

## **Mathes, Betty**

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

#### **Assignment of action**

Where settlement between worker and uninsured motorist coverage carrier was entered without written approval of self-insured employer as required by RCW 51.24.090, and the employer elects to void the deficiency settlement, the voided settlement does not constitute an automatic assignment of the cause of action to the employer. The employer must petition the court or act in accordance with RCW 51.24.090(2). **...In re Betty Mathes, BIIA Dec., 89 3473 (1991)** [*Editor's Note:* The Board's decision was appealed to superior court under Kitsap County Cause No. 91-2-00389-2.]

#### **Distribution of recovery**

Where a self-insured employer voided deficiency settlement but did not comply with RCW 51.24.090(2) regarding assignment of action, its attorney's fees and costs associated with its pursuing a third party recovery may not be included in calculating any distribution of the recovery. **...In re Betty Mathes, BIIA Dec., 89 3473 (1991)** [*Editor's Note:* The Board's decision was appealed to superior court under Kitsap County Cause No. 91-2-00389-2.]

#### **Settlement of action**

There is no statutory prohibition against the worker, employer, and Department participating cooperatively by voluntary mutual consent in negotiations with a third party source. Neither the self-insured employer nor the Department have a legal right to pursue third party recovery for their own benefit and/or the worker's benefit without first obtaining an assignment of the action. RCW 51.24.070(1), (2). **...In re Betty Mathes, BIIA Dec., 89 3473 (1991)** [*Editor's Note:* The Board's decision was appealed to superior court under Kitsap County Cause No. 91-2-00389-2.]

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

1     **IN RE: BETTY L. MATHES**                     )  
2   )  
3     **CLAIM NO. S-692670**                     )     **DOCKET NO. 89 3473**  
4   )     **DECISION AND ORDER**

5 APPEARANCES:

6  
7             Claimant, Betty L. Mathes, by  
8             Casey & Casey, per  
9             Carol Casey and Gerald L. Casey, Attorneys

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11            Self-Insured Employer, City of Bremerton, by  
12            Office of the City Attorney, per  
13            Leila Mills, Assistant City Attorney

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15            Department of Labor and Industries, by  
16            The Attorney General, per  
17            Stephen A. Eggerman and Beverly Norwood Goetz, Assistants

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19            This is an appeal filed by the claimant, Betty L. Mathes, on August 16, 1989 from an order of  
20 the Department of Labor and Industries dated July 27, 1989 which stated the claimant and employer  
21 recovered \$69,226.95 and directed distribution of settlement proceeds: (1) net share to attorney for  
22 fees and costs \$14,276.99; (2) net share to claimant \$34,654.75; and, (3) net share to self-insured  
23 employer \$20,295.21, and further declared a self-insured employer statutory lien against the claimant's  
24 third party recovery for the sum of \$26,726.95, and further ordered no benefits or compensation will be  
25 paid to or on behalf of the claimant until such time as the excess recovery totaling \$14,861.11 has  
26 been expended by the claimant for costs incurred as a result of the conditions covered under the  
27 claim. **REVERSED AND REMANDED.**

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32   **PROCEDURAL AND EVIDENTIARY MATTERS**

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34            Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
35 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
36 issued on July 3, 1990 in which the order of the Department dated July 27, 1989 was affirmed.

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38            The Department issued a prior third party settlement proceeds distribution order on September  
39 22, 1988. After we granted review in this matter, the parties stipulated that a protest of that order was  
40 filed by Ms. Mathes on October 4, 1988. The stipulation is accepted. We will adjust our findings  
41 related to jurisdiction accordingly.  
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1 **DECISION**

