

Haag, Dick

THIRD PARTY ACTIONS (RCW 51.24)

Distribution of recovery

The excess recovery subject to offset must be calculated by deducting the Department's proportionate share of costs and reasonable attorney's fees from the remaining balance. *Citing In re Maston Mullins, Jr.*, BIIA Dec., 90 0403 (1992). ...***In re Dick Haag*, BIIA Dec., 90 1236 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 91-2-07862-4. Rule reversed by *Davis v. Department of Labor & Indus.*, 71 Wn. App. 360 (1993), *reviewed denied*, 123 Wn.2d 1016 (1994).]

Scroll down for order.

1	2.	<u>Attorneys' fees and costs</u>	- \$119,749.70
2		<u>paid pursuant to</u>	
3		<u>RCW 51.24.060(1)(a):</u>	
4			
5		Net Recovery:	<u>\$180,250.30</u>
6			
7	3.	<u>Claimant's 25% share of net</u>	- \$ 45,062.58
8		<u>recovery pursuant to</u>	
9		<u>RCW 51.24.060(1)(b):</u>	
10			
11		Balance:	<u>\$135,187.72</u>
12			
13	4.	<u>Department's lien reduced</u>	- \$ 66,058.34
14		<u>by its proportionate share</u>	
15		<u>of attorneys' fees and costs</u>	
16		<u>calculated pursuant to</u>	
17		<u>RCW 51.24.060(1)(c)(1):</u>	
18			
19		Remaining Balance:	<u>\$ 69,129.38</u>
20			

21 We agree with our industrial appeals judge's calculation of the dollar amounts to be distributed to the
22 claimant, his attorney, and to the Department respectively. We disagree, however, with our industrial
23 appeals judge's conclusion that Mr. Haag can receive no additional compensation or benefits from the
24 Department until his future entitlement equals \$50,000.00. The industrial appeals judge treated the
25 Department's proportionate share of attorneys' fees and costs as if it were included in the excess
26 recovery subject to offset under RCW 51.24.060(1)(d) and (e). He determined that under the terms of
27 RCW 51.24.060(1) the excess subject to offset would be \$69,129.38, but based upon the testimony of
28 Virginia Anderson, a third party adjudicator with the Department, he determined that the Department
29 had negotiated a reduction of the excess subject of offset to \$50,000.00. RCW 51.24.060(1)(c)(ii)
30 dictates a different result. That section specifically excludes the Department's share of attorneys' fees
31 and costs from both the remaining balance (RCW 51.24.060(1)(d)) and from the excess subject to
32 offset (RCW 51.24.060(1)(e)).

33 Mr. Haag sustained an industrial injury while in the course of his employment with Continental
34 Systems, Inc. The injury was due to the negligence of a third party. Mr. Haag filed an application for
35 workers' compensation benefits with the Department of Labor and Industries. Mr. Haag also filed a
36 civil lawsuit against the liable third party, who settled for \$300,000.00. At the time of the settlement,
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1 the Department had paid Mr. Haag \$109,946.60. Attorneys' fees and costs in the third party
2 settlement were \$119,749.70.
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4 The controlling statute is RCW 51.24.060(1):
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6 If the injured worker or beneficiary elects to seek damages from the third
7 person, any recovery made shall be distributed as follows:
8

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

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

16 (c) The department and/or self-insurer shall be paid the balance of the
17 recovery made, but only to the extent necessary to reimburse the
18 department and/or self-insurer for compensation and benefits paid;
19

20 (i) The department and/or self-insurer shall bear its proportionate share of
21 the costs and reasonable attorneys' fees incurred by the worker or
22 beneficiary to the extent of the benefits paid or payable under this title:
23 Provided, That the department or self-insurer may require court approval
24 of costs and attorneys' fees or may petition a court for determination of the
25 reasonableness of costs and attorneys' fees.

