Stamp, Edwin

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*, BIIA Dec., 88 1826 (1989)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

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

APPEARANCES:

Claimant, Edwin E. Stamp, by
Schroeter, Goldmark and Bender, per
James D. Hailey

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

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

This is an appeal filed by the claimant on May 2, 1988 from an order of the Department of Labor and Industries dated April 7, 1988 which made demand upon the claimant to reimburse the self-insured employer in the amount of $61,370.14 and the Department of Labor and Industries in the amount of $1,195.75 and further ordered that 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 expended by the claimant for costs incurred as a result of the conditions covered under this claim. **AFFIRMED**.

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 claimant to a Proposed Decision and Order issued on June 8, 1989 in which the order of the Department dated April 7, 1988 was sustained.

The focus of the controversy in this matter is the third party recovery of the claimant, Edwin Stamp. Mr. Stamp was severely injured in the course of his employment with Summit Timber Company, a self- insured employer in the State of Washington, on February 24, 1984. Mr. Stamp was operating a machine known as "the little chipper". This machine was fed by a waste conveyor carrying excess lumber from the trim saws. One of Mr. Stamp's duties was to clear the periodic jams which would occur on the waste conveyor. Mr. Stamp had three middle fingers of his left hand ripped off and additional injuries to the thumb and fingers of his right hand when he was attempting to clear the conveyor, which he thought had been shut down.

Mr. Stamp brought an action in Federal District Court against Lumber Systems, Inc., the manufacturer of the machine which caused his injury. Lumber Systems, Inc. is an Oregon corporation licensed to do business in the State of Washington. Lumber Systems, Inc. had purchased primary liability insurance through Mission Insurance Company in an amount of $500,000.00. Mission Insurance became insolvent and pursuant to the Oregon Revised Statutes, 734.510 et seq., the Oregon Insurance Guarantee Association (OIGA) stepped in to provide $300,000.00 in coverage to Lumber Systems, Inc. for the potential liability to Mr. Stamp. The OIGA's limit of liability pursuant to statute is $300,000.00. Lumber Systems, Inc. had also purchased excess insurance coverage.

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

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

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

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

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

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

The Industrial Appeals Judge then concluded that the provisions of the OIGA only prohibited the payment of the subrogated interest of "member insurers" from OIGA funds. Since the Department and the self- insured employer are not "member insurers" of the OIGA, he reasoned, the OIGA funds are subject to the subrogated interest of the Department and self-insured employer. We disagree with this analysis of the Oregon court's decision in Villalobos.

The court's decision in Villalobos is capable of two different interpretations. If we limit the court's decision to the particular facts of that case, then the decision merely resolves a conflict between Oregon statutes pertaining to Oregon workers' compensation benefits and the OIGA. However, since the court in Villalobos assumed that SAIF was not a member insurer of the OIGA, the decision may also arguably be read as prohibiting payment of subrogated interests of any insurer. Villalobos, at 140.

Villalobos dealt with a third party recovery by an injured worker. The OIGA paid $35,000.00 on account of the insolvent insurer. SAIF argued that the prohibitions on recovery for subrogated interests did not apply to payments made by SAIF under Oregon's workers' compensation law. The court in Villalobos appears to have limited its decision to the specific question of resolving the conflict between two Oregon statutory schemes. The court framed the issues as follows:

> The issues in this appeal involve two statutory schemes: ORS 656.576 to 656.595, relating to third- party actions and allocation of third party recoveries between workers' compensation insurers and recipients; and ORS 734.510 to 734.710, relating to the payment of "covered claims" against insolvent insurers.

Villalobos, at 139.

Villalobos resolved this conflict between the Oregon statutes involving Oregon insurers by holding that SAIF was not entitled to satisfaction of its lien from the $35,000.00 paid by the OIGA. Villalobos did not resolve the problem presented when an out-of-state workers' compensation insurer which is not a "member insurer" subject to the provisions of the OIGA seeks reimbursement for subrogated claims.

