

## **Guyette, Lawrence, Dec'd**

---

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

#### **Multiple beneficiaries**

When a surviving spouse becomes a beneficiary under the Act and becomes entitled to benefits as a result of the worker's death, her benefits cannot be offset under RCW 51.24 unless she has realized a third party recovery (*e.g.*, for loss of consortium). Where the Department attributed the entire amount of a prior third party recovery solely to the worker, the only recovery subject to RCW 51.24 is that made by and previously allocated to the injured worker. ...*In re Lawrence Guyette, Dec'd, BIA Dec., 89 0832 (1990)*

Scroll down for order.



1 matter, there was an excess recovery totaling \$81,718.76." Stipulation of Facts, 1/23/90, paragraph 3.  
2  
3 Mr. Guyette died as a result of his occupational disease on May 12, 1988.

4 On May 23, 1988, the Department issued an order in Mr. Guyette's claim which distributed  
5 proceeds from the third party recovery pursuant to RCW 51.24.060. The stipulation sets forth the  
6 terms of this order as follows: "no benefits or compensation will be paid to or on behalf of the claimant  
7 until such time as this excess totaling \$81,718.76 has been expended by the claimant for costs  
8 incurred as a result of the condition(s) covered under this claim." Stipulation of Facts, 1/23/90,  
9 paragraph 4. Time loss compensation totaling \$16,387.97, owed to the claimant for the period March  
10 23, 1987 through May 11, 1988, was subsequently credited against the excess recovery. The May 23,  
11 1988 order was neither appealed by any party, nor set aside by the Department, within the time  
12 allowed by RCW 51.52.060.

13 Arlet J. Guyette is the claimant's widow. Pursuant to RCW 51.32.050(2), she made a claim for  
14 pension benefits as a surviving spouse. In an order dated September 8, 1988, the Department  
15 awarded Arlet Guyette a widow's pension. By the order which is currently on appeal dated January  
16 10, 1989, the Department asserted a third party offset against the benefits payable to Mrs. Guyette.  
17 The offset, which totaled \$65,330.70, was based upon the remainder of the excess third party  
18 recovery not previously offset against benefits payable to or on behalf of her husband.

19 Under RCW 51.24.030 a worker or beneficiary is permitted in certain circumstances to seek  
20 and recover damages from third parties, subject to the distribution scheme found in RCW 51.24.060.  
21 A "beneficiary," as defined in RCW 51.08.020, includes a "wife ... of a worker in whom shall vest a  
22 right to receive payment under this title."

23 Under RCW 51.32.050 a right to receive payment by a spouse is a right which is separate from  
24 the worker's claim. A claim under this section may not be filed unless the circumstances described in  
25 the statute are present. The primary contingency is the death of the worker as a result of the injury (or  
26 disease). The surviving spouse's claim is totally separate and distinct from that of the worker. Purdy  
27 & Whitfield v. Dep't of Labor & Indus., 12 Wn.2d 131 (1942).

28 In In re Charles H. Downey, Dec'd., BIIA Dec., 87 1718 (1989), another asbestosis case which  
29 is somewhat similar to the one before us, a third party recovery had been made while both Mr. and  
30 Mrs. Downey were alive. The Department allocated to Mrs. Downey a 20% share of the recovery.  
31 The Department recognized the common law remedy for loss of consortium by the wife as separate  
32 and distinct from the remedies available to the husband. See Reichelt v. Johns-Manville Corp., 107  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

1 Wn.2d 761, 776 (1987). At the time of the recovery, Mrs. Downey was not technically a "beneficiary"  
2 as defined in RCW 51.08.020 and as contemplated by the specific language in RCW 51.24.030.  
3 However, Mrs. Downey was a contingent beneficiary in the sense that she possessed a contingent  
4 right to make a claim under RCW 51.32.050, which would not be operational until her husband's  
5 death. While Mr. Downey was alive he received benefits which were offset by 80% of the total excess  
6 recovery. When Mr. Downey died, Mrs. Downey filed her claim under RCW 51.32.050, which was  
7 accepted by the Department. We held that the remaining 20% of the total excess recovery previously  
8 apportioned to Mrs. Downey could then be offset against the widow's pension benefits otherwise  
9 payable to her.  
10

