

## **Dillard, Dannie**

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

#### **Multiple beneficiaries**

Where the Department had approved a third party settlement and received notice of a court hearing to allocate the recovery between the widow and two minor children, yet chose not to appear, it may not thereafter attempt to allocate the third party settlement between the multiple beneficiaries in a manner different from that ordered by the court.  
**....*In re Dannie Dillard, Dec'd, BIIA Dec., 89 3691 (1990)***

Scroll down for order.

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

1 **IN RE: DANNIE L. DILLARD, DEC'D** ) **DOCKET NO. 89 3691**  
2 )  
3 **CLAIM NO. J-747039** ) **DECISION AND ORDER**  
4 \_\_\_\_\_ )

5 **APPEARANCES:**

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7 Beneficiaries, Susan L. Dillard, Jennifer Dillard and Michael Dillard, by  
8 Buskirk and Anderson, per  
9 Bruce A. Buskirk

10  
11 Employer, Sun Rise West,  
12 None

13  
14 Department of Labor and Industries, by  
15 The Attorney General, per  
16 Steve LaVergne, Paralegal, and Douglas D. Walsh, Assistant  
17

18 This is an appeal filed by the beneficiaries of the deceased on August 28, 1989 from orders of  
19 the Department of Labor and Industries dated June 29, 1989. One order determined that the minor  
20 children of the deceased worker had recovered \$5,600.00 in a third party settlement, declared a  
21 statutory lien for the sum of \$4,272.19 against the third party recovery of Jennifer and Michael Dillard,  
22 and demanded reimbursement in the amount of \$865.22. The other order determined that Susan  
23 Dillard, widow of the deceased, had recovered \$134,400.00 in a third party settlement, declared a  
24 statutory lien for the sum of \$42,504.23 against the third party recovery of the widow, and demanded  
25 reimbursement in the amount of \$17,897.01. **REVERSED AND REMANDED.**  
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30 style="text-align:center">**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 beneficiaries to a Proposed Decision and  
33 Order issued on April 18, 1990 in which the orders of the Department dated June 29, 1989 were  
34 affirmed.  
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36 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no  
37 prejudicial error was committed and said rulings are hereby affirmed. The stipulated facts are well set  
38 forth in the Proposed Decision and Order.  
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40 Briefly, Mr. Dillard died as a result of a structural failure of a part of the drive mechanism of the  
41 helicopter he occupied. His death occurred within the course of his logging employment on May 31,  
42 1986. Susan Dillard, his widow, and his two minor children by a former marriage, brought suit against  
43 the defendant in a third party action pursuant to statute. See RCW 51.24.030. The action was  
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1 removed to Federal District Court. The Department calculated the beneficiaries' entitlement under the  
2 Act at \$255,716.80. See RCW 51.24.060. The beneficiaries settled with the third party for  
3 \$140,000.00 in damages. The Department approved the settlement in writing. See RCW 51.24.090.  
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5 The Department was told the beneficiaries were going to agree to an equal division (allocation)  
6 of the recovery between the widow and the two minor children. The Department advised the  
7 beneficiaries it would not agree. The Department was given notice of a hearing before the court  
8 during which the court would set the allocation. The Department did not appear nor did it file a motion,  
9 brief, or position paper setting forth its position. The court set the allocation at 50% of the recovery to  
10 the widow and 25% to each of the minor children. The Department thereafter issued orders which  
11 allocated 96% of the recovery to the widow and 4% to the children. The beneficiaries appealed from  
12 the orders.  
13

14 The issue is whether, after its written approval of the overall settlement, the Department may  
15 establish an allocation of a third party recovery (for purposes of reimbursement) which is different from  
16 a court- ordered allocation. There are three sub-issues: (1) whether the Department waived its  
17 objection to the allocation; (2) whether the Department is estopped from asserting its lien in accord  
18 with its allocation of the settlement; and (3) whether, in the absence of established standards, the  
19 Department's allocation procedure is arbitrary and capricious. A collateral issue is whether the  
20 Department's action was constitutional.  
21