The question presented, then, is whether the provisions of the OIGA bar payment for the subrogated interests of any insurer or only member insurers.

The State of Oregon, like many jurisdictions, has adopted legislation in order to protect both insureds and injured parties from insolvent insurers. The scope of the OIGA and its authority is set out in ORS 734.510-734.710. The purpose of the OIGA is defined in ORS 734.520:

> The purpose of ORS 734.510 to 734.710 is to provide for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, to provide an association to assess the cost of such protection among insurers and to assist in the liquidation of insurers as provided in this chapter.

A "covered claim" is "an unpaid claim" "that arises out of and is within the coverage and limits of an insurance policy to which ORS 734.510 to 734.710 apply," but excludes "[a]ny amount due any reinsurer, insurer, insurance pool or underwriting association as subrogated recoveries or otherwise." ORS 734.510(4)(a) and (b)(B).

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

ORS 734.695 also provides that:

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

Claimant has not cited us to any decision interpreting the term "insurer" or "member insurer" as used in the OIGA statute with respect to out-of-state insurers. In deciding whether the exclusionary provisions of ORS 734.510(4)(b)(B) applied to SAIF, an in-state non- member insurance company, the Oregon Court of Appeals in Villalobos interpreted the language "due any ... insurer ... as subrogated recoveries or otherwise" as follows: "Our understanding of that language is that an amount which, for any reason, finds its way to an insurer rather than a claimant or an insured, is beyond the scope of what OIGA is authorized or required to pay." Villalobos, at 140. Unlike the court in Villalobos, other jurisdictions with a statutory framework similar to the OIGA statute have interpreted the term "insurer", as it is used in the exclusionary provision regarding subrogated claims, to mean "member insurer". See, e.g., Arnone v. Murphy, 153 N.J.Super. 584, 380 A.2d 734 (1977) (involving New Jersey workers' compensation lien).

At least with respect to out-of-state insurers, the court's decision in Arnone appears to be a more reasonable interpretation of the statutory provisions prohibiting the payment of subrogated

interests of an insurer by limiting the prohibition to "member insurers" of the insurance guarantee association. We believe this interpretation should apply to the OIGA, since no Oregon case law which is directly on point with respect to out-of-state insurers has been cited to us. Thus, since the self-insured employer in this instance, Summit Timber, and the Department are not "member insurers" of the OIGA, they are not prohibited by the provisions of the OIGA statute from recovering their subrogated interests.

However, because the court in Villalobos assumed that SAIF was not a "member insurer" but nonetheless found that the provisions of the OIGA statute prohibited the payment of SAIF's subrogated interest, the Villalobos decision might be read to bar the recovery of the subrogated interests of any insurer. If the Villalobos decision were read to bar recovery of subrogated interests of any insurer, and if the provisions of the Oregon statutes are controlling, the Department and the self-insured employer in this case (assuming that they are "insurers") would be prohibited from recovering any of the monies paid by the OIGA or Lumber Systems, Inc.

Under such an interpretation, the provisions of the OIGA statute would be in direct conflict with the provisions of our Industrial Insurance Act which provide for a third party action and recovery, and allow the Department and/or the self-insured employer a statutory subrogation interest in any such recovery. In that case we believe that the issues in this appeal can only be resolved by an analysis of the conflicting statutes in order to determine the appropriate choice of law in this matter.

The State of Washington, in exercising its inherent police and sovereign powers, has enacted a comprehensive Industrial Insurance Act and declared 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.

RCW 51.04.010.

The Industrial Insurance Act is the exclusive source of any cause of action, right, or remedy accruing to any injured worker in the State of Washington. The Washington Legislature has also created, within the Industrial Insurance Act, provisions for actions against third persons, not in the worker's same employ, who are liable for damages on account of the worker's injury. RCW 51.24.030.

