Industrial Appeals Judge then concluded that the provisions of the OIGA only prohibited  
2 the payment of the subrogated interest of "member insurers" from OIGA funds. Since the Department  
3 and the self- insured employer are not "member insurers" of the OIGA, he reasoned, the OIGA funds  
4 are subject to the subrogated interest of the Department and self-insured employer. We disagree with  
5 this analysis of the Oregon court's decision in Villalobos.  
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9 The court's decision in Villalobos is capable of two different interpretations. If we limit the  
10 court's decision to the particular facts of that case, then the decision merely resolves a conflict  
11 between Oregon statutes pertaining to Oregon workers' compensation benefits and the OIGA.  
12 However, since the court in Villalobos assumed that SAIF was not a member insurer of the OIGA, the  
13 decision may also arguably be read as prohibiting payment of subrogated interests of any insurer.  
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16 Villalobos, at 140.

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18 Villalobos dealt with a third party recovery by an injured worker. The OIGA paid \$35,000.00  
19 on account of the insolvent insurer. SAIF argued that the prohibitions on recovery for subrogated  
20 interests did not apply to payments made by SAIF under Oregon's workers' compensation law. The  
21 court in Villalobos appears to have limited its decision to the specific question of resolving the conflict  
22 between two Oregon statutory schemes. The court framed the issues as follows:  
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26 The issues in this appeal involve two statutory schemes: ORS 656.576 to  
27 656.595, relating to third- party actions and allocation of third party  
28 recoveries between workers' compensation insurers and recipients; and  
29 ORS 734.510 to 734.710, relating to the payment of "covered claims"  
30 against insolvent insurers.

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32 Villalobos, at 139.

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34 Villalobos resolved this conflict between the Oregon statutes involving Oregon insurers by  
35 holding that SAIF was not entitled to satisfaction of its lien from the \$35,000.00 paid by the OIGA.  
36 Villalobos did not resolve the problem presented when an out-of-state workers' compensation insurer  
37 which is not a "member insurer" subject to the provisions of the OIGA seeks reimbursement for  
38 subrogated claims.  
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41 The question presented, then, is whether the provisions of the OIGA bar payment for the  
42 subrogated interests of any insurer or only member insurers.  
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45 The State of Oregon, like many jurisdictions, has adopted legislation in order to protect both  
46 insureds and injured parties from insolvent insurers. The scope of the OIGA and its authority is set out  
47 in ORS 734.510-734.710. The purpose of the OIGA is defined in ORS 734.520:

1 The purpose of ORS 734.510 to 734.710 is to provide for the payment of  
2 covered claims under certain insurance policies to avoid excessive delay  
3 in payment and to avoid financial loss to claimants or policyholders  
4 because of the insolvency of an insurer, to assist in the detection and  
5 prevention of insurer insolvencies, to provide an association to assess the  
6 cost of such protection among insurers and to assist in the liquidation of  
7 insurers as provided in this chapter.  
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9 A "covered claim" is "an unpaid claim" "that arises out of and is within the coverage and limits of an  
10 insurance policy to which ORS 734.510 to 734.710 apply," but excludes "[a]ny amount due any  
11 reinsurer, insurer, insurance pool or underwriting association as subrogated recoveries or otherwise."  
12  
13 ORS 734.510(4)(a) and (b)(B).  
14

15 A "member insurer" is defined as "an insurer, including a reciprocal insurer, authorized to  
16 transact insurance in this state that writes any kind of insurance to which ORS 734.510 to 734.710  
17 apply." ORS 734.510(7). "Member insurers" are assessed the amounts necessary to pay the  
18 expenses incurred in meeting the obligations under the Act. ORS 734.570(3).  
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21 ORS 734.695 also provides that:

22 The insured of an insolvent insurer shall not be personally liable for  
23 amounts due any reinsurer, insurer, insurance pool or underwriting  
24 association as subrogation recoveries or otherwise up to the applicable  
25 limits of the liability provided by the insurance policy issued by the  
26 insolvent insurer.  
27

