McQuirk, Michael

THIRD PARTY ACTIONS (RCW 51.24)

Allocation of fault

The statute requires a finding of employer fault before settlement and before the distribution order is issued; without a finding of fault there may be no reduction of the reimbursement amount. In those cases settled after the issuance of *Clark v. Pacificorp*, 118 Wn.2d 167 (1991), there may be no reduction of the Department's reimbursement amount where settlement is entered into before a finding of employer fault by a trier of fact. (Limiting application of *In re Peter N. Hrebeniuk*, BIIA Dec., 91 2764 (1992) to cases settled before filing of *Clark*.) **….*In re Michael McQuirk*, BIIA Dec., 93 1355 (1994)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MICHAEL T. McQUIRK	**)**	**DOCKET NO. 93 1355**
	)	
CLAIM NO. M-374637	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Michael T. McQuirk, by
Jennifer A. Kowalski and Christopher L. Otorowski, Attorneys

Employer, Longnecker Communication Corp., by
Edward A. Schenck, Administrator, and
Oliver Longnecker, President

The Department of Labor and Industries, by
The Office of the Attorney General, per
Jeffrey P. Bean, Assistant

This is an appeal filed by the claimant, Michael T. McQuirk, on March 26, 1993, from an order of the Department of Labor and Industries dated February 1, 1993, which affirmed a prior order dated December 28, 1992 that determined that the claimant had recovered $200,000.00 and required distribution of the settlement proceeds, as follows: 1) Net share to attorney for fees and costs ($69,877.78); 2) Net share to claimant ($100,013.35); and, 3) Net share to Department ($30,108.87). The Department of Labor and Industries declared a statutory lien against the claimant's third-party recovery for the sum of $46,278.59, demanded reimbursement from the claimant in the amount of $30,108.87, and ordered no benefits or compensation will be paid to or on behalf of the claimant until such time the excess recovery totalling $67,482.79 has been expended by the claimant for costs incurred as a result of the condition(s) covered under this claim. The December 28, 1992 Department order further provided that pursuant to RCW 51.24.060(7), any unpaid amount shall bear the maximum rate of interest per RCW 19.52.020, beginning sixty days from the date the order is mailed, or sixty days from the date the order is communicated, as established by documentary evidence. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on February 1, 1994, in which the order of the Department dated February 1, 1993 was reversed and this matter was remanded to the Department with instruction to allow the parties a

reasonable time within which to obtain a determination of fault attributable to each party involved in the injury to claimant on April 17, 1991, and issue a further order distributing the third-party recovery.

This matter was resolved based on stipulated facts and cross motions for summary judgment. The parties submitted briefs and arguments were heard on the motions for summary judgment at a hearing held on August 11, 1993. Based on our review of the stipulated facts, the Department's Motion for Summary Judgment and Memorandum in Support, Claimant's Answer to Department's Motion for Summary Judgment, and Department's Reply Re Summary Judgment, we agree with our industrial appeals judge that there is no material question of fact presented in this appeal. We disagree, however, with the result reached in the Proposed Decision and Order.

The issue presented by this appeal is whether there can be a reduction of the Department's reimbursement amount under RCW 51.24.060(1)(f) if there has been no determination of employer fault by a trier of fact prior to settlement.

The stipulation of facts indicates: Mr. McQuirk filed an application for job injury occurring on April 17, 1991, while he was employed by Longnecker Communication Corporation. The claim was accepted and benefits were paid.

Mr. McQuirk filed a third-party cause of action against Puget Sound Power and Light. The third-party claim was settled for $200,000.00 on December 18, 1992.

> There has been no allocation of fault among all at-fault entities by a trier of fact under RCW 4.22.070. There has been no determination by a trier of fact under RCW 4.22.070 that the claimant's employer or co-employee were at fault for his industrial injuries. There has been no determination by a trier of fact under RCW 4.22.070 that his employer or co-employee were at fault for his industrial injuries before he settled the claim with the third party, signed the Release of All Claims, and obtained the $200,000 third-party recovery.

Stipulated Statement of Facts, at 2.

The Department's Petition for Review presents the argument that the employer fault statute requires a finding of employer fault before settlement and before the distribution order is issued, and without a finding of fault there may be no reduction of the reimbursement amount. Based on the facts presented and our review of relevant statutes and case law, we agree with the Department.