The Washington statutes also provide that, if a third party recovery is collected, the Department and/or any self-insurer who has paid benefits due under the Industrial Insurance Act, shall be entitled to reimbursement from the third party recovery. RCW 51.24.060.

In a situation such as this, where a third party action authorized by the laws of the State of Washington, results in a recovery subject to the provisions of the Oregon Insurance Guarantee Association statute, a clear conflict exists. The Washington statutes mandate payment of the Department's and self-insured employer's lien against the recovery as reimbursement for the benefits they have paid. The Oregon statutes prohibit any such payment. It is therefore necessary to determine the appropriate choice of law in order to resolve this conflict.

The Washington State Supreme Court has adopted the "most significant relationship" rule regarding choice-of-law problems in tort cases. Johnson v. Spider Staging Corp., 87 Wn.2d 577, 555 P.2d 997 (1976). In Johnson the court looked to the Restatement (Second) of Conflicts of Law § 145 (1971), for the general principles which apply to a tort choice-of-law problem:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Johnson, at 580-581.

The court in Johnson, relying upon its decision in Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn.2d 806, 459 P.2d 32 (1969), applied an "interest analysis" in evaluating each state's "significant contacts". This interest analysis focuses on the public policies and purposes sought to be achieved by each state. Initially we must identify each state's contacts with this matter.

Washington's contacts with this matter are: (1) the injured worker resides in the State of Washington; (2) the injury occurred within the State of Washington at a place of employment; (3) the third party defendant transacted business in the State of Washington.

Oregon's contacts with this matter are: (1) the third party defendant is an Oregon corporation; and (2) the Oregon Insurance Guarantee Association provides funds which are subject to the demand for reimbursement.

Our analysis of the provisions of the OIGA statute leads us to conclude that its purpose is to protect insureds and persons making claims, as well as to allocate the loss between "member insurers". The "member insurers" are the parties who bear the burden of the insolvent member insurance company. Thus, as we view it, the prohibition on payment of subrogated interests of insurers from the OIGA funds or from the insured, is logical as it pertains to the other members of the OIGA. It appears to us that such a provision merely serves as a means of allocating the costs of the association's obligations among member insurers, simplifies the administration of claims against insolvent carriers, and allows the OIGA to provide a lower limit of liability coverage. However, we fail to see how the policy underlying the OIGA is adversely affected by allowing the payment of the subrogated interests of the Washington State Department of Labor and Industries and a Washington State self-insurer, since neither are members of the OIGA.

Since we view the Oregon provision prohibiting payment of subrogated interests as a method of allocating the cost of that fund among the member insurers, we fail to see how Oregon has a policy interest in denying reimbursement to out-of-state, non-member insurers, since in doing so the purpose of the OIGA will not be affected. The cost of the OIGA fund is to be distributed between "member insurers" who must belong to the association as a condition of doing business in Oregon. To distribute the cost of such a fund to non-member insurers is not a legitimate purpose of the Oregon statute.

The State of Washington's interest in allowing third party recoveries and requiring reimbursement to the Department and/or the self-insured employer for benefits paid, is a legitimate effort to afford the greatest possible recovery for injured workers and at the same time limit the cost of the industrial insurance system by requiring the responsible third party to bear the loss.

Oregon has no interest in applying its limitation on payment of subrogated interests to insurers who are neither members of the OIGA nor Oregon insurers. Washington has a legitimate interest in the application of its law which allows additional recovery to the injured worker and also provides a

proper allocation of the loss to the responsible party. We therefore find Washington law to be the appropriate choice of law to apply to the facts of this case.

We also note that we are not convinced the "self-insured" employer in this instance is, in any case, an "insurer" within the meaning of the OIGA statute. For that reason as well, the self-insured employer is not subject to the exclusionary provisions of that statute.

