

## **Mullins, Maston, Jr.**

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

#### **Distribution of recovery**

The requirement that the Department or self-insurer pay its proportionate share of costs and reasonable attorney's fees includes the directive that the Department or self-insurer reduce the remaining balance subject to offset by the Department's proportionate share of attorney's fees and costs. ....*In re Maston Mullins, Jr.*, BIIA Dec., 90 0403 (1991)  
[Editor's Note: The Board's decision was appealed to superior court under Pierce County 91-2-06809-2. Rule reversed by *Davis v. Department of Labor & Indus.*, 71 Wn. App. 360 (1993), reviewed denied, 123 Wn.2d 1016 (1994).]

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	Balance:	\$ 77,568.09
4.	<u>Department's lien reduced by its proportionate share of attorneys' fees and costs calculated pursuant to RCW 51.24.060(1)(c)(1):</u>	- \$ 59,286.36
	Remaining Balance:	\$ 18,281.73

We agree with our industrial appeals judge's calculation of the dollar amounts to be distributed to the claimant, his attorney, and to the Department respectively. We disagree, however, with our industrial appeals judge's conclusion that Mr. Mullins can receive no additional compensation or benefits from the Department until his future entitlement equals \$18,281.73. The industrial appeals judge treated the Department's proportionate share of attorneys' fees and costs as if it were included in the excess subject to offset under RCW 51.24.060(1)(d) and (e). RCW 51.24.060(1)(c)(ii) dictates a different result. That section specifically excludes the Department's share of attorneys' fees and costs both from the remaining balance (RCW 51.24.060(1)(d)) and from the excess subject to offset (RCW 51.24.060(1)(e)).

Mr. Mullins sustained an industrial injury while in the course of his employment with North Cascade Incorporated. The injury was due to the negligence of a third party. Mr. Mullins filed an application for workers' compensation benefits with the Department of Labor and Industries. Mr. Mullins also filed a civil lawsuit against the liable third party, who settled for \$165,000.00. At the time of the settlement, the Department had paid Mr. Mullins benefits in the amount of \$94,581.65. Attorneys' fees and costs in the third party settlement were \$61,575.88.

The controlling statute is RCW 51.24.060(1):

If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

(a) The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award; provided, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for compensation and benefits paid;

1 (i) The department and/or self-insurer shall bear its proportionate share of  
2 the costs and reasonable attorneys' fees incurred by the worker or  
3 beneficiary to the extent of the benefits paid or payable under this title:  
4 Provided, that the department or self-insurer may require court approval of  
5 costs and attorneys' fees or may petition a court for determination of the  
6 reasonableness of costs and attorneys' fees.

7 (ii) The sum representing the department's and/or self-insurer's  
8 proportionate share shall not be subject to subsection (1)(d) and (e) of this  
9 section.

10 (d) Any remaining balance shall be paid to the injured worker or  
11 beneficiary;

12 (e) Thereafter no payment shall be made to or on behalf of a worker or  
13 beneficiary by the department and/or self-insurer for such injury until the  
14 amount of any further compensation and benefits shall equal any such  
15 remaining balance. Thereafter, such benefits shall be paid by the  
16 department and/or self-insurer to or on behalf of the worker or beneficiary  
17 as though no recovery had been made from a third person;

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19 Our industrial appeals judge relied upon the decision in Longview Fibre Company v. Dep't of  
20 Labor & Indus., 58 Wn.App. 751 (1989) rev. denied, 115 Wn.2d 1010 (1990) (hereinafter, the McGee  
21 decision). Applying the formula set forth in McGee, our industrial appeals judge correctly determined  
22 that the Department's proportionate share of attorneys' fees and costs under RCW 51.24.060(1) is  
23 calculated by multiplying a fraction, the numerator of which is the amount of the reimbursement lien  
24 and the denominator being the gross recovery from the third party, times the total attorneys' fees and  
25 costs incurred by the worker.