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3 This case was submitted for decision upon stipulated facts and briefing by the parties. We  
4 have granted review because we believe the Department's distribution order is premature. Our review  
5 of the Proposed Stipulation of Facts and the accompanying exhibits leaves serious doubt as to  
6 whether a settlement with the City of Bremerton's uninsured motorist (UIM) insurance carrier has been  
7 reached within the meaning of RCW 51.24.050 or .060. Exhibits stipulated for our consideration by the  
8 parties show that the UIM carrier was still disputing the amount for which it was liable in the third party  
9 matter as of the date of the last communication provided. Apart from this, we further disagree with the  
10 Department's distribution order in that it included in the calculations an amount of \$1,000.00 as  
11 attorney's fees incurred by the City of Bremerton even though the third party action was never  
12 assigned to the City under RCW 51.24.050, .070, or .090. Even if a settlement was reached, the City's  
13 incurred attorney's fees and costs would not be payable out of the settlement proceeds, absent an  
14 assignment of the third party action to the City.  
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21 This is the second time the matter of distribution of third party proceeds under this claim has  
22 been before us. On May 9, 1988 we issued an Order on Agreement of Parties which reversed a prior  
23 distribution order and remanded "for further adjudication following issuance of a settlement agreement  
24 in the third party claim approved by all the proper parties." (Emphasis supplied) Order on Agreement  
25 of Parties, In re Betty L. Mathes, Dckt. No. 88 0074 (May 9, 1988).  
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28 Ms. Mathes was involved in a motor vehicle accident with an uninsured motorist during the  
29 course of her employment with the City of Bremerton on December 13, 1983. Ms. Mathes "settled" a  
30 claim against the City's UIM carrier Home Insurance Company (apparently unbeknownst to the City)  
31 on November 6, 1986 for the amount of \$42,500.00. Her then attorney, Charles Brocato, received  
32 \$14,276.99 and Ms. Mathes received \$28,223.01. In exchange, Ms. Mathes signed a Receipt and  
33 Trust Agreement and a Hold Harmless Agreement, the latter of which recited in part that Ms. Mathes  
34 agreed to "indemnify and hold harmless the Home Insurance Companies and the City of Bremerton  
35 from . . . any claim of insurance, Group Health, Workers Compensation or Medicare claims on behalf  
36 of Betty Mathes arising out of the accident . . . ." Exhibit No. 2.  
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41 The City did not become aware of Ms. Mathes' "settlement" with the UIM carrier until on or  
42 about March 18, 1987. At some time on, or earlier than, February 18, 1988 (see letter of that date  
43 from the City Attorney to Home Insurance, Exhibit No. 6) the City began its own pursuit of the UIM  
44 carrier for additional monies. The City noted that the "settlement" reached between the UIM carrier  
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1 and Ms. Mathes was deficient in that the distribution would not allow the City to fully recover its  
2 payment as a self-insurer of Ms. Mathes' workers' compensation entitlement. The City attorney stated  
3 in part: "At Mr. Brocato's request, we are hereby voiding the settlement agreement executed on  
4 November 6, 1986, in hopes that Mr. Brocato will be able to negotiate a more equitable settlement  
5 considering his client's repayment obligations under state law." Exhibit No. 6. Meanwhile the  
6 Department had issued an order on November 19, 1987 which directed distribution of the amounts  
7 thus far received by Ms. Mathes and Mr. Brocato. An order of December 15, 1987 which affirmed  
8 that order was the subject of the Order on Agreement of Parties which this Board previously issued on  
9 May 9, 1988 in Docket No. 88 0074.

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15 It is, of course, astounding that attorney Brocato proceeded to arrive at a deficiency  
16 "settlement" with the UIM carrier without first notifying the City and the Department of the claimant's  
17 election, and obtaining settlement approval as required by RCW 51.24.090, particularly in light of his  
18 receipt of attorney's fees and costs in the amount of \$14,276.99. Nevertheless, Mr. Brocato had no  
19 monopoly in this matter on the inclination to disregard the statutory scheme. The City, through its then  
20 involved Assistant City Attorney, proceeded in a separate approach to Home Insurance, after  
21 maintaining its position that the prior "settlement" was void:

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25 I write to suggest that Home Insurance remit the total amount due the  
26 City of \$26,723.95 immediately, in exchange for our release of the City's  
27 statutory lien. You would then be free to seek reimbursement from Ms.  
28 Mathes pursuant to the hold harmless agreement. Failing such a  
29 resolution, the City will have no option but to obtain an assignment of the  
30 claim and seek the full original amount of Ms. Mathes' damages. Please  
31 call if you have questions. (Emphasis supplied)

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33 Letter of March 7, 1988, Exhibit No. 9.