In Clark v. Pacificorp, 118 Wn.2d 167 (1991) the court was faced with the first interpretation of the employer fault statute (RCW 51.24.060(1)(f)) and its incorporation of RCW 4.22.070. The Clark court determined that the trial courts are to decide the percentage of the total fault attributable to every

entity that caused the plaintiff's (injured worker's) damages and that the Department's right of reimbursement is reduced in proportion to the employer's share of fault. The Clark case was a certification from the Federal District Court for the Eastern District of Washington. A companion case was Whitten v. Associated Building Components. The Whitten portion of the Clark decision served as the basis for a court of appeals decision, Wilson v. Kiewit Pacific, Inc., 68 Wash. App. 51 (1992) and for this Board's decision in In re Peter N. Hrebeniuk, BIIA Dec., 91 2764 (1992).

In an extensive discussion of necessary procedures for assessing and determining fault, the Clark court made the following statements:

> **Where a trier of fact determines each entity's share of fault** and apportions damages accordingly **before settlement or trial**, the plaintiff will not have his damages twice reduced . . .
>
> We hold that RCW 51.24.060(1)(f) and RCW 4.22.070 require a trier of fact to determine the percentage of total fault attributable to every entity which caused plaintiff's damages. . . .
>
> The following guidelines for determination of fault hearings under RCW 51.24.060 and 4.22.070 apply: . . .
>
> **Before** the worker and third party enter **a settlement agreement, a hearing shall be held to determine the fault of all at-fault entities.**

(Emphasis added.) Clark, at 181-182.

To make it clear that the fault determination was to be made before settlement, the Clark court again stated for a third time:

> Through the adoption of comparative negligence, tort reform, and the incorporation of these two statutes [RCW 4.22.070 and RCW51.24.060], we believe the Legislature intended to bring all entities which are liable for a claimant's injuries **before the court for a determination of fault before any settlement is reached** or damages are awarded. Bringing all parties before the court in one fault determination hearing prevents manipulation by any one party.

(Emphasis added.) Clark, at 186.

Despite its emphasis on requiring a determination of fault before settlement, the Clark court remanded the Whitten case to the superior court for a determination of the reimbursement issue consistent with the opinion. It is important to note that the superior court in Whitten had entered findings of fact and conclusions of law, allocating fault to the employer after Mrs. Whitten had settled her law suit with Associated Building Components. She then filed a motion to eliminate the Department's lien and to determine the percentage of employer's fault. Clark, at 173-174.

In Wilson v. Kiewit Pacific, Inc., 68 Wn. App. 51 (1992), rev. denied, 122 Wn.2d 1005 (1994), Division One of the Court of Appeals interpreted the Clark decision in a third-party action settled before the Clark decision was filed. The Wilson court determined that the "only logical reading of Clark is that the court allowed Whitten a post-settlement fault hearing because Whitten entered into the settlement before the Clark decision was filed." The Wilson court remanded for a fault determination despite the prior settlement. Wilson, at 56.

The Clark decision was first rendered in April 1991 and modified with further reconsideration denied December 16, 1991. Wilson was filed in December 1992 contemporaneously with our decision in Hrebeniuk.

In Hrebeniuk, we reversed a Department reimbursement order with instructions to allow the parties a reasonable time to seek a hearing in superior court to determine the percentage of total fault attributable to each entity involved in claimant's injury. However, Mr. Hrebeniuk settled his third-party suit in October 1990, prior to the filing of the Clark decision. As noted above, the Hrebeniuk Decision and Order was issued at the same time that the Wilson case was decided. This Board did not have the benefit of the Wilson decision when Hrebeniuk was issued. Based on our review of the Clark and Wilson decisions, we must narrow the rule in Hrebeniuk to apply only to those cases settled prior to the filing of the Clark decision.

In summary, we hold that in those cases settled after the filing of the Clark decision, there may be no reduction of the Department's reimbursement amount where settlement is entered into prior to a finding of employer fault by a trier of fact. Because there had been no determination of fault by a trier of fact in this case prior to settlement, the Department order must be affirmed.

After consideration of the Proposed Decision and Order, the Stipulated Statement of Facts, the Department's Motion for Summary Judgment and Memorandum in Support, the Claimant's Answer to the Department's Motion for Summary Judgment, the Department's Reply Re Summary Judgment, arguments of counsel, and a thorough review of the entire record before us, we hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On April 24, 1991, the Department of Labor and Industries received an accident report alleging an industrial injury to claimant, Michael T. McQuirk, while in the course of his employment with Longnecker Communication Corp. The claim was allowed and benefits were provided.

   On December 28, 1992, the Department issued an order distributing the proceeds of a third-party recovery in the amount of $200,000.00 as

follows: 1) Net share to attorney for fees and costs ($69,877.78); 2) Net share to claimant ($100,013.35); 3) Net share to the Department ($30,108.87), and declared a statutory lien for $46,278.59 against the recovery, demanded reimbursement of $30,108.87, and denied further benefits until claimant expends the excess recovery of $67,482.79.