22 In its allocation procedure, the Department has done what is not only legally incorrect, but also  
23 unfair. It may not have both sides of the argument. The Department argues it may approve the  
24 settlement between the beneficiaries and the third party defendant, take the benefit of that bargain,  
25 and then disapprove the allocation in order to maximize its lien recovery. This, however, would be at  
26 the expense of those who have done its work in pursuing the litigation and obtaining the settlement,  
27 and, more importantly, those whom the Department was created to serve. See RCW 51.04.010 et  
28 seq. It is unfair and disingenuous to attribute to the widow an amount of money that she did not and  
29 probably could not have received in the third party action.  
30

31 The statutory intent is to make certain the Department has the ability to maximize its  
32 reimbursement from a liable third party, not from the beneficiaries of the injured or dead worker. One  
33 of the ways to insure that this legislative intent is carried out is to require written approval by the  
34 Department when there is a lesser recovery contemplated than the entitlement. The entitlement is  
35 defined as the amount paid and payable to the beneficiaries under the Act. RCW 51.24.090. The  
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1 statutory scheme is outlined by the Court of Appeals in In re Estate of Boettcher, 35 Wn.App. 178,  
2 180-181, 665 P.2d 1378 (1983):  
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4 This section [RCW 51.24.090] was enacted in 1977 as part of several  
5 sections dealing with third party actions. RCW 51.24.030-100. In  
6 general, these provisions allow a beneficiary to elect to seek damages for  
7 personal injuries from third persons while receiving workers' compensation  
8 benefits. RCW 51.24.030. The beneficiary is entitled to benefits under the  
9 statute regardless of any election. RCW 51.24.040.  
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11 If an election is made to pursue a third party claim and the beneficiary  
12 obtains an award or settlement, after payment of costs and reasonable  
13 attorney's fees, 25 percent of the recovery is to be paid to the beneficiary.  
14 Although the beneficiary may compromise that 25 percent, DLI  
15 [Department of Labor and Industries] is entitled to reimbursement out of  
16 the remaining proceeds for compensation or benefits paid. The  
17 beneficiary then receives any remaining balance. Any award or  
18 settlement of the third party action is subject to a lien by the department.  
19 RCW 51.24.060.

20 If the beneficiary elects not to pursue a third party claim, DLI is authorized  
21 to do so. It may prosecute or compromise the claim at its discretion and  
22 recover benefits paid to the beneficiary after deducting costs and  
23 attorney's fees. The beneficiary receives any remainder. RCW  
24 51.24.050.

25 [1] It is apparent from this statutory scheme that the Legislature intended  
26 DLI to aggressively collect any benefits paid to the beneficiary. See  
27 House Journal, 45th Legislature (1977), at 1465. To this end, the right to  
28 reimbursement for benefits paid is protected in the settlement context by  
29 requiring written approval if the settlement results in the beneficiary  
30 receiving less than his or her entitlement. Otherwise, the settlement is  
31 void. RCW 51.24.090.  
32

33 By attributing 96% of the settlement to the widow, the Department is attempting to reduce the benefits  
34 of one beneficiary by the recovery made by another beneficiary. This the Department may not do.  
35 Department liens must be based upon the benefits paid to individual beneficiaries and attributed to the  
36 recovery made by such individual. The Department is not statutorily authorized to recoup from the  
37 widow the difference between the children's entitlement and their portion of the settlement as dictated  
38 by the court. Boettcher, at 182.  
39

40 If a part of the settlement (the allocation) is void under RCW 51.24.090, logic would dictate that  
41 the entire settlement is void. Nothing in the statute gives the Department a partial veto power. RCW  
42 51.24.090. Furthermore, if a settlement is void, presumably the Department is required to follow the  
43 procedure laid out in Boettcher. That is, the Department must move the court to vacate the  
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1 settlement. Then the Department could determine whether it should itself proceed against the third  
2 party defendant or whether it would approve a different settlement. The Department has not chosen to  
3 follow that procedure. Instead, the Department has attempted to void a part of the settlement (the  
4 allocation), even though it agreed to the overall compromise between the beneficiaries and the third  
5 party.  
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9 The Department was given adequate and timely notice of the hearing in federal district court on  
10 the issue of allocation. It was aware that the plaintiffs would be presenting the court with a proposed  
11 allocation of 50% of the recovery to the widow and 25% to each of the children. While the Department  
12 advised the parties plaintiff (the beneficiaries) it would not approve such an allocation, it chose not to  
13 give the court the benefit of its position. The Department's written agreement to the overall settlement  
14 was before the court. Such an agreement, coupled with the failure to appear, must be interpreted as a  
15 waiver of any further rights the Department might have had under the statute to void the settlement or  
16 any part thereof. Our Supreme Court has stated:  
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21 A right which one may enforce or insist upon, he may also repudiate or  
22 relinquish. Although the relinquishment must be voluntary and intentional,  
23 it may be either express or implied. It may arise from an express  
24 declaration of an intention not to claim the right, or it may be the result of  
25 acts or conduct which are inconsistent with the continued assertion of the  
26 right in question.  
27