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27 We start with the following figures:

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32 1. Gross recovery: \$165,000.00  
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34 2. Attorneys' fees and costs \$ 61,575.88  
35 incurred by worker:  
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37 3. Reimbursement lien: \$ 94,581.65  
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39 The ratio of the reimbursement lien to the gross recovery is .5732. Multiplying the total amount  
40 of attorneys' fees and costs (\$61,575.88) by .5732, the Department's proportionate share as  
41 contemplated by RCW 51.24.060(1)(c)(i) is \$35,295.29. That amount is then subtracted from the total  
42 reimbursement lien and the reduced lien is calculated as follows:  
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- 45 1. Reimbursement Lien: \$ 94,581.65  
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2.	<u>Department's proportionate share of attorneys' fees and costs:</u>	- \$ 35,295.29
3.	<u>Reduced lien:</u>	<u>\$ 59,286.36</u>

Pursuant to the provisions of RCW 51.24.060, the gross recovery is distributed as follows:

1.	<u>Gross recovery:</u>	\$165,000.00
2.	<u>Attorneys' fees and costs (RCW 51.24.060(1)(a)):</u>	- \$ 61,575.88
	Net recovery:	<u>\$103,424.12</u>
3.	<u>Claimant's 25% share of net recovery pursuant to RCW 51.24.060(1)(b):</u>	- \$ 25,856.03
	Balance:	<u>\$ 77,568.09</u>
4.	<u>Department's lien reduced by its proportionate share of attorneys' fees and costs calculated pursuant to RCW 51.24.060(1)(c)(i):</u>	- \$ 59,286.36
	Remainder:	<u>\$ 18,281.73</u>

The remaining balance of \$18,281.73 is to be paid to Mr. Mullins pursuant to the provisions of RCW 51.24.060(1)(d) which states, "Any remaining balance shall be paid to the injured worker or beneficiary."

We agree with our industrial appeals judge's calculations up to this point. We have granted review, however, because of our industrial appeals judge's determination that, pursuant to the provisions of RCW 51.24.060(1)(e), no further payment is to be made to Mr. Mullins until the amount of any further compensation and benefits shall equal \$18,281.73. The sole issue before us is the amount, if any, which should be treated as the excess recovery subject to offset against the payment of future benefits pursuant to RCW 51.24.060(1)(e). As the figures set forth above demonstrate, the

1 industrial appeals judge calculated the excess recovery subject to offset by subtracting the  
2 Department's reduced reimbursement lien from the balance.  
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4 In McGee the Court stated:

5 A remainder according to subsection (1)(d) is whatever is left when the  
6 reduced lien is offset against the balance.  
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8 McGee, at 757.  
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10 The "remaining balance", according to RCW 51.24.060(1)(d), is paid to the worker. However,  
11 for the reasons stated below, the amount of this remainder cannot be the same as the amount of the  
12 excess recovery subject to offset without running afoul of RCW 51.24.060(1)(c)(ii), which provides:  
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14 The sum representing the department's and/or self-insurer proportionate  
15 share shall not be subject to subsection (1)(d) and (e) of this section.  
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18 It is true that the rote application of the equation set forth by the appellate court in McGee,  
19 considered with dicta defining the remainder, would seem to support the industrial appeal judge's  
20 interpretation. However, if the Department is to truly offset an excess amount of the third party  
21 recovery and contribute its proportionate share of attorneys' fees and costs, the excess recovery  
22 subject to offset must be calculated by deducting the amount of the Department's proportionate share  
23 of attorneys' fees and costs from the "remainder" or "remaining balance". The calculation of the  
24 excess recovery subject to offset then looks like this:  
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29	1.	<u>Gross recovery:</u>	\$165,000.00
30	2.	<u>Attorneys' fees and costs</u>	- \$ 61,575.88
31		<u>(RCW 51.24.060(1)(a)):</u>	
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33		Net recovery:	\$103,424.12
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35	3.	<u>Claimant's 25% share of net</u>	- \$ 25,856.03
36		<u>recovery pursuant to</u>	
37		<u>RCW 51.24.060(1)(b):</u>	
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39		Balance:	\$ 77,568.00
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41	4.	<u>Department's lien reduced</u>	- \$ 59,286.36
42		<u>by its proportionate share</u>	
43		<u>of attorneys' fees and costs</u>	
44		<u>calculated pursuant to</u>	
45		<u>RCW 51.24.060(1)(c)(1):</u>	
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2 Remaining Balance: \$ 18,281.73

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4 5. Department's proportionate - \$ 35,295.29  
5 share of attorneys' fees and  
6 costs:

