

Mathes, Betty

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.]

Scroll down for order.

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.¹
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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 ¹Chapter 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**

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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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4. As of July 27, 1989 the amount of third party recovery from Home Insurance Company was not known, due to a contingency whereby Home Insurance Company reserved the right to proceed against Ms. Mathes for reimbursement of the amount remitted by Home Insurance Company to the City of Bremerton. The order of the Department dated July 27, 1989 directed distribution of total monies received by Ms. Mathes, her attorney, and the City of Bremerton, from Home Insurance Company without taking into account the stated reservation of Home Insurance Company of its claimed right to seek reimbursement from Ms. Mathes and/or her attorney of some of the monies which the Department purported to disburse by way of its order. The order of the Department dated July 27, 1989 also calculated attorneys' fees and costs by including both the attorney's fees and costs claimed by Ms. Mathes' attorney, Charles Brocato, and an amount of \$1,000.00 claimed by the City of Bremerton as its attorney's fees and costs related to its negotiations directly with its uninsured motorist carrier, Home Insurance Company.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
2. The order of the Department dated July 27, 1989 was issued prematurely by the Department and must be reversed because the amount of recovery from a third party had not yet been finally determined within the meaning of RCW 51.24.050 or RCW 51.24.060.
3. The agreement reached between claimant Betty L. Mathes and Home Insurance Company for payments in the amount of \$14,276.99 to her attorney and \$28,223.01 to herself is voidable at the will of the self-insurer, City of Bremerton, because the "settlement" was not made with the written approval of the City of Bremerton.
4. The "settlement" reached between the City of Bremerton and Home Insurance Company in the amount of \$26,723.95 is void as a settlement of Ms. Mathes' cause of action against the third party and Home Insurance Company in this matter, because the City of Bremerton did not obtain an assignment to it of the cause of action within the meaning of RCW 51.24.090(2), RCW 51.24.050(1), or RCW 51.24.070.
5. A third party distribution order made by the Department pursuant to RCW 51.24.060 may take into account only the attorney's fees and costs of a claimant or beneficiaries and may not take into account either the Department's or the self-insurer's attorney's fees and costs, if any, alleged to have been expended by way of participation and efforts to make the recovery. Likewise, the Department in a distribution order issued pursuant to RCW 51.24.050 may only take into account the attorney's fees and costs, if any, alleged to have been expended by the assignee or assignees and may not take into account the claimant's or beneficiaries' attorney's fees and costs. To the extent that the Department's order dated

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.

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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 15th day of January, 1991.

36 BOARD OF INDUSTRIAL INSURANCE APPEALS

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39 /s/ _____
40 SARA T. HARMON Chairperson

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43 /s/ _____
44 PHILLIP T. BORK Member