28 In re Arbitration Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards, 1 Wn.2d 401,  
29 410, 96 P.2d 257 (1939).  
30

31 The statute makes provision for the manner in which the Department may waive its rights. It  
32 may do so by approving a settlement in writing where there is a deficiency recovery. It did so here.  
33 RCW 51.24.090.  
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35 It is intuitively obvious that an allocation would have to occur as a part of the settlement  
36 proceeding. It is equally obvious it was the court, having full jurisdiction over the matter, which would  
37 ultimately decide that issue, uncontrolled by the Department, once the Department had approved the  
38 settlement. The Department cannot now be heard to complain that the outcome did not fit with its  
39 plans or desires.  
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43 The Department had the right to approve both the total amount of the deficiency settlement and  
44 the allocation. In re Estate of Kinsman, 44 Wn.App. 174 (1986). However, the Department does not  
45 have the right to sit back, refuse to participate in the court proceedings, and then ignore the court's  
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1 allocation. As both Kinsman and Boettcher illustrate, the Department must challenge the settlement  
2 through the appropriate judicial channels.  
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4 What that means in this case is that the Department was required to appear in court and  
5 challenge the proposed allocation. Having failed to do so and, at the same time, having accepted the  
6 benefit of the settlement, the Department cannot now be heard to complain.  
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8 Having determined that the Department may not allocate the third party settlement in a manner  
9 different from that ordered by the court, and having also determined that the Department waived any  
10 right it may have had to object to the allocation ordered by the court, we do not reach the other  
11 arguments raised by the beneficiaries.  
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13 After consideration of the Proposed Decision and Order and the Petition for Review filed  
14 thereto, and a careful review of the entire record before us, we make the following:  
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#### 17 **FINDINGS OF FACT**

- 18  
19 1. On June 4, 1986 the Department of Labor and Industries received a report  
20 of accident alleging that Dannie L. Dillard died on May 31, 1986 while  
21 working for Sun Rise West. On October 9, 1986 the Department issued  
22 an order approving the claim of the surviving spouse for benefits. On  
23 October 9, 1986 the Department also issued an order determining that no  
24 second injury fund relief was applicable. On June 29, 1989 the  
25 Department issued an order declaring a statutory lien against Jennifer and  
26 Michael Dillard's third party recovery for the sum of \$4,272.19 and  
27 demanding reimbursement in the amount of \$865.22. On June 29, 1989 it  
28 also issued an order declaring a statutory lien for the sum of \$42,504.23  
29 against the third party recovery of Susan Dillard and demanding  
30 reimbursement in the amount of \$17,897.01. The two orders of June 29,  
31 1989 were received by the surviving spouse and children of Dannie Dillard  
32 on July 5, 1989. On August 28, 1989 the surviving spouse and children of  
33 Dannie L. Dillard filed a notice of appeal with the Board of Industrial  
34 Insurance Appeals from the two orders of June 29, 1989. On September  
35 22, 1989 the Board issued an order granting the appeal subject to proof of  
36 timeliness, assigned Docket No. 89 3691 to the appeal and directed that  
37 hearings be held on the issues raised by the appeal.  
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- 39 2. On May 31, 1986 Dannie L. Dillard was killed in a helicopter crash while  
40 working for Sun Rise West. He was survived by his wife, Susan L. Dillard,  
41 and two children from a previous marriage, Jennifer and Michael Dillard.  
42 Jennifer Dillard was born on September 22, 1972. Michael Dillard was  
43 born on January 24, 1975.  
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- 45 3. A complaint was filed in the Superior Court of the state of Washington in  
46 King County by the Dillard family against various third party defendants  
47 associated with the death of Dannie L. Dillard. The suit was later removed

1 to Federal District Court. The parties negotiated a settlement of the civil  
2 action for the amount of \$140,000.00, subject to the approval of the  
3 Department of Labor and Industries. The settlement was less than the  
4 entitlement of the beneficiaries of Dannie L. Dillard under Title 51 RCW,  
5 which was in the total amount of \$255,716.80.