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8 Excess Recovery Subject To Offset: 0<sup>1</sup>  
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11 Nothing in the McGee decision requires that the excess recovery subject to offset be  
12 calculated without consideration of the Department's share of attorneys' fees and costs. To the  
13 contrary, if the Department's proportionate share of attorneys' fees and costs is not taken into account  
14 when the excess recovery subject to offset is calculated, then the Department would avoid paying  
15 some or all of its proportionate share in all cases where future benefits are paid. In the instant case,  
16 the parties have stipulated that Mr. Mullins has been placed on the pension rolls. Although it is not a  
17 certainty, it is highly likely that during Mr. Mullins' lifetime he will be entitled to future benefits in excess  
18 of \$18,281.73. The industrial appeals judge's calculation of the excess recovery subject to offset  
19 would mean that the Department's share of the attorneys' fees and costs incurred by the claimant  
20 would be reduced by \$18,281.73. The Department would end up paying only \$17,013.56, not  
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31 <sup>1</sup> In the present appeal, the calculations stop at the fifth step. Because the Department's  
32 proportionate share of attorneys' fees and costs is greater than the remaining balance, it is  
33 clear in this case that there is no excess recovery subject to offset.

34 However, if the remaining balance were greater than the Department's proportionate share  
35 of attorneys' fees and costs, an additional step would be necessary as follows:

36 6. Excess Recovery Subject to Offset X Total attorneys'=  
37 Gross Recovery fees and costs

38 Department's proportionate share of attorneys' fees and costs to be paid on the excess  
39 recovery subject to offset.  
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41 In the event further benefits are payable and the Department wishes to take advantage of  
42 the offset provisions of RCW 51.24.060(1)(e), the Department must further reduce the amount  
43 actually offset by its proportionate share of attorneys' fees and costs with respect to that  
44 payable amount. The Department cannot benefit by offsetting the excess recovery against  
45 future benefits payable to the worker unless the Department also deducts its proportionate  
46 share of attorneys' fees and costs from the excess recovery subject to offset.  
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2 \$35,295.29, in attorneys' fees and costs. This would render meaningless RCW 51.24.060(1)(a) which  
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4 requires that:

5           The costs and reasonable attorneys' fees shall be paid proportionately by  
6           the injured worker or beneficiary and the department and/or self-insurer;  
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8 (Emphasis added)

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10           For the Department to effectively contribute to the attorneys' fees and costs when there is a  
11 remaining balance, the amount of the Department's proportionate share of the fees and costs must be  
12 subtracted from the remaining balance in calculating the excess recovery subject to offset. (See also,  
13 Footnote 1) To do otherwise would allow the Department to recoup all or part of its proportionate  
14 share of the attorneys' fees and costs by setting off the amount of its share against future benefits,  
15 future benefits which would otherwise be payable to the claimant.  
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19           We note that the issue raised by this appeal was not before the Court in McGee. The Court in  
20 McGee was concerned with the fair apportionment of attorneys' fees and costs between the claimant  
21 and the self-insured employer. McGee must be read in that light. It was not necessary to the Court's  
22 holding to consider the calculation of the excess recovery subject to offset. It is not necessary or  
23 appropriate to read McGee in a manner which would permit the Department to recoup all or part of its  
24 proportionate share of attorneys' fees and costs by offsetting the entire remaining balance against  
25 future benefits which would otherwise be payable to the claimant. Such an interpretation would make  
26 the Department's payment of its proportionate share of attorneys' fees and costs illusory in any  
27 instance in which the claimant is entitled to future benefits.  
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32           The Department order of January 22, 1990 is incorrect and is reversed. This matter is  
33 remanded to the Department with directions to distribute the third party recovery as follows:  
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| 36 | 1. | Net share to attorney for fees and costs: | \$ 61,575.88 |
| 37 | 2. | Net share to claimant:                    | \$ 44,137.76 |
| 38 | 2. | Net share to Department:                  | \$ 59,286.36 |
| 39 | 4. | Excess recovery subject to offset:        | \$ 0         |
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43           **FINDINGS OF FACT**

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45 for benefits with the Department of Labor and Industries alleging the  
46 occurrence of an industrial injury on July 8, 1983 during the course of his  
47 employment with Northwest Cascade, Inc. On September 16, 1986, the