11  
12 In this case, a third party recovery was also made during Mr. Guyette's lifetime. However, in its  
13 May 23, 1988 order the Department did not attribute any portion of the recovery to Mrs. Guyette.  
14 Instead, the Department established a lien and an excess recovery which attributed the entire amount  
15 of the third party recovery solely to Mr. Guyette. Mrs. Guyette was not even implicitly recognized as  
16 having made a recovery under RCW 51.24.030 and .060.  
17

18  
19 Despite the fact the parties here stipulated that the recovery was made by both Mr. and Mrs.  
20 Guyette, the Department allocated all the proceeds of the third party recovery to Mr. Guyette.<sup>1</sup>  
21 Therefore, the only recovery subject to Chapter 51.24 RCW was that made by and previously  
22 allocated to the injured worker. When Mrs. Guyette became entitled to benefits under RCW 51.32.050  
23 her claim could not be encumbered with any excess third party recovery since Mrs. Guyette, per the  
24 May 23, 1988 order, did not realize a third party recovery. The Department is not entitled to reduce  
25 the benefits of one beneficiary by a recovery made by the worker or other beneficiaries. See In re  
26 Estate of Boettcher, 35 Wn. App. 178 (1983); See also Anderson v. Dep't of Labor & Indus., 40 Wn.2d  
27 210 (1952); Gassaway v. Dep't of Labor & Indus., 18 Wn. App. 747 (1977).  
28

29  
30 We reiterate the importance of the Department's own final third party distribution order dated  
31 May 23, 1988. It pronounced satisfaction of the lien and established an offset solely against Mr.  
32 Guyette's claim. It was based on an allocation of the entire third party recovery to Mr. Guyette. The  
33  
34

35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  

---

<sup>1</sup> It is not known whether the court in which the recovery was made apportioned the recovery made by the Guyettes. There is no evidence of any judicial determination allocating the damages recovered between Mr. Guyette's claims for personal injuries and Mrs. Guyette's claims for loss of consortium or otherwise declaring the extent to which each shared individually or jointly in the entire recovery, either by virtue of their separate and independent claims or a community property interest in any amounts recovered. See In re Marriage of Brown, 100 Wn.2d 729 (1984).

1 Department now has no power to indirectly attack the integrity of its own prior determination and  
2 contend that the recovery it attributed to Mr. Guyette should now be attributed to Mrs. Guyette.  
3

4 The Department order of January 10, 1989 must be reversed and the matter remanded to the  
5 Department to pay benefits to Mrs. Guyette without regard to any excess third party recovery  
6 previously attributed to her husband.  
7

### 8 **FINDINGS OF FACT**

- 9
- 10 1. On May 15, 1987 the Department of Labor and Industries received an  
11 application for benefits indicating Lawrence Guyette suffered an  
12 occupational disease during the course of his employment with various  
13 Washington employers. The claim was assigned Claim No. K-275200.  
14 On February 23, 1988 the Department issued an order allowing the claim  
15 for occupational asbestosis and mesothelioma. On May 23, 1988 the  
16 Department issued an order declaring a statutory lien against the  
17 claimant's third party recovery for the sum of \$647.77. The order remitted  
18 to the claimant \$17,276.06. The lien against this recovery was found to  
19 have been satisfied and no benefits or compensation were to be paid to or  
20 on behalf of the claimant until such time as the excess third party recovery  
21 totaling \$81,718.76 had been expended by the claimant for costs incurred  
22 as a result of the conditions covered under the claim.  
23

24 On June 8, 1988 the Department was advised that the claimant had died  
25 on May 12, 1988, as a result of mesothelioma. On June 30, 1988 the  
26 Department received a claim for pension benefits filed by the worker's  
27 surviving spouse, Arlet J. Guyette. On September 8, 1988 the  
28 Department issued an order allowing the claim filed by the surviving  
29 spouse. By another order dated September 8, 1988 the Department  
30 ordered the payment of time loss compensation for the periods March 23,  
31 1987 to June 30, 1987 and July 1, 1987 through May 11, 1988, for a total  
32 amount of \$16,387.97. The amount of time loss compensation due was  
33 not paid, but was offset against the excess third party recovery.