26 (ii) The sum representing the department's and/or self-insurer's
27 proportionate share shall not be subject to subsection (1)(d) and (e) of this
28 section.
29

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

32 (e) Thereafter no payment shall be made to or on behalf of a worker or
33 beneficiary by the department and/or self-insurer for such injury until the
34 amount of any further compensation and benefits shall equal any such
35 remaining balance. Thereafter, such benefits shall be paid by the
36 department and/or self-insurer to or on behalf of the worker or beneficiary
37 as though no recovery had been made from a third person;
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40 Our industrial appeals judge relied upon the decision in Longview Fibre Company v. Dep't of Labor &
41 Indus., 58 Wn.App. 751 (1989) rev. denied, 115 Wn.2d 1010 (1990) (hereinafter, the McGee decision).
42

43 Applying the formula set forth in McGee, our industrial appeals judge correctly determined that the
44 Department's proportionate share of attorneys' fees and costs under RCW 51.24.060(1) is calculated
45 by multiplying a fraction, the numerator of which is the amount of the reimbursement lien and the
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1
2 denominator being the gross recovery from the third party, times the total attorneys' fees and costs
3
4 incurred by the worker.

5 We start with the following figures:

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7	1. <u>Gross recovery:</u>	\$300,000.00
8	2. <u>Attorneys' fees and costs</u>	\$119,749.70
9	<u>incurred by worker:</u>	
10		
11	3. <u>Reimbursement lien:</u>	\$109,946.60

12 The ratio of the reimbursement lien to the gross recovery is .3665. Multiplying the total amount of
13 attorneys' fees and costs (\$119,749.70) by .3665, the Department's proportionate share as
14 contemplated by RCW 51.24.060(1)(c)(i) is \$43,888.26. That amount is then subtracted from the total
15 reimbursement lien and the reduced lien is calculated as follows:
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18	1. <u>Reimbursement Lien:</u>	\$109,946.60
19		
20	2. <u>Department's proportionate -</u>	\$ 43,888.26
21	<u>share of attorneys' fees</u>	
22	<u>and costs:</u>	
23		
24	3. <u>Reduced lien:</u>	<u>\$ 66,058.34</u>

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

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27		
28	1. <u>Gross recovery:</u>	\$300,000.00
29		
30	2. <u>Attorneys' fees and costs</u>	
31	<u>(RCW 51.24.060(1)(a)):</u>	- \$119,749.70
32		
33	Net recovery:	\$180,250.30
34		
35	3. <u>Claimant's 25% share of</u>	- \$ 45,062.58
36	<u>net recovery pursuant to</u>	
37	<u>RCW 51.24.060(1)(b):</u>	
38		
39	Balance:	<u>\$135,187.72</u>
40		
41	4. <u>Department's lien reduced</u>	- \$66,058.34
42	<u>by its proportionate share</u>	
43	<u>of attorneys' fees and costs</u>	
44	<u>calculated pursuant to</u>	
45	<u>RCW 51.24060(1)(c)(i):</u>	
46		
47	Remainder:	<u>\$69,129.38</u>

1 The remaining balance of \$69,129.38 is to be paid to Mr. Haag pursuant to the provisions of
2 RCW 51.24.060(1)(d) which states, "Any remaining balance shall be paid to the injured worker or
3 beneficiary."
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5 We agree with our industrial appeals judge's calculations up to this point. We have granted
6 review, however, because of our industrial appeals judge's determination that, pursuant to the
7 provisions of RCW51.24.060(1)(e), no further payment is to be made to Mr. Haag until the amount of
8 any further compensation and benefits shall equal \$50,000.00. The sole issue before us is the
9 amount, if any, which should be treated as the excess recovery subject to offset against the payment
10 of future benefits pursuant to RCW 51.24.060(1)(e). As the figures set forth above demonstrate, the
11 industrial appeals judge calculated the excess recovery subject to offset by subtracting the
12 Department's reduced reimbursement lien from the balance (\$69,129.38, but reduced by the
13 agreement of the parties to \$50,000.00).
14

15 In McGee the Court stated:

16 A remainder according to subsection (1)(d) is whatever is left when the
17 reduced lien is offset against the balance.
18

19 McGee, at 757.
20

21 The "remaining balance", according to RCW 51.24.060(1)(d), is paid to the worker. However,
22 for the reasons stated below, the amount of this remainder cannot be the same as the amount of the
23 excess recovery subject to offset without running afoul of RCW 51.24.060(1)(c)(ii), which provides:
24

25 The sum representing the department's and/or self-insurer's proportionate
26 share shall not be subject to subsection (1)(d) and (e) of this section.
27