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

FINDINGS OF FACT

1. On February 24, 1984 while in the course of his employment for the Summit Timber Company, a self- insured employer, the claimant herein, Edwin E. Stamp, sustained a severe injury to his hands. On March 12, 1984, a report of accident was filed with the Department of Labor and Industries. On April 2, 1984 the Department issued an order allowing the claim. On April 7, 1988 the Department issued an order requiring distribution of settlement proceeds of a third party action taken by the claimant. In this order the Department required reimbursement to the self-insured employer of $61,370.14 and to the Department in the amount of $1,195.75. The order furthermore set forth that no benefits or compensation will be paid to or on behalf of the claimant until such time as the excess recovery totaling $45,987.00 has been expended by the claimant for costs incurred as a result of the conditions covered by this claim. On May 2, 1988, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On May 10, 1988, this Board issued an order granting the appeal, assigning it Docket No. 88 1826 and ordering that hearings be held on the issues raised by the notice of appeal.

2. The claimant brought an action in Federal District Court on October 30, 1985 against Lumber Systems Inc., an Oregon corporation registered to do business as a contractor in Washington State, for injuries he sustained in the course of his employment for Summit Timber on February 24, 1984.

3. Lumber Systems, Inc.'s primary insurance carrier, Mission Insurance, a California corporation, became insolvent on February 24, 1987, after Mr. Stamp's action was filed. Mission Insurance was a California corporation certified to transact insurance in both Oregon and Washington State in addition to other states. Lumber Systems, Inc. had $500,000.00 in primary coverage through Mission Insurance.

4. Lumber Systems Inc. also had an excess carrier which insured it for losses in excess of $500,000.00.

5. Summit Timber was aware that a law suit had been filed and that periodic negotiations were occurring between Mr. Stamp, Lumber Systems, Inc. and the insurance carriers. The Department of Labor and Industries was not informed of the settlement conferences nor was it a party to the negotiations.

6. Lumber Systems, Inc. settled Mr. Stamp's claim for $350,000.00. The Oregon Insurance Guarantee Association paid $300,000.00 of this settlement, the maximum of its liability. Lumber Systems, Inc. paid $25,000.00. Lumber Systems, Inc.'s excess carrier paid $25,000.00.

7. The Washington State Department of Labor and Industries and the self-insured employer in this matter, Summit Timber, Inc., are not "member insurers" of the Oregon Insurance Guarantee Association.

8. Mr. Stamp resides in the State of Washington, the injury occurred within the State of Washington at a place of employment, and the third party defendant transacted business in the State of Washington. The State of Oregon's contacts with this matter are that the third party defendant is an Oregon corporation and the Oregon Insurance Guarantee Association provides funds which are subject to the demand for reimbursement.

CONCLUSIONS OF LAW

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

2. Summit Timber is not an insurer within the meaning of the OIGA statute. The Oregon Insurance Guarantee Association Act's prohibition on payment of the subrogated interests of insurers is in conflict with the provisions of the Washington State Industrial Insurance Act allowing for third party actions and requiring distribution of the third party recoveries. The State of Washington has the most significant contacts and significant relationship with this matter. The Oregon contacts are not as significant as the Washington contacts.

3. The Washington State Industrial Insurance Act provisions regarding third party recoveries and distributions is the appropriate law to be applied in this matter.

4. Sums paid by OIGA in the amount of $300,000.00, Lumber Systems, Inc. in the amount of $25,000.00, and Lumber Systems, Inc.'s excess carrier in the sum of $25,000.00 in settlement of the claimant's third party action, are subject to the lien and offset provisions of RCW 51.24.060.

5. The order of the Department of Labor and Industries issued on April 7, 1988, which made demand upon the claimant to reimburse the self-insured employer in the amount of $61,370.14 and the Department of Labor and Industries in the amount of $1,195.75 and further ordered that 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

expended by the claimant for costs incurred as a result of the conditions covered under this claim is correct and is affirmed.

It is so ORDERED.

Dated this 5th day of December, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member