- 6  
7 4. On May 22, 1989 a representative of the Department advised the parties  
8 that their proposed allocation of the settlement at 50% to the surviving  
9 spouse and 50% to the two children of Dannie L. Dillard was not likely to  
10 be approved by the Department.
- 11 5. On May 24, 1989 the beneficiaries of Dannie Dillard filed a request for  
12 waiver of lien and approval of the amount and distribution of the  
13 settlement, and also advised the Department of a court hearing on petition  
14 for approval of minors' settlement to be held on June 16, 1989.
- 15 6. On May 30, 1989 the Department notified the beneficiaries that the  
16 deficiency settlement in the amount of \$140,000.00 was approved but  
17 denied the request for compromise of the Department's lien.
- 18 7. On June 6, 1989 the Department notified the beneficiaries that it  
19 disapproved of their proposed distribution of the recovery. The  
20 Department provided a worksheet to the beneficiaries which combined the  
21 benefit entitlements of all of the beneficiaries and considered the  
22 settlement as paid to all.
- 23 8. On June 6, 1989 the beneficiaries notified the Department that the court  
24 date for settlement approval had been changed to June 23, 1989, with  
25 argument to be presented in writing. On June 22, 1989 the beneficiaries  
26 notified the Department that the guardian ad litem representing the  
27 children of Dannie L. Dillard would approve the settlement only if benefits  
28 were divided 50% to the surviving spouse and 50% to the two children.
- 29 9. On June 27, 1989 the Federal District Court entered an order subsequent  
30 to hearing, approving the settlement in the amount of \$140,000.00, to be  
31 divided 50% to the surviving spouse and 50% to the two children of  
32 Dannie L. Dillard. The Department did not appear at the hearing; it filed  
33 no documents with the court regarding or in support of its disapproval of  
34 the allocation.
- 35 10. On June 29, 1989 the Department determined that the minor children had  
36 recovered \$5,600.00 in the third party settlement, declared a statutory lien  
37 of \$4,272.19 and demanded reimbursement in the amount of \$865.22.
- 38 11. On June 29, 1989 the Department determined that the widow had  
39 recovered \$134,400.00 in the third party settlement, declared a statutory  
40 lien of \$42,504.23, demanded reimbursement of \$17,897.01, and ordered  
41 that no further benefits be paid to the widow until the excess recovery of  
42 \$150.17 had been expended for costs incurred as a result of the condition  
43 covered under the claim.  
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**CONCLUSIONS OF LAW**

1. The appeal of the beneficiaries of Dannie L. Dillard filed August 28, 1989 was timely in regard to the two orders of the Department dated June 29, 1989. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
2. The Department orders of June 29, 1989 incorrectly allocated the third party recovery in a manner different from the allocation ordered by the court on June 27, 1989 (Finding of Fact No. 9). The Department had given written approval of the overall settlement pursuant to RCW 51.24.090(1). Because the Department failed to participate in the court proceedings to challenge the allocation of the settlement, and because the Department has accepted the benefit of the settlement rather than seeking to vacate it, the settlement is not void under the terms of RCW 51.24.090. The third party recovery must therefore be allocated consistent with the terms of the court order dated June 27, 1989 (described in Finding of Fact No. 9).
3. The two orders of the Department of Labor and Industries dated June 29, 1989 which (1) determined that the minor children of the deceased worker had recovered \$5,600.00 in a third party settlement, declared a statutory lien for the sum of \$4,272.19 against the third party recovery of Jennifer and Michael Dillard and demanded reimbursement in the amount of \$865.22 and (2) determined that Susan Dillard, widow of the deceased, had recovered \$134,400.00 in a third party settlement, declared a statutory lien for the sum of \$42,504.23 against the third party recovery of Susan Dillard and demanded reimbursement in the amount of \$17,897.01, are both incorrect and are reversed. The matters are remanded to the Department with directions to allocate the third party settlement in the same manner as the court ordered and recalculate the distribution of the third party recovery, using the court's allocations.

It is so ORDERED.

Dated this 31<sup>st</sup> day of October, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/

SARA T. HARMON

Chairperson

/s/

FRANK E. FENNERTY, JR.

Member

/s/

PHILLIP T. BORK

Member