28 It is true that the rote application of the equation set forth by the appellate court in McGee,
29 considered with dicta defining the remainder, would seem to support the industrial appeal judge's
30 interpretation. However, if the Department is to truly offset an excess amount of the third party
31 recovery against future benefits and contribute its proportionate share of attorneys' fees and costs, the
32 excess recovery subject to offset must be calculated by deducting the amount of the Department's
33 proportionate share of attorneys' fees and costs from the "remainder" or "remaining balance". The
34 calculation of the excess recovery subject to offset then looks like this:
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|----|-------------------------------------|----------------|
| 37 | 1. <u>Gross recovery:</u> | \$300,000.00 |
| 38 | 2. <u>Attorneys' fees and costs</u> | - \$119,749.70 |
| 39 | <u>(RCW 51.24.060(1)(a)):</u> | |
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1	Net recovery:	\$180,250.30
2	3. <u>Claimant's 25% share of net</u>	- \$ 45,062.58
3	<u>recovery pursuant to</u>	
4	<u>RCW 51.24.060(1)(b):</u>	
5		
6	Balance:	\$135,187.72
7		
8	4. <u>Department's lien reduced</u>	- \$ 66,058.34
9	<u>by its proportionate share</u>	
10	<u>of attorneys' fees and costs</u>	
11	<u>calculated pursuant to</u>	
12	<u>RCW 51.24.060(1)(c)(1):</u>	
13		
14	Remaining Balance:	\$ 69,129.38
15		
16	5. <u>Department's proportionate</u>	- \$ 43,888.26
17	<u>share of attorneys' fees and</u>	
18	<u>costs:</u>	
19		
20	Excess:	\$ 25,241.12

21
22 In the recent case of In re Maston Mullins, Jr., BIIA Dec. 90 0403 (June 14, 1991) we first set
23 forth the calculation method we are using in the instant case. In Mullins, the calculations stopped at
24 the fifth step because the Department's proportionate share of attorneys' fees and costs was greater
25 than the remaining balance, leaving no excess recovery subject to offset. We noted, however, that if
26 the remaining balance were greater than the Department's proportionate share of attorneys' fees and
27 costs (as it is in this case) an additional step would be necessary. This step first involves determining
28 the ratio of the excess to the gross recovery. That ratio is .0841. The total attorneys' fees and costs of
29 \$119,749.70 is multiplied by the ratio (.0841) to determine the Department's proportionate share of
30 attorneys' fees and costs to be paid on the excess recovery subject to offset, i.e., \$10,070.19. The
31 excess recovery of \$25,241.12 is therefore reduced by \$10,070.19, and the excess subject to offset
32 against future benefits is \$15,170.93. Rather than restate in this case all the reasoning supporting this
33 holding, we incorporate the reasoning of In re Maston Mullins, Jr., by reference here.
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40 One additional issue not raised in re Maston Mullins, Jr. is the claimant's contention that the
41 Department is equitably estopped from seeking any different method for distributing the third party
42 recovery than set forth in Exhibit No. 2. This is based upon communications between claimant's
43 counsel and Virginia Anderson. We decline to apply equitable estoppel to the facts before us. For
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1 equitable estoppel to apply, there needs to be a reliance upon a statement of facts. Equitable estoppel
 2 does not apply to cases where the representations concern questions of law. The responses of
 3 Virginia Anderson were clearly statements to Mr. Haag's attorney concerning her understanding of the
 4 correct application of RCW 51.24.060. (See Chemical Bank v. WPPSS, 102 Wn.2d 874, 905 (1984).
 5 "Equitable principals cannot be asserted to establish equitable relief in derogation of statutory
 6 mandates." Dep't of Labor & Indus. v. Dillon, 28 Wn. App 853, 855 (1981).
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12 The Department order of January 29, 1990 is incorrect and is reversed. The matter is
 13 remanded to the Department with direction to distribute the third party recovery as follows:
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- | | | | | |
|----|----|---|------------------------------------|--------------|
| 15 | 1. | Net share to attorney for fees and costs: | \$119,749.70 | |
| 16 | 17 | 2. | Net share to claimant: | \$114,191.96 |
| 18 | 19 | 3. | Net share to Department: | \$ 66,058.34 |
| 20 | 21 | 4. | Excess recovery subject to offset: | \$ 15,170.93 |

22 We hereby adopt proposed Finding of Fact No. 1 and proposed Conclusion of Law No. 1, and
 23 make the following additional findings and conclusions.
 24

