

## **Mills, Marvin**

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

#### **Multiple beneficiaries**

It is not improper for the Department to assert its lien for benefits paid to the worker against the entire third party recovery where there is no valid court order or settlement document allocating the damages recovered between multiple individuals who may legally share in the third party recovery. In this case, the Board held that in the absence of such an allocation it could not speculate as to the amount of the recovery which should be attributed to the spouse's claim for loss of consortium. ...***In re Marvin Mills, BIA Dec., 89 3090 (1990)*** [*Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 91-2-00363-7.*]

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

1     **IN RE: MARVIN MILLS**                             )     **DOCKET NO. 89 3090**  
2   )  
3     **CLAIM NO. J-314149**                             )     **DECISION AND ORDER**  
4 \_\_\_\_\_

5 **APPEARANCES:**

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7         Claimant, Marvin Mills, by  
8         Schroeter, Goldmark, and Bender, P.S., per  
9         William S. Bailey and Sydney Stillerman Swan

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11        Employer, Westlake Chevrolet, Incorporated, by  
12        None

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14        Department of Labor and Industries, by  
15        The Attorney General, per  
16        Beverly Norwood Goetz and Jeffrey Boyer, Assistants   and Whitney Petersen, Paralegal  
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18        This is an appeal filed by the claimant, Marvin Mills, on February 27, 1989 from an order of the  
19 Department of Labor and Industries dated January 17, 1989 which corrected and superseded the  
20 Department order dated January 12, 1989, and provided that:  
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23           WHEREAS, claimant has recovered \$145,000.00, and RCW 51.24.060  
24           requires distribution of the settlement proceeds as follows: 1) Net share to  
25           attorney for fees and costs (\$50,479.04); 2) Net share to claimant  
26           (\$50,567.21); and 3) Net share to Department (\$43,953.75).

27           WHEREAS, the Department of Labor and Industries declares a statutory  
28           lien against the claimant's third party recovery for the sum of \$68,632.95;

29           NOW THEREFORE, demand is hereby made upon the claimant to  
30           reimburse the Department in the amount of \$43,953.75.

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32           IT IS FURTHER ORDERED no benefits or compensation will be paid to or  
33           on behalf of the claimant until such time the excess recovery totaling  
34           \$2,257.77 has been expended by the claimant for costs incurred as a  
35           result of the condition(s) covered under this claim.  
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37 **AFFIRMED.**

**DECISION**

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39        Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
40        and decision on timely Petitions for Review filed by the claimant and the Department of Labor and  
41        Industries to a Proposed Decision and Order issued on July 19, 1990 in which the order of the  
42        Department dated January 17, 1989 was affirmed.  
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1 This case was presented for decision based on the parties' agreement that the settlement of  
2 the third party claim made by Mr. and Mrs. Mills against numerous defendants included compensation  
3 for Mrs. Mills' loss of consortium claim, although the settlement documents did not specify the  
4 percentage or monetary award for the consortium claim. The Department asserted a lien pursuant to  
5 RCW 51.24.060 against the third party recovery and attributed the entire amount of the recovery solely  
6 to Mr. Mills. Mr. Mills now challenges the Department's authority to assert its lien against the entire  
7 recovery since a portion of the recovery was to compensate Mrs. Mills.  
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10 We agree with our Industrial Appeals Judge that the Department cannot assess its lien against  
11 any portion of a third party recovery awarded specifically to the spouse of a worker based on a claim  
12 for loss of consortium until such time as the spouse becomes a beneficiary under the Act. In re  
13 Charles H. Downey, Dec'd., BIIA Dec., 87 1718 (1989). We have also stated that where the third party  
14 recovery is made jointly by both claimant and spouse without evidence of any determination allocating  
15 a portion of the recovery to the loss of consortium claim, and the Department attributes the entire  
16 amount of the recovery to the worker, benefits to which the surviving spouse may subsequently be  
17 entitled in her own right as a beneficiary cannot be offset by the excess third party recovery previously  
18 attributed to the worker. In re Lawrence Guyette, Dec'd., Dckt. No. 89 0832 (September 14, 1990).  
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22 Likewise, we agree with our Industrial Appeals Judge that when the court documents from the  
23 third party recovery do not specify the percentage nor monetary award for the loss of consortium  
24 claim, we cannot speculate as to the amount that should be attributed to the consortium claim. Mr.  
25 Mills argues that he is not asking this Board to speculate. He alleges for the first time in the Petition for  
26 Review that the affidavit of Robert G. Andre, lead counsel for the defendants in the third party action,  
27 was included as part of our record and establishes that Mrs. Mills was entitled to 20% of the recovery  
28 as compensation for her loss of consortium. Our records contain no such affidavit. However, even if  
29 the affidavit were before us, it would not change the result. If there is no valid court order or settlement  
30 document allocating the damages recovered between multiple individuals who may legally share in the  
31 third party recovery, it would not be appropriate for us to rely on information developed after the third  
32 party recovery has been made and the Department's distribution order issued, to make a  
33 determination as to the ownership of the settlement proceeds.  
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43 In the Proposed Decision and Order at page four, our Industrial Appeals Judge stated: "There  
44 is nothing in the statute to prevent the Department from exercising its discretion to reduce the amount  
45 against which a lien is asserted in consideration of a spouse's claim for loss of consortium", citing  
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1 RCW 51.24.060(3). With this we disagree in part. The discretion of the Department to compromise its  
2 lien under that statute has no bearing on the recovery separately made for loss of consortium.  
3 Segregation of a loss of consortium award is not a waiver of lien. If this living spouse had recovered a  
4 specific amount for loss of consortium the Department, to that extent, would have no lien against that  
5 recovery. This is not a discretionary decision. However, this particular point does not affect the  
6 outcome in this case in any event.  
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10 After consideration of the Proposed Decision and Order and the Petitions for Review filed  
11 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed  
12 Decision and Order is correct. The proposed findings and conclusions are hereby adopted as this  
13 Board's final findings and conclusions and are incorporated herein by their reference.  
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16 It is so ORDERED.

17 Dated this 7<sup>th</sup> day of December, 1990.  
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19 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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21 /s/  
22 SARA T. HARMON Chairperson  
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24 /s/  
25 PHILLIP T. BORK Member  
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