34 In a letter dated December 21, 1988 the Department set forth a  
35 determination that the excess third party recovery on the claim would be  
36 offset against benefits payable to the surviving spouse until the sum of  
37 \$65,317.83 had been expended. In a letter dated December 27, 1988 the  
38 Department also indicated that the excess third party recovery would be  
39 offset against the widow's benefits. On December 27, 1988 the surviving  
40 spouse wrote a letter to the Department protesting the offset provisions of  
41 the Department's December 21, 1988 letter.

42 On January 5, 1989 the Board of Industrial Insurance Appeals received  
43 two notices of appeal, filed on behalf of the widow- petitioner, from the  
44 letters dated December 21, 1988 and December 27, 1988. These  
45 appeals were assigned Docket Nos. 89 0036 and 89 0037, respectively.  
46 On January 10, 1989 the Department issued an order stating that Arlet  
47

1 Guyette's widow's pension benefits were to be offset against the excess  
2 recovery of \$65,330.70. On January 11, 1989 the Department issued an  
3 order stating that the letters dated December 21, 1988 and December 27,  
4 1988 had been corrected and superseded by the Department order of  
5 January 10, 1989. On January 13, 1989 the Board issued two orders in  
6 the appeals assigned Docket Nos. 89 0036 and 89 0037, returning the  
7 case to the Department for further action.

8  
9 On March 10, 1989 the Board of Industrial Insurance Appeals received a  
10 notice of appeal, filed on behalf of the widow-petitioner, from the January  
11 10, 1989 Department order. On March 21, 1989 the Board issued its  
12 order granting the appeal, assigning it Docket No. 89 0832, and directing  
13 that proceedings be held on the issues raised by the notice of appeal.

- 14 2. Lawrence Guyette, the claimant, contracted asbestosis and mesothelioma  
15 during the course of his employment in the state of Washington. He was a  
16 worker who filed a claim for and received benefits under the Washington  
17 Industrial Insurance Act as a result of an occupational disease.
- 18 3. As a result of a law suit against certain asbestos manufacturers, Mr.  
19 Guyette and his wife recovered \$195,500.00. After all the parties had  
20 settled the matter there was an excess recovery totaling \$81,781.76.
- 21 4. Mr. Guyette died on May 12, 1988. His death was caused by his  
22 occupational disease. The Department was advised of the  
23 disease-caused death on June 8, 1988. Mr. Guyette was survived by his  
24 wife, Arlet J. Guyette. On June 30, 1988 Mrs. Guyette made a claim for  
25 benefits under RCW 51.32.050 and was awarded a surviving spouse's  
26 pension.
- 27 5. In a final order dated May 23, 1988 the Department declared that Mr.  
28 Guyette had made a third party recovery in the amount of \$195,500.00. A  
29 lien was set forth totaling \$647.00. The lien was declared satisfied. It was  
30 further declared that no compensation was to be paid to or on behalf of the  
31 claimant until an excess recovery totaling \$81,718.76 had been expended  
32 by the claimant for costs incurred as a result of conditions covered under  
33 the claim.

#### 34 **CONCLUSIONS OF LAW**

- 35 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties  
36 and the subject matter of this appeal.
- 37 2. The Department order of May 23, 1988 constitutes a res judicata  
38 determination in this case, binding upon the Department, that the entire  
39 third party recovery was made by Mr. Guyette and that the excess  
40 recovery was subject to offset only against benefits payable to or on behalf  
41 of Mr. Guyette.
- 42 3. Because of the final Department order of May 23, 1988, the Department is  
43 not entitled under the provisions of RCW 51.24.060 to offset an excess  
44

1 third party recovery previously attributed to Mr. Guyette against any  
2 benefits paid or payable as a result of Mrs. Guyette's separate claim for  
3 benefits as a surviving spouse.

- 4  
5 4. The order of the Department of Labor and Industries dated January 10,  
6 1989 which provided that Arlet Guyette's widow's pension benefits were to  
7 be offset against the claimant's excess recovery of \$65,330.70 is incorrect  
8 and is reversed. This matter is remanded to the Department to provide  
9 Arlet Guyette with widow's pension benefits without offset for the third  
10 party recovery made prior to Lawrence Guyette's death.

11 It is so ORDERED.

12 Dated this 14<sup>th</sup> day of September, 1990.

13 BOARD OF INDUSTRIAL INSURANCE APPEALS

14  
15  
16  
17 /s/  
18 SARA T. HARMON Chairperson

19  
20  
21 /s/  
22 PHILLIP T. BORK Member