25 **FINDINGS OF FACT**

- 26 2. The claimant sustained an industrial injury on November 2, 1983. In
 27 addition to filing a claim for workers' compensation benefits, he sued the
 28 liable third party. That lawsuit was settled for \$300,000.00.
 29
- 30 3. The claimant incurred attorneys' fees and costs related to the third party
 31 settlement in the amount of \$119,749.70.
 32
- 33 4. At the time of the settlement of the third party action, the Department had
 34 paid the claimant compensation and benefits in the amount of
 35 \$109,946.60. That amount is the reimbursement lien.
 36
- 37 5. The Department's proportionate share of costs and attorneys' fees based
 38 on the reimbursement lien is calculated as follows:
 39

$$\frac{\text{Reimbursement lien } \$109,946.60}{\text{Gross recovery } \$300,000.00} = .3665$$

$$.3665 \times \text{attorneys' fees and costs } \$119,749.70 = \$43,888.26.$$

$$\text{The Department's reduced lien is } \$109,946.60 - \$43,888.26 = \$66,058.34.$$

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 43 6. The Department's proportionate share of costs and attorneys' fees with
 44 regard to any excess third-party suit recovery to be offset against future
 45 benefits is calculated as follows:
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$$\frac{\text{Excess } \$25,241.12}{\text{Gross recovery } \$300,000.00} = .084$$

1	Gross Recovery	\$ 300,000.00
2		
3	.0841. .0841 x attorneys fees	
4	and costs \$119,740.79 =	\$ 10,070.19
5	7. The distribution of the third party recovery is as follows:	
6	a. <u>Gross recovery:</u>	\$300,000.00
7		
8	b. <u>Attorneys' fees and costs</u> -	\$119,749.70
9	<u>(RCW 51.24.060(1)(a)):</u>	
10		
11	Net recovery:	\$180,250.30
12		
13	c. <u>Claimant's 25% share of net</u> -	\$ 45,062.58
14	<u>recovery pursuant to</u>	
15	<u>RCW 51.24.060(1)(b):</u>	
16		
17	Balance:	\$135,187.72
18		
19	d. <u>Department's lien reduced</u> -	\$ 66,058.34
20	<u>by its proportionate share</u>	
21	<u>of attorneys' fees and costs</u>	
22	<u>calculated pursuant to</u>	
23	<u>RCW 51.24.060(1)(c)(1):</u>	
24		
25	Remaining Balance:	\$ 69,129.38
26		
27	e. <u>Department's proportionate</u> -	\$ 43,888.26
28	<u>share of attorneys' fees and</u>	
29	<u>costs:</u>	
30	Excess:	\$ 25,241.12
31		
32	f. <u>Department's proportionate</u>	\$ 10,070.19
33	<u>share of attorneys' fees and</u>	
34	<u>costs for the excess:</u>	
35	Excess Recovery Subject to	\$ 15,170.93
36	Offset Against Future Benefits:	

CONCLUSIONS OF LAW

2. There is an excess recovery subject to offset within the meaning of RCW 51.24.060(1)(e) only to the extent the remaining balance exceeds the Department's proportionate share of attorneys' fees and costs, 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 29, 1990, which adhered to the provisions of an order dated January 11, 1990 which superseded an order of December 22, 1989 and distributed the third party recovery of \$300,000.00 as follows: \$114,124.77 for attorneys' fees and costs,

1 \$117,754.72 to the claimant and \$68,119.51 to the Department, and
2 declared an excess recovery of \$50,000.00 subject to offset against future
3 benefits, is incorrect and is reversed. This matter is remanded to the
4 Department with directions to distribute the third party recovery as follows:

- 5
6 (a) Net share to attorney \$119,749.70
7 for fees and costs:
8 (b) Net share to claimant: \$114,191.96
9 (c) Net share to Department: \$ 66,058.34
10 (d) Excess recovery subject \$ 15,170.93
11 to offset against future
12 benefits:
13

14 Dated this 10th day of July, 1991.
15

16 BOARD OF INDUSTRIAL INSURANCE APPEALS
17

18
19 /s/
20 S. FREDERICK FELLER Chairperson
21

22
23 /s/
24 FRANK E. FENNERTY, JR. Member
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27 /s/
28 PHILLIP T. BORK Member
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