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35 Home Insurance Company remitted \$26,723.95 to the City on July 14, 1988 in exchange for  
36 the City signing a Receipt and Release of Claims which recited that the amount was "full settlement  
37 and satisfaction of all claims" under the policy arising out of the subject incident. Exhibit No. 4. Thus,  
38 having declared the prior "settlement" void pursuant to RCW 51.24.290 (1) for lack of settlement  
39 approval, the City itself sought reimbursement for Ms. Mathes' workers' compensation entitlement, in  
40 derogation of the statutory scheme which sets forth the proper course:

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44 If a compromise or settlement is void because of subsection (1) of this  
45 section, the department or self-insurer may petition the court in which the  
46 action was filed for an order assigning the cause of action to the  
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1 department or self-insurer. If an action has not been filed, the department  
2 or self-insurer may proceed as provided in chapter 7.24 RCW.<sup>1</sup>  
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4 RCW 51.24.090(2) (Emphasis supplied).  
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6 The claims supervisor at Home Insurance Company then wrote attorney Brocato on May 9,  
7 1988. The letter indicated Home Insurance's intention to "satisfy the City of Bremerton's (Worker's  
8 Compensation) lien" and, further indicated that Home Insurance "will look to you and your client for  
9 whatever legal redress and remedies are available to us for reimbursement" pursuant to the release  
10 and hold harmless instrument signed by Ms. Mathes. Exhibit No. 13. An Assistant City Attorney wrote  
11 the Home Insurance claims supervisor on June 16, 1988 reminding Home Insurance of the City's  
12 "offering to release our statutory lien in exchange for payment to the City by Home Insurance of the  
13 amount of \$26,726.95." Exhibit No. 14. The letter further warned Home Insurance that Ms. Mathes'  
14 workers' compensation claim was still open and medical bills were mounting, and threatened:  
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19 If the amount of \$26,726.95 is received by this office within twenty (20)  
20 days of the date of this letter, we will sign off on the original settlement, but  
21 will not release our lien as against Ms. Mathes. Our maintenance of the  
22 lien would presumably allow you to pursue any recourse you may have  
23 against Mrs. Mathes for the amount of that lien. Failing receipt of the  
24 \$26,726.95 within the time limit set forth above, we will pursue a more  
25 appropriate settlement amount, or file suit, if necessary. I appreciate your  
26 prompt reply.  
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28 Letter of June 16, 1988, Exhibit No. 14 (Emphasis supplied).  
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30 The Home Insurance claims supervisor, by letter of July 18, 1988 to the Assistant City Attorney,  
31 forwarded a draft payable to the City of Bremerton for the amount of \$26,726.95 as "representing the  
32 City's statutory lien" and further requested "(p)lease forward the City's properly executed release so  
33 that we may seek reimbursement from Ms. Mathes pursuant to the hold harmless agreement." Exhibit  
34 No. 15. Apart from the Department's subsequent distribution orders of September 22, 1988 and July  
35 27, 1989, and underlying Third Party Recovery Worksheet, the letter of July 8, 1988 is the last dated  
36 document provided us by the parties. The Proposed Stipulation of Facts does not in any manner  
37 suggest that Home Insurance Company subsequently released its claim for reimbursement against  
38 Ms. Mathes. In fact to the contrary, the stipulation, after noting the amount remitted to the City by  
39 Home Insurance on July 14, 1988, recites "The negotiated settlement is documented through  
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45 <sup>1</sup>Chapter 7.24 RCW would allow for a declaratory judgment action to determine the City's  
46 right to pursue a claim with its UIM carrier for Ms. Mathes' personal injuries.  
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1 correspondence dated October 12, 1987, through July 14, 1988. (Exhibit Nos. 5 through 15). The  
2 Department was notified of the settlement." Proposed Stipulation of Facts, para. 8, at 3.