Within 60 days of the order of December 28, 1992, claimant filed a protest and request for reconsideration of the Department's order. On February 1, 1993, the Department issued an order adhering to the provisions of its order of December 28, 1992.

On March 26, 1993, the Board of Industrial Insurance Appeals received an appeal from claimant from the Department's order of February 1, 1993. On April 26, 1993, the Board issued its order granting the appeal, assigning it Docket 93 1355 and ordering that further proceedings be held.

2. On April 17, 1991, the claimant, Michael T. McQuirk, was injured at Tenino, Washington, in his employment for Longnecker Communication Corp. He made application for workers' compensation benefits under Title 51 RCW and the Department accepted his claim, assigning it Claim M-374637.

3. The claimant pursued a third-party cause of action against Puget Sound Power & Light Company under RCW 51.24.030. On December 18, 1992, the claimant settled with the third-party and signed a Release of All Claims. In settlement the claimant received from the third-party a recovery of $200,000.00.

4. At the time of the settlement and release, the claimant had received from the Department, on behalf of the workers' compensation funds, benefits and compensation in the amount of $46,278.59.

5. There has been no allocation of fault among all at-fault entities by a trier of fact under RCW 4.22.070. There has been no determination by a trier of fact under RCW 4.22.070 that the claimant's employer or co-employee were at fault for his industrial injuries. There has been no determination by a trier of fact under RCW 4.22.070 that his employer or co-employee were at fault for his industrial injuries before he settled the claim with the third-party, signed the Release of All Claims, and obtained the $200,000.00 third-party recovery.

6. The claimant incurred costs and reasonable attorneys fees associated with this recovery in the amount of $69,877.78.

7. There is no material question of fact presented in this appeal.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction of the subject matter and parties to this proceeding.

2. Claimant's failure to secure a fault determination pursuant to RCW 4.22.070(1) prior to settlement of his third-party action bars any reduction of the Department's reimbursement amount under RCW 51.24.060(1)(f).

3. The order of the Department of Labor and Industries dated February 1, 1993, which affirmed the prior order of December 28, 1992 that determined that the claimant had recovered $200,000.00 and required distribution of the settlement proceeds, as follows: 1) Net share to attorney for fees and costs ($69,877.78); 2) Net share to claimant ($100,013.35); and, 3) Net share to Department ($30,108.87). The Department of Labor and Industries declared a statutory lien against the claimant's third-party recovery for the sum of $46,278.59, demanded reimbursement from the claimant in the amount of $30,108.87, and order no benefits or compensation will be paid to or on behalf of the claimant until such time the excess recovery totalling $67,482.79 has been expended by the claimant for costs incurred as a result of the condition(s) covered under this claim. The December 28, 1992 Department order further provided that pursuant to RCW 51.24.060(7), any unpaid amount shall bear the maximum rate of interest per RCW 19.52.020, beginning sixty days from the date the order is mailed, or sixty days from the date the order is communicated, as established by documentary evidence, is affirmed.

It is so ORDERED.

Dated this 25th day of April, 1994.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
ROBERT L. McCALLISTER Member

DISSENT

I cannot agree with the majority's interpretation of the Clark and Wilson decisions. Their narrow construction of the case law and of our Hrebeniuk decision renders these decisions, in essence, inapplicable.

This change of direction by the majority creates a trap for unwary claimants and their representatives, in contravention of our duty to liberally construe the Act on behalf of the worker and beneficiaries.

Furthermore, inconsistencies in the Clark decision make it unclear whether an employer fault hearing is actually required prior to settlement. As pointed out in Hrebeniuk, the Clark court remanded the Whitten companion case to superior court for a hearing to determine fault even though the parties had already settled the third-party litigation:

> While a determination of fault by a trier of fact should be made before settlement and before any damages are awarded, Whitten has already settled with Associated Building Components. In view of our finding of substantial compliance with the notice requirement, we affirm the court's decision as to the determination of fault, affirm the decision to allow the Department to intervene, and remand to the Superior Court for determination of the reimbursement issue, consistent with this opinion.

(Emphasis added.) Clark, at 195.

It also is clear to me that the Department needs to take a more active role in monitoring third-party claims in order to help alleviate unnecessarily harsh consequences for injured workers and their beneficiaries in this type of case.

Dated this 25th day of April, 1994.

/s/_____
FRANK E. FENNERTY, JR. Member