

Goldstein, William

THIRD PARTY ACTIONS (RCW 51.24)

Distribution of recovery

Under RCW 51.24.060, the Department must pay a proportionate share of the reasonable attorney's fees and costs "incurred" by the worker in obtaining the third party recovery. The term "incurred" refers to the amount of attorney's fees the worker is actually required to pay to secure the third party recovery, not the fee as originally specified in the contingent fee agreement. ...*In re William Goldstein*, BIA Dec., 88 2275 (1990)

Scroll down for order.

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

1 **IN RE: WILLIAM GOLDSTEIN**) **DOCKET NO. 88 2275**
2)
3 **CLAIM NO. J-433414**) **DECISION AND ORDER**
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5 APPEARANCES:

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7 Claimant, William Goldstein, by
8 Leonard W. Moen & Associates, per
9 Randolph F. Jones

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11 Employer, Waterway Spas, Inc.,
12 None (Finaled--Account Closed)

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Barbara Gary, Assistant, and Laurel Anderson, Paralegal
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18 This is an appeal filed by the claimant on June 3, 1988 from an order of the Department of
19 Labor and Industries dated May 10, 1988. The order adhered to the provisions of an order dated April
20 11, 1988 which stated that the claimant has recovered \$75,000.00 and RCW 51.24.060 requires
21 distribution of the settlement proceeds as follows: (1) net share to attorney for fees and costs
22 \$26,736.60; (2) net share to claimant \$24,968.93; and, (3) net share to Department \$23,294.47; and
23 which declared a statutory lien against the claimant's third party recovery in the amount of \$36,904.54
24 and made demand upon the claimant to reimburse the Department in the amount of \$23,294.47 plus
25 an overpayment of \$334.00. **AFFIRMED.**
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30 **DECISION**

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 Department to a Proposed Decision and Order
33 issued on January 12, 1990, in which the order of the Department dated May 10, 1988, was reversed,
34 and the matter remanded to the Department to recalculate the distribution of the settlement proceeds
35 as well as its statutory lien and demand for reimbursement and to use the following figures in its
36 calculation: "(1) a third party recovery of \$75,000.00; (2) benefits paid by the Department in the
37 amount of \$36,197.55; (3) litigation costs in the amount of \$2,989.11; and, (4) reasonable attorneys'
38 fees incurred by the claimant in the third party action in the amount of \$25,000.00."
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43 The sole issue before us in this appeal is whether \$25,000.00 or \$23,747.49 constitutes
44 "reasonable attorneys' fees incurred by the worker" for purposes of the distribution of claimant's third
45 party recovery pursuant to RCW 51.24.060.
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1 Mr. Goldstein argues that, as a result of the contingent fee agreement he signed, he "incurred"
2 an obligation to pay an attorneys' fee of one-third of the amount recovered in the third party action. As
3 the third party action was settled for \$75,000.00, he contends that the Department should have used
4 an attorneys' fee of \$25,000.00 in calculating its proportionate share of attorneys' fees. However, the
5 parties' stipulation further reveals that Mr. Goldstein's attorney reduced his fee to \$23,747.49 and the
6 Department used that figure in calculating its proportionate share of attorneys' fees. Focusing on the
7 word "incurred", our Industrial Appeals Judge determined that the \$25,000.00 figure should have been
8 used and reversed the Department order. We disagree, and affirm the Department order.

9 It is likely that the word "incurred", rather than "paid", was used in RCW 51.24.060(1)(c)(i)
10 because, at the time the Department calculates the distribution of a third party settlement, attorneys'
11 fees have usually not been paid. However, another subsection of the statute, RCW 51.24.060(1)(a),
12 requires that "reasonable attorneys' fees" be "paid proportionately" by the Department and the worker.
13 To be consistent, these two subsections must require the parties to bear a proportionate share of the
14 reasonable attorneys' fees which the claimant is actually required to pay to secure the third party
15 recovery. The use of the term "incurred" in the latter part of the statute simply recognizes the fact that
16 the attorneys' fees may not have actually been paid at the time the distribution is calculated. Any other
17 interpretation would require the Department to pay attorneys' fees which the claimant was not in fact
18 obligated to pay, thus providing a windfall to the claimant.

19 After consideration of the Proposed Decision and Order and the Petition for Review filed
20 thereto, and a careful review of the entire record before us, we are persuaded that the Department
21 order determining distribution of the third party settlement proceeds, is correct and must be affirmed.

22 Proposed Findings of Fact Nos. 1, 2, 3 and 6 and proposed Conclusion of Law No. 1 are
23 hereby adopted as this Board's final findings and conclusion. In addition, we enter the following
24 findings and conclusions:

25 **FINDINGS OF FACT**

- 26 4. Pursuant to the written contingent fee agreement of June 26, 1984,
27 described in Finding of Fact No. 2, claimant would have been obligated to
28 pay attorneys' fees in the amount of \$25,000.00. However, claimant's
29 attorney subsequently reduced the attorneys' fee from \$25,000.00 to
30 \$23,747.49.
- 31 5. The attorneys' fee incurred by claimant as a result of the third party
32 litigation was \$23,747.49, not \$25,000.00.

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3 **CONCLUSIONS OF LAW**
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- 5 2. Within the meaning of RCW 51.24.060(1)(a) and RCW 51.24.060(1)(c)(i),
6 claimant, William Goldstein, incurred reasonable attorneys' fees in the
7 amount of \$23,747.49 and reasonable costs in the amount of \$2,989.11
8 in settlement of his third party action.
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10 3. The order of the Department dated May 10, 1988, which adhered to the
11 provisions of an order dated April 11, 1988, which stated that the claimant
12 has recovered \$75,000.00 and RCW 51.24.060 requires distribution of the
13 settlement proceeds, as follows: (1) net share to attorney for fees and
14 costs \$26,736.60; (2) net share to claimant \$24,968.93; and, (3) net share
15 to Department \$23,294.47; and which declared a statutory lien against the
16 claimant's third party recovery in the amount of \$36,904.54, and made
17 demand upon the claimant to reimburse the Department in the amount of
18 \$23,294.47 plus an overpayment of \$334.00, is correct, and is affirmed.

19 It is so ORDERED.

20 Dated this 8th day of August, 1990.

21 BOARD OF INDUSTRIAL INSURANCE APPEALS

22 /s/
23 _____
24 SARA T. HARMON Chairperson

25
26 /s/
27 _____
28 PHILLIP T. BORK Member