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4 It is not necessary to discuss here the full detail of the Department's Third Party Recovery  
5 Worksheet and distribution order now before us. The Department essentially added together the total  
6 amounts received from Home Insurance Company by Ms. Mathes and her attorney and the City, for a  
7 stated total of \$69,226.95 which the Department considered as settlement proceeds recovered. It  
8 appears that the Department's order dated September 22, 1988 computed attorney's fees and costs  
9 as \$14,276.99, in other words, the amount of attorney Brocato's fees. The order of July 27, 1989  
10 presently before us differs from this by apparently including \$1,000.00 in attorney's fees and costs  
11 claimed by the City of Bremerton for its efforts in pursuing its UIM carrier, Home Insurance Company.  
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14 Given the facts before us, we must conclude that the Department's distribution order is  
15 premature. First, the Order on Agreement of Parties which we issued previously in Docket No. 88  
16 0074 directed that further Department adjudication should occur following issuance of a settlement  
17 agreement approved by all the proper parties. The subsequent Department order is premised upon a  
18 false assumption that an approved settlement has been reached in the amount of \$69,226.95. Yet,  
19 the portion of this amount apparently presently in the hands of the City (\$26,723.95) was accepted  
20 from its UIM carrier with the understanding that the carrier would seek a reimbursement from Ms.  
21 Mathes in like amount. A settlement has not been reached so long as there remains a possibility such  
22 reimbursement will be sought. An action by Home Insurance Company against Ms. Mathes for  
23 reimbursement would likely result in a third party recovery less than the total amount stated in the  
24 Department's order, either by way of some actual reimbursement to Home Insurance from Ms. Mathes  
25 or by way of additional attorney's fees incurred by her or both. Upon remand, then, we in any event  
26 direct that the Department should not issue a further third party recovery distribution order until such  
27 time as it receives verification from Ms. Mathes and the City of the amount of the total third party  
28 recovery free from any contingencies such as those evidenced in the facts now before us.  
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31 Secondly, there is certainly no statutory prohibition against Ms. Mathes and/or the City and/or  
32 the Department participating cooperatively by voluntary mutual consent in negotiations with a third  
33 party source such as Home Insurance Company. However, under the statute, neither the Department  
34 nor the self-insurer City of Bremerton have a legal right to pursue a third party recovery for their own  
35 benefit and/or Ms. Mathes' benefit without first having an assignment of the action. Our statutes are  
36 clear and unambiguous with regard to the conditions under which such an assignment may be had.  
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1 RCW 51.24.070(1) and (2) provide specific means by which the Department or self-insurer may make  
2 written demand upon the worker to exercise the worker's right of election; if an election is not made  
3 within sixty days of the demand, or the action is neither instituted or settled within ninety days or a  
4 greater time allowed by the demanding party, then the action is deemed assigned. Under subsection  
5 (3) the Department or self-insurer may petition the court for an assignment if the action which the  
6 worker has elected to pursue is not diligently prosecuted. It appears from the facts before us that the  
7 City of Bremerton did not act under any of the provisions of RCW 51.24.070 or RCW 51.24.050 which,  
8 likewise, notes that a worker's election not to proceed against the third person operates as an  
9 assignment.

10 As we have previously indicated, RCW 51.24.090(1) allows the City to void any deficiency  
11 settlement not reached with its written approval. However, a voided settlement agreement under  
12 subsection (1) does not itself result in automatic assignment of the cause of action to the City. If the  
13 City wishes to void the settlement and pursue the action as against Home Insurance Company itself,  
14 then it must "petition the court in which the action was filed for an order assigning the cause of action"  
15 or, "[i]f an action has not been filed, . . . proceed as provided in Chapter 7.24 RCW." RCW  
16 51.24.090(2). These provisions are designed in part to prevent exactly the type of situation which  
17 developed in the present case; that is, the worker and the self-insurer each pursuing their own selfish  
18 interests in disregard of the financial interest which the other has in the cause of action. The  
19 requirement that a deficiency settlement have written approval of the workers' compensation lien  
20 holder " is unambiguous and mandates strict compliance." Estate of Boettcher, 35 Wn.App. 178, 181,  
21 665 P.2d 1378 (1983). We hold the same is true as to the self-insurer's or Department's obligations  
22 under subsection (2). The present case well illustrates that, absent strict compliance, a substantial risk  
23 remains that an enforceable settlement might not have been reached and proper distribution of funds  
24 cannot be had. Thus, the City of Bremerton has no right to hold funds solicited from Home Insurance  
25 Company unless and until the prior agreement between Home Insurance and Ms. Mathes is declared  
26 void and the City of Bremerton obtains an assignment of the cause of action by way of a superior court  
27 decree as provided in RCW 51.24.090(2).