28 Claimant has not cited us to any decision interpreting the term "insurer" or "member insurer" as used  
29 in the OIGA statute with respect to out-of-state insurers. In deciding whether the exclusionary  
30 provisions of ORS 734.510(4)(b)(B) applied to SAIF, an in-state non-member insurance company, the  
31 Oregon Court of Appeals in Villalobos interpreted the language "due any ... insurer ... as subrogated  
32 recoveries or otherwise" as follows: "Our understanding of that language is that an amount which, for  
33 any reason, finds its way to an insurer rather than a claimant or an insured, is beyond the scope of  
34 what OIGA is authorized or required to pay." Villalobos, at 140. Unlike the court in Villalobos, other  
35 jurisdictions with a statutory framework similar to the OIGA statute have interpreted the term "insurer",  
36 as it is used in the exclusionary provision regarding subrogated claims, to mean "member insurer".  
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38 See, e.g., Arnone v. Murphy, 153 N.J.Super. 584, 380 A.2d 734 (1977) (involving New Jersey workers'  
39 compensation lien).  
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45 At least with respect to out-of-state insurers, the court's decision in Arnone appears to be a  
46 more reasonable interpretation of the statutory provisions prohibiting the payment of subrogated  
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1 interests of an insurer by limiting the prohibition to "member insurers" of the insurance guarantee  
2 association. We believe this interpretation should apply to the OIGA, since no Oregon case law which  
3 is directly on point with respect to out-of-state insurers has been cited to us. Thus, since the  
4 self-insured employer in this instance, Summit Timber, and the Department are not "member insurers"  
5 of the OIGA, they are not prohibited by the provisions of the OIGA statute from recovering their  
6 subrogated interests.  
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10 However, because the court in Villalobos assumed that SAIF was not a "member insurer" but  
11 nonetheless found that the provisions of the OIGA statute prohibited the payment of SAIF's  
12 subrogated interest, the Villalobos decision might be read to bar the recovery of the subrogated  
13 interests of any insurer. If the Villalobos decision were read to bar recovery of subrogated interests of  
14 any insurer, and if the provisions of the Oregon statutes are controlling, the Department and the self-  
15 insured employer in this case (assuming that they are "insurers") would be prohibited from recovering  
16 any of the monies paid by the OIGA or Lumber Systems, Inc.  
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19 Under such an interpretation, the provisions of the OIGA statute would be in direct conflict with  
20 the provisions of our Industrial Insurance Act which provide for a third party action and recovery, and  
21 allow the Department and/or the self-insured employer a statutory subrogation interest in any such  
22 recovery. In that case we believe that the issues in this appeal can only be resolved by an analysis of  
23 the conflicting statutes in order to determine the appropriate choice of law in this matter.  
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26 The State of Washington, in exercising its inherent police and sovereign powers, has enacted  
27 a comprehensive Industrial Insurance Act and declared that:  
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31 all phases of the premises are withdrawn from private controversy, and  
32 sure and certain relief for workers, injured in their work, and their families  
33 and dependents is hereby provided regardless of questions of fault and to  
34 the exclusion of every other remedy, proceeding or compensation, except  
35 as otherwise provided in this title; and to that end all civil actions and civil  
36 causes of action for such personal injuries and all jurisdiction of the courts  
37 of the state over such causes are hereby abolished, except as in this title  
38 provided.  
39

40 RCW 51.04.010.

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42 The Industrial Insurance Act is the exclusive source of any cause of action, right, or remedy  
43 accruing to any injured worker in the State of Washington. The Washington Legislature has also  
44 created, within the Industrial Insurance Act, provisions for actions against third persons, not in the  
45 worker's same employ, who are liable for damages on account of the worker's injury. RCW 51.24.030.  
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1 The Washington statutes also provide that, if a third party recovery is collected, the Department and/or  
2 any self-insurer who has paid benefits due under the Industrial Insurance Act, shall be entitled to  
3 reimbursement from the third party recovery. RCW 51.24.060.  
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6 In a situation such as this, where a third party action authorized by the laws of the State of  
7 Washington, results in a recovery subject to the provisions of the Oregon Insurance Guarantee  
8 Association statute, a clear conflict exists. The Washington statutes mandate payment of the  
9 Department's and self-insured employer's lien against the recovery as reimbursement for the benefits  
10 they have paid. The Oregon statutes prohibit any such payment. It is therefore necessary to  
11 determine the appropriate choice of law in order to resolve this conflict.  
12

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14 The Washington State Supreme Court has adopted the "most significant relationship" rule  
15 regarding choice-of-law problems in tort cases. Johnson v. Spider Staging Corp., 87 Wn.2d 577, 555  
16 P.2d 997 (1976). In Johnson the court looked to the Restatement (Second) of Conflicts of Law § 145  
17 (1971), for the general principles which apply to a tort choice-of-law problem:  
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21 (1) The rights and liabilities of the parties with respect to an issue in tort are  
22 determined by the local law of the state which, with respect to that issue,  
23 has the most significant relationship to the occurrence and the parties  
24 under the principles stated in § 6.  
25  
26 (2) Contacts to be taken into account in applying the principles of § 6 to  
27 determine the law applicable to an issue include:  
28 (a) the place where the injury occurred,  
29 (b) the place where the conduct causing the injury occurred,  
30 (c) the domicil, residence, nationality, place of incorporation  
31 and place of business of the parties, and  
32 (d) the place where the relationship, if any, between the  
33 parties is centered.  
34