1 Department issued an order determining that the claimant was a  
2 permanently and totally disabled worker effective October 29, 1985. On  
3 December 28, 1989, the Department issued an order stating that the  
4 claimant had recovered \$165,000.00 and, pursuant to the provisions of  
5 RCW 51.24.060, the settlement proceeds were distributed as follows: to  
6 the attorney for fees and costs - \$61,575.88; to the claimant -\$45,490.06;  
7 and to the Department - \$57,934.06. The Department order further  
8 calculated an excess recovery totaling \$19,634.03, subject to offset by the  
9 Department. On January 4, 1990, the claimant filed a notice of appeal  
10 with the Board of Industrial Insurance Appeals from the Department order  
11 of December 28, 1989 and that appeal was assigned Docket No. 90 0016.  
12 On January 17, 1990, the Department issued an order holding its prior  
13 order of December 28, 1989 in abeyance. On January 18, 1990, the  
14 Board issued an order in Docket No. 90 0016 returning the case to the  
15 Department for further action.

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17 On January 22, 1990, the Department issued an order setting aside and  
18 holding for naught its prior order of December 28, 1989 and made the  
19 following distribution of the claimant's third party recovery of \$165,000.00:  
20 to the attorney for fees and costs - \$61,575.88; to the claimant -  
21 \$25,856.03; to the Department - \$77,568.09 with the Department  
22 declaring a statutory lien against the third party recovery for a sum of  
23 \$94,581.00. On January 25, 1990, the claimant filed a notice of appeal  
24 with the Board from the Department order of January 22, 1990. On  
25 February 27, 1990, the Board issued an order granting the appeal,  
26 assigned it Docket No. 90 0403, and directed that hearings be held on the  
27 issues raised therein.

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2. The claimant sustained an industrial injury on July 8, 1983. In addition to filing a claim for workers' compensation benefits, he sued the liable third party. That lawsuit was settled for \$165,000.00.
  3. The claimant incurred attorneys' fees and costs related to the third party settlement in the amount of \$61,575.88.
  4. At the time of the settlement of the third party action, the Department had paid the claimant compensation and benefits in the amount of \$94,581.65. That amount is the reimbursement lien.
  5. The Department's proportionate share of costs and attorneys' fees is calculated as follows:

40 Reimbursement lien \$ 94,581.65 = .5732  
41 Gross recovery \$165,000.00

42 .5732 X attorneys' fees and costs \$ 61,575.88 =  
43 \$35,295.29.

44 The Department's reduced lien is \$ 94,581.65 - \$35,295.29 = \$ 59,286.36.

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6. The distribution of the third party recovery is as follows:

a. <u>Gross recovery:</u>	\$165,000.00
b. <u>Attorneys' fees and costs</u> - \$ 61,575.88 <u>(RCW 51.24.060(1)(a)):</u>	
	_____
Net recovery:	\$103,424.12
c. <u>Claimant's 25% share of net-</u> \$ 25,856.03 <u>recovery pursuant to</u> <u>RCW 51.24.060(1)(b):</u>	
	_____
Balance:	\$ 77,568.09
d. <u>Department's lien reduced</u> - \$ 59,286.36 <u>by its proportionate share</u> <u>of attorneys' fees and costs</u> <u>calculated pursuant to</u> <u>RCW 51.24.060(1)(c)(1):</u>	
	_____
Remaining Balance:	\$ 18,281.73
e. <u>Department's proportionate</u> - \$ 35,295.29 <u>share of attorneys' fees and</u> <u>costs:</u>	
Excess Recovery Subject To Offset:	0

**CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
2. There is no excess recovery subject to offset within the meaning of RCW 51.24.060(1)(e) because RCW 51.24.060(1)(c)(ii) specifically excludes the Department's proportionate share of attorneys' fees and costs from RCW 51.24.060(1)(e), i.e., from the excess recovery subject to offset.
3. The Department order entered on January 22, 1990, which set aside and held for naught a prior Department order of December 28, 1989 and distributed the third party recovery of \$165,000.00 as follows: \$61,575.88 for attorneys' fees and costs, \$25,856.03 to the claimant and \$77,568.09 to the Department, is incorrect is reversed. This matter is remanded to the Department with directions to distribute the third party recovery as follows:
  - (a) Net share to attorney \$ 61,575.88  
for fees and costs:
  - (b) Net share to claimant: \$ 44,137.76

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(c) Net share to Department: \$ 59,286.36

(d) Excess recovery subject \$ 0  
to offset:

It is so ORDERED.

Dated this 14<sup>th</sup> day of June, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/  
SARA T. HARMON Chairperson

/s/  
FRANK E. FENNERTY, JR. Member

/s/  
PHILLIP T. BORK Member