28 Likewise, attorney's fees and costs claimed by the City of Bremerton to be associated with  
29 pursuing its rights in this matter may not be included in the calculation of any distribution unless the  
30 City of Bremerton obtains a proper assignment of the cause of action. If the cause of action remains  
31 that of Ms. Mathes, RCW 51.24.060(1)(a) does not contemplate that parties other than Ms. Mathes  
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1 shall have their attorney's fees and costs borne by the fund recovered. We recognize that the most  
2 efficient manner of resolving this matter might include leaving the cause of action assigned to Ms.  
3 Mathes and cooperating in reaching a final, enforceable settlement agreement with Home Insurance  
4 Company to be given written approval by the City. If, in this event, the City believes Mr. Brocato's fees  
5 are unreasonable in light of the circumstances, it may petition the court for a determination of the  
6 reasonableness of costs and attorney's fees under RCW 51.24.060(1)(i).  
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10 If, on the other hand, the City elects to void the prior settlement agreement and obtains an  
11 assignment of the cause of action from the superior court, then reasonable attorney's fees and costs  
12 incurred by the City may be included in computation of the disbursement of proceeds under RCW  
13 51.24.050(4)(a). We have not been provided any information regarding the fee agreement had  
14 between Ms. Mathes and attorney Brocato. Nevertheless, should the City obtain an assignment and  
15 proceed under RCW 51.24.050, the Department may not include in its distribution calculations any of  
16 Ms. Mathes' attorney's fees and costs. We further suggest, that in the event the City of Bremerton files  
17 for an assignment of the cause of action under RCW 51.24.090(2), the involved parties should request  
18 the court to direct that funds thus far remitted by Home Insurance Company, including those paid to  
19 Mr. Brocato, be immediately remitted to the registry of the court or returned to Home Insurance  
20 Company until such time as the Department issues its distribution order. Although we do not have the  
21 authority to order this ourselves, we are concerned about the fact that disregard for use of proper legal  
22 procedure has already delayed resolution of this matter. We see no reason why the parties should not  
23 exercise foresight and request the fullest possible assistance of the court should the City seek an  
24 assignment.  
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33 In light of all the foregoing, we make the following Findings of Fact and Conclusions of Law:

34 **FINDINGS OF FACT**

- 35  
36 1. On November 19, 1987 the Department of Labor and Industries issued an  
37 order regarding distribution of an alleged third party recovery by the  
38 claimant, Betty L. Mathes, in the amount of \$42,500.00. The claimant filed  
39 a request for reconsideration with the Department on December 1, 1987.  
40 On December 15, 1987 the Department issued an order denying  
41 reconsideration of its order dated November 19, 1987 and adhering to the  
42 order. On January 7, 1988 the claimant filed an appeal to this Board from  
43 the order of the Department dated December 15, 1987. The appeal was  
44 granted by order dated January 12, 1988. On May 9, 1988 the Board of  
45 Industrial Insurance Appeals issued an Order on Agreement of Parties  
46 which reversed the order dated December 15, 1987 and remanded the  
47 claim to the Department of Labor and Industries for further adjudication



1 following issuance of a settlement agreement in the third party claim  
2 approved by all the proper parties.