35 These contacts are to be evaluated according to their relative importance  
36 with respect to the particular issue.  
37

38 Johnson, at 580-581.  
39

40 The court in Johnson, relying upon its decision in Potlatch No. 1 Fed. Credit Union v.  
41 Kennedy, 76 Wn.2d 806, 459 P.2d 32 (1969), applied an "interest analysis" in evaluating each state's  
42 "significant contacts". This interest analysis focuses on the public policies and purposes sought to be  
43 achieved by each state. Initially we must identify each state's contacts with this matter.  
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1 Washington's contacts with this matter are: (1) the injured worker resides in the State of  
2 Washington; (2) the injury occurred within the State of Washington at a place of employment; (3) the  
3 third party defendant transacted business in the State of Washington.  
4

5 Oregon's contacts with this matter are: (1) the third party defendant is an Oregon corporation;  
6 and (2) the Oregon Insurance Guarantee Association provides funds which are subject to the demand  
7 for reimbursement.  
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10 Our analysis of the provisions of the OIGA statute leads us to conclude that its purpose is to  
11 protect insureds and persons making claims, as well as to allocate the loss between "member  
12 insurers". The "member insurers" are the parties who bear the burden of the insolvent member  
13 insurance company. Thus, as we view it, the prohibition on payment of subrogated interests of  
14 insurers from the OIGA funds or from the insured, is logical as it pertains to the other members of the  
15 OIGA. It appears to us that such a provision merely serves as a means of allocating the costs of the  
16 association's obligations among member insurers, simplifies the administration of claims against  
17 insolvent carriers, and allows the OIGA to provide a lower limit of liability coverage. However, we fail  
18 to see how the policy underlying the OIGA is adversely affected by allowing the payment of the  
19 subrogated interests of the Washington State Department of Labor and Industries and a Washington  
20 State self-insurer, since neither are members of the OIGA.  
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27 Since we view the Oregon provision prohibiting payment of subrogated interests as a method  
28 of allocating the cost of that fund among the member insurers, we fail to see how Oregon has a policy  
29 interest in denying reimbursement to out-of-state, non-member insurers, since in doing so the purpose  
30 of the OIGA will not be affected. The cost of the OIGA fund is to be distributed between "member  
31 insurers" who must belong to the association as a condition of doing business in Oregon. To distribute  
32 the cost of such a fund to non-member insurers is not a legitimate purpose of the Oregon statute.  
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36 The State of Washington's interest in allowing third party recoveries and requiring  
37 reimbursement to the Department and/or the self-insured employer for benefits paid, is a legitimate  
38 effort to afford the greatest possible recovery for injured workers and at the same time limit the cost of  
39 the industrial insurance system by requiring the responsible third party to bear the loss.  
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42 Oregon has no interest in applying its limitation on payment of subrogated interests to insurers  
43 who are neither members of the OIGA nor Oregon insurers. Washington has a legitimate interest in  
44 the application of its law which allows additional recovery to the injured worker and also provides a  
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1 proper allocation of the loss to the responsible party. We therefore find Washington law to be the  
2 appropriate choice of law to apply to the facts of this case.  
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4 We also note that we are not convinced the "self-insured" employer in this instance is, in any  
5 case, an "insurer" within the meaning of the OIGA statute. For that reason as well, the self-insured  
6 employer is not subject to the exclusionary provisions of that statute.  
7

8 The Department of Labor and Industries and Summit Timber Company, the self-insured  
9 employer, are entitled to reimbursement from the claimant for benefits paid and to an offset against  
10 future benefits payable pursuant to RCW 51.24.060, and the order of the Department issued on April  
11 7, 1988 is therefore affirmed.  
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13

