

## Haag, Dick

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### 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.

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

1     **IN RE: DICK K. HAAG**                                     )  
2                                                                                     )  
3     **CLAIM NO. J-358794**                                     )  
4                                                                                     )  
                                                                                   **DOCKET NO. 90 1236**  
                                                                                   **DECISION AND ORDER**

5 APPEARANCES:

6  
7             Claimant, Dick K. Haag, by  
8             Small, Snell, Logue & Weiss, P. S., per  
9             Richard E. Weiss

10  
11            Employer, Continental Systems, Inc., by  
12            Pete Kennedy, President

13  
14            Department of Labor and Industries, by  
15            The Attorney General, per  
16            Beverly Norwood Goetz, Assistant  
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18            This is an appeal filed by the claimant, Dick K. Haag, on March 12, 1990 from an order of the  
19 Department of Labor and Industries dated January 29, 1990. The Department order of January 29,  
20 1990 adhered to the provisions of a Department order dated January 11, 1990 which superseded an  
21 order of December 22, 1989 and made the following distribution of a \$300,000.00 third party  
22 settlement pursuant to the provisions of RCW 51.24.060: \$114,124.77 for attorneys' fees and costs;  
23 \$117,754.72 to the claimant; and \$68,119.51 to the Department. The order further declared a  
24 statutory lien on behalf of the Department in the amount of \$109,946.60; declared that the Department  
25 had received payment of \$107,824.13; and remits to the claimant \$39,704.62 and determines that the  
26 claimant will receive no further benefits until such time as an excess recovery totaling \$50,000.00 has  
27 been expended by the claimant for costs incurred as a result of the conditions covered by the claim.  
28 The Department order is **REVERSED AND REMANDED**.  
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34                                                                                     **DECISION**

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36            Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
37 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
38 issued on December 14, 1990 in which the order of the Department dated January 29, 1990 was  
39 reversed and the claim remanded to the Department with direction to distribute the third party recovery  
40 as follows: \$119,749.70 to the attorney for fees and costs, \$114,191.96 to the claimant, and  
41 \$66,058.34 to the Department. The industrial appeals judge made the following calculations:  
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45            1.     Gross recovery:                                     \$300,000.00  
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|    |    |                                     |                     |
|----|----|-------------------------------------|---------------------|
| 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.  
3

4 The controlling statute is RCW 51.24.060(1):  
5

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;  
38

39  
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:

|    |                                     |              |
|----|-------------------------------------|--------------|
| 6  |                                     |              |
| 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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17

|    |                                        |                     |
|----|----------------------------------------|---------------------|
| 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:

|    |                                     |                     |
|----|-------------------------------------|---------------------|
| 26 |                                     |                     |
| 27 | 1. <u>Gross recovery:</u>           | \$300,000.00        |
| 28 |                                     |                     |
| 29 | 2. <u>Attorneys' fees and costs</u> |                     |
| 30 | <u>(RCW 51.24.060(1)(a)):</u>       | - \$119,749.70      |
| 31 |                                     |                     |
| 32 | Net recovery:                       | \$180,250.30        |
| 33 |                                     |                     |
| 34 | 3. <u>Claimant's 25% share of</u>   | - \$ 45,062.58      |
| 35 | <u>net recovery pursuant to</u>     |                     |
| 36 | <u>RCW 51.24.060(1)(b):</u>         |                     |
| 37 |                                     |                     |
| 38 | Balance:                            | <u>\$135,187.72</u> |
| 39 |                                     |                     |
| 40 | 4. <u>Department's lien reduced</u> | - \$66,058.34       |
| 41 | <u>by its proportionate share</u>   |                     |
| 42 | <u>of attorneys' fees and costs</u> |                     |
| 43 | <u>calculated pursuant to</u>       |                     |
| 44 | <u>RCW 51.24060(1)(c)(i):</u>       |                     |
| 45 |                                     |                     |
| 46 | Remainder:                          | <u>\$69,129.38</u>  |
| 47 |                                     |                     |

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."  
4

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:  
35

- 36
- |    |                                     |                |
|----|-------------------------------------|----------------|
| 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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 11

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:  
 14

- |    |    |                                           |                                    |              |
|----|----|-------------------------------------------|------------------------------------|--------------|
| 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

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

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

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

- 40  
 41  
 42  
 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:  
 46

$$\frac{\text{Excess } \$25,241.12}{\text{Gross recovery } \$300,000.00} = .084$$



|    |                                                                |               |
|----|----------------------------------------------------------------|---------------|
| 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 10<sup>th</sup> 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  
25

26  
27 /s/  
28 PHILLIP T. BORK Member  
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