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4 On September 22, 1988 the Department issued an order distributing an  
5 alleged third party recovery in the amount of \$69,226.95. On October 4,  
6 1988 the claimant filed a protest and request for reconsideration of the  
7 order dated September 22, 1988. On July 27, 1989, the Department  
8 issued an order again distributing proceeds of a third party recovery  
9 alleged to total \$69,226.95. On August 16, 1989 the claimant filed a  
10 notice of appeal with the Board of Industrial Insurance Appeals. The  
11 appeal was assigned Docket No. 89 3473. On August 25, 1989 the Board  
12 issued an order granting the appeal and directing that proceedings be held  
13 thereon.

14 2. On December 13, 1983 claimant Betty L. Mathes was injured, while in the  
15 course of her employment with the City of Bremerton, in a motor vehicle  
16 accident involving an uninsured motorist. Ms. Mathes, through her then  
17 attorney, entered into negotiations with the City's uninsured motorist  
18 carrier, Home Insurance Company, and on or about November 6, 1986  
19 Home Insurance Company, as intended settlement of Ms. Mathes' claim,  
20 provided to her attorney, Charles Brocato, an amount of \$14,276.99 for his  
21 attorney's fees and costs and an amount of \$28,223.01 to Ms. Mathes.  
22 These payments by Home Insurance Company were made as a third  
23 person liable to pay damages on account of Ms. Mathes' injury for which  
24 workers' compensation benefits were paid under Claim No. S-692670.  
25 The self-insurer, City of Bremerton, did not approve of this "settlement" in  
26 writing. The City of Bremerton learned of the "settlement" on or about  
27 March 18, 1987.

28 3. By way of correspondence directed to Ms. Mathes' attorney and to Home  
29 Insurance Company, the City declared the "settlement" negotiated  
30 between Home Insurance Company and Ms. Mathes void under RCW  
31 51.24.090(1). The City, however, did not seek an assignment of the  
32 cause of action to it in a court of law. Having not sought an assignment of  
33 the cause of action, the City proceeded to negotiate directly with Home  
34 Insurance Company for an amount which it deemed would equal the City's  
35 disbursements under Claim No. S-692670 and suggested to Home  
36 Insurance Company that Home Insurance Company should seek  
37 recovery of a like amount from Ms. Mathes pursuant to terms of a hold  
38 harmless agreement entered into between Ms. Mathes and Home  
39 Insurance Company in exchange for the payments previously made to Ms.  
40 Mathes and her attorney. Subsequently, Home Insurance Company  
41 remitted to the City of Bremerton an amount of \$26,723.95 in exchange for  
42 a release of all claims on its policy from the City of Bremerton and with the  
43 stated intention that it would seek reimbursement from Ms. Mathes. Home  
44 Insurance Company in fact demanded reimbursement from Ms. Mathes in  
45 a like amount paid to the City.  
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1 4. As of July 27, 1989 the amount of third party recovery from Home  
2 Insurance Company was not known, due to a contingency whereby Home  
3 Insurance Company reserved the right to proceed against Ms. Mathes for  
4 reimbursement of the amount remitted by Home Insurance Company to  
5 the City of Bremerton. The order of the Department dated July 27, 1989  
6 directed distribution of total monies received by Ms. Mathes, her attorney,  
7 and the City of Bremerton, from Home Insurance Company without taking  
8 into account the stated reservation of Home Insurance Company of its  
9 claimed right to seek reimbursement from Ms. Mathes and/or her attorney  
10 of some of the monies which the Department purported to disburse by way  
11 of its order. The order of the Department dated July 27, 1989 also  
12 calculated attorneys' fees and costs by including both the attorney's fees  
13 and costs claimed by Ms. Mathes' attorney, Charles Brocato, and an  
14 amount of \$1,000.00 claimed by the City of Bremerton as its attorney's  
15 fees and costs related to its negotiations directly with its uninsured  
16 motorist carrier, Home Insurance Company.