### 14 **FINDINGS OF FACT**

- 15 1. On February 24, 1984 while in the course of his employment for the  
16 Summit Timber Company, a self-insured employer, the claimant herein,  
17 Edwin E. Stamp, sustained a severe injury to his hands. On March 12,  
18 1984, a report of accident was filed with the Department of Labor and  
19 Industries. On April 2, 1984 the Department issued an order allowing the  
20 claim. On April 7, 1988 the Department issued an order requiring  
21 distribution of settlement proceeds of a third party action taken by the  
22 claimant. In this order the Department required reimbursement to the  
23 self-insured employer of \$61,370.14 and to the Department in the amount  
24 of \$1,195.75. The order furthermore set forth that no benefits or  
25 compensation will be paid to or on behalf of the claimant until such time as  
26 the excess recovery totaling \$45,987.00 has been expended by the  
27 claimant for costs incurred as a result of the conditions covered by this  
28 claim. On May 2, 1988, the claimant filed a notice of appeal with the  
29 Board of Industrial Insurance Appeals. On May 10, 1988, this Board  
30 issued an order granting the appeal, assigning it Docket No. 88 1826 and  
31 ordering that hearings be held on the issues raised by the notice of  
32 appeal.  
33
- 34 2. The claimant brought an action in Federal District Court on October 30,  
35 1985 against Lumber Systems Inc., an Oregon corporation registered to  
36 do business as a contractor in Washington State, for injuries he sustained  
37 in the course of his employment for Summit Timber on February 24, 1984.  
38
- 39 3. Lumber Systems, Inc.'s primary insurance carrier, Mission Insurance, a  
40 California corporation, became insolvent on February 24, 1987, after Mr.  
41 Stamp's action was filed. Mission Insurance was a California corporation  
42 certified to transact insurance in both Oregon and Washington State in  
43 addition to other states. Lumber Systems, Inc. had \$500,000.00 in  
44 primary coverage through Mission Insurance.  
45
- 46 4. Lumber Systems Inc. also had an excess carrier which insured it for  
47 losses in excess of \$500,000.00.

- 1 5. Summit Timber was aware that a law suit had been filed and that periodic  
2 negotiations were occurring between Mr. Stamp, Lumber Systems, Inc.  
3 and the insurance carriers. The Department of Labor and Industries was  
4 not informed of the settlement conferences nor was it a party to the  
5 negotiations.  
6  
7 6. Lumber Systems, Inc. settled Mr. Stamp's claim for \$350,000.00. The  
8 Oregon Insurance Guarantee Association paid \$300,000.00 of this  
9 settlement, the maximum of its liability. Lumber Systems, Inc. paid  
10 \$25,000.00. Lumber Systems, Inc.'s excess carrier paid \$25,000.00.  
11  
12 7. The Washington State Department of Labor and Industries and the  
13 self-insured employer in this matter, Summit Timber, Inc., are not  
14 "member insurers" of the Oregon Insurance Guarantee Association.  
15  
16 8. Mr. Stamp resides in the State of Washington, the injury occurred within  
17 the State of Washington at a place of employment, and the third party  
18 defendant transacted business in the State of Washington. The State of  
19 Oregon's contacts with this matter are that the third party defendant is an  
20 Oregon corporation and the Oregon Insurance Guarantee Association  
21 provides funds which are subject to the demand for reimbursement.

#### **CONCLUSIONS OF LAW**

- 22 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
23 and the subject matter to this appeal.  
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25 2. Summit Timber is not an insurer within the meaning of the OIGA statute.  
26 The Oregon Insurance Guarantee Association Act's prohibition on  
27 payment of the subrogated interests of insurers is in conflict with the  
28 provisions of the Washington State Industrial Insurance Act allowing for  
29 third party actions and requiring distribution of the third party recoveries.  
30 The State of Washington has the most significant contacts and significant  
31 relationship with this matter. The Oregon contacts are not as significant  
32 as the Washington contacts.  
33  
34 3. The Washington State Industrial Insurance Act provisions regarding third  
35 party recoveries and distributions is the appropriate law to be applied in  
36 this matter.  
37  
38 4. Sums paid by OIGA in the amount of \$300,000.00, Lumber Systems, Inc.  
39 in the amount of \$25,000.00, and Lumber Systems, Inc.'s excess carrier in  
40 the sum of \$25,000.00 in settlement of the claimant's third party action, are  
41 subject to the lien and offset provisions of RCW 51.24.060.  
42  
43 5. The order of the Department of Labor and Industries issued on April 7,  
44 1988, which made demand upon the claimant to reimburse the  
45 self-insured employer in the amount of \$61,370.14 and the Department of  
46 Labor and Industries in the amount of \$1,195.75 and further ordered that  
47 no benefits or compensation would be paid to or on behalf of the claimant  
until such time as the excess recovery totaling \$45,987.00 has been