#### 17 **CONCLUSIONS OF LAW**

- 18 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
19 and the subject matter of this appeal.
- 20 2. The order of the Department dated July 27, 1989 was issued prematurely  
21 by the Department and must be reversed because the amount of recovery  
22 from a third party had not yet been finally determined within the meaning  
23 of RCW 51.24.050 or RCW 51.24.060.
- 24 3. The agreement reached between claimant Betty L. Mathes and Home  
25 Insurance Company for payments in the amount of \$14,276.99 to her  
26 attorney and \$28,223.01 to herself is voidable at the will of the self-insurer,  
27 City of Bremerton, because the "settlement" was not made with the written  
28 approval of the City of Bremerton.
- 29 4. The "settlement" reached between the City of Bremerton and Home  
30 Insurance Company in the amount of \$26,723.95 is void as a settlement of  
31 Ms. Mathes' cause of action against the third party and Home Insurance  
32 Company in this matter, because the City of Bremerton did not obtain an  
33 assignment to it of the cause of action within the meaning of RCW  
34 51.24.090(2), RCW 51.24.050(1), or RCW 51.24.070.
- 35 5. A third party distribution order made by the Department pursuant to RCW  
36 51.24.060 may take into account only the attorney's fees and costs of a  
37 claimant or beneficiaries and may not take into account either the  
38 Department's or the self-insurer's attorney's fees and costs, if any, alleged  
39 to have been expended by way of participation and efforts to make the  
40 recovery. Likewise, the Department in a distribution order issued pursuant  
41 to RCW 51.24.050 may only take into account the attorney's fees and  
42 costs, if any, alleged to have been expended by the assignee or  
43 assignees and may not take into account the claimant's or beneficiaries'  
44 attorney's fees and costs. To the extent that the Department's order dated  
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1 July 27, 1989 took into account both the claimant's and the self- insurer's  
2 alleged attorney's fees and costs, the Department order is incorrect. The  
3 Department is directed to require that the cause of action be pursued  
4 under either RCW 51.24.050 or RCW 51.24.060 and not both; to make  
5 inquiry as to whether an assignment of the cause of action has been  
6 obtained by the City of Bremerton or whether the cause of action remains  
7 that of the claimant, Betty L. Mathes; and to direct distribution of proceeds  
8 recovered accordingly, taking into account only the attorney's fees and  
9 costs of the party having the cause of action.

- 10  
11 6. The order of the Department of Labor and Industries dated July 27, 1989  
12 which stated that pursuant to an order of the Board of Industrial Insurance  
13 Appeals of May 9, 1988 the claimant and the employer recovered  
14 \$69,226.95 and directed distribution of the proceeds as: (1) net share to  
15 attorney for fees and costs \$14,276.99; (2) net share to claimant  
16 \$34,654.75; and (3) net share to self-insured employer \$20,295.21 and  
17 which declared the self-insured employer had a statutory lien against the  
18 claimant's recovery for the sum of \$26,726.95 and further ordered that no  
19 benefits or compensation will be paid to or on behalf of the claimant until  
20 such time as the excess recovery totaling \$14,861.11 has been expended  
21 by the claimant for costs incurred as a result of the conditions covered  
22 under the claim, is incorrect and is reversed. The matter is remanded to  
23 the Department of Labor and Industries with directions to further  
24 investigate the matter and require the City of Bremerton to promptly advise  
25 the Department and Ms. Mathes as to whether it is proceeding to obtain  
26 an assignment of the cause of action pursuant to RCW 51.24.090(2). The  
27 Department shall inquire so as to assure itself that a final settlement of the  
28 action has been made, which is free of contingencies, either by Ms.  
29 Mathes with the City of Bremerton's written approval or by the City with  
30 proper assignment, as the case may be. Upon resolution of these matters,  
31 the Department shall issue a disbursement order which distributes the  
32 proceeds and which takes into account only the attorney's fees and costs  
33 of the party having the right to pursue the cause of action.

34 It is so ORDERED.

35 Dated this 15<sup>th</sup> day of January, 1991.

36  
37 BOARD OF INDUSTRIAL INSURANCE APPEALS

38  
39  
40 /s/  
41 SARA T. HARMON Chairperson

42  
43  
44 /s/  
45 PHILLIP T. BORK Member