Brown, Penny

THIRD PARTY ACTIONS (RCW 51.24)

Accord and satisfaction

The principles of accord and satisfaction do not apply to third party lien transactions under the industrial insurance act and do not prevent consideration of the factors of RCW 51.24.060 in responding to a worker's request for compromise of its lien, even if a check tendered with the request is presented for payment. **….*In re Penny Brown,* BIIA Dec., 96 2568 (1999)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PENNY BROWN	)	**DOCKET NO. 96 2568**
	)	
CLAIM NO. T-669803	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Penny Brown, by
Law Offices of Finch & Levandowski, P.L.L.C., per
Richard Levandowski

Self-Insured Employer, Central Kitsap School, by
Craig, Jessup & Stratton, per
Bernadette M. Pratt

Department of Labor and Industries, by
The Office of the Attorney General, per
Diane H. Cornell, Assistant

The claimant, Penny Brown, filed an appeal with the Board of Industrial Insurance Appeals on April 10, 1996, from an order of the Department of Labor and Industries dated February 8, 1996. The order adhered to the provisions of a July 17, 1995 order, which distributed the proceeds of a $45,000 third party settlement with the net share to the self-insured employer determined to be $18,679.54. **REVERSED AND REMANDED.**

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 claimant to a Proposed Decision and Order issued on January 11, 1999, in which the order of the Department dated February 8, 1996, was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and the rulings are affirmed.

We have granted review in this appeal in order to direct the self-insured employer to consider the statutory factors in RCW 51.24.060 before exercising its discretion regarding the compromise of its lien against the third party settlement in this claim. The industrial appeals judge

properly disposed of the remaining issues. Specifically, he rejected the claimant's attempt to invoke the defense of accord and satisfaction to payment of any lien amount, and concluded that the Department calculation properly included time-loss compensation payments made to Ms. Brown between February and October 1994.

For purposes of clarity, we will briefly review the facts in this case. Ms. Brown has a complicated history of industrial injuries and unrelated, serious health problems. They are well summarized in the Proposed Decision and Order and we will not repeat them here. The injury that gave rise to the third party recovery arose from a November 25, 1992 motor vehicle accident in a school bus in which Ms. Brown was riding as a bus safety instructor. As a result of the accident, she injured her left arm and wrist. Recovery from that injury was complicated by her other health problems, and she was off work for varying periods of time, including periods between February 28, 1994 and October 11, 1994. Her claim for the November 25, 1992 industrial injury was open for vocational evaluation during that period, obligating the self-insured employer to continue payment of time-loss compensation until a determination that she was capable of gainful employment or claim closure. Ms. Brown accepted time-loss compensation payments under this claim number for that period without objection.

While her claim was being administered, Ms. Brown pursued a third party action against the other driver in the accident and the insurance carrier that covered the school bus. Apparently her attorney had some communications with the self-insured employer's former claim service administrator, Johnson & Culberson, before July 1994. As a result of that contact, he arrived at a figure purporting to represent amounts paid by the self-insured employer on Ms. Brown's industrial injury claim through September 3, 1993. On July 1, 1994, Eberle Vivian replaced Johnson & Culberson as the self-insured employer's claims administrator.

On September 28, 1994, the claimant's attorney sent a letter to Geri Nelson, the account executive assigned by Eberle Vivian to Ms. Brown's claim. Exhibit No. 11. The letter did not directly request that the self-insured employer compromise its lien. However, it enumerated the factors that influenced Ms. Brown's acceptance of a third party settlement. It alleged that Johnson & Culberson had agreed to a lien compromise amount equal to $8,638.50 (expenses through September 3, 1993) plus medical expenses and time-loss compensation related to the recovery period following carpal tunnel surgery performed on January 25, 1994.

In the September 28, 1994 letter, the claimant's attorney first raised the assertion that any time-loss compensation received after the recovery period from the carpal tunnel release surgery was unrelated to the injury. He indicated the average recovery period was four weeks. The attorney did not attempt to explain why his client accepted benefits she did not feel she was entitled to for the balance of almost a year. Nevertheless, he excluded from his calculation of the self-insured employer's lien amount any time-loss compensation paid after February 1994. Finally, he added the medical expenses incurred after September 3, 1993, and deducted the self-insured employer's share of attorney fees. He thus arrived at a total compromise lien amount of $8,059.73 for the self-insured employer. He enclosed a check made out to the self-insured employer in that amount. Over the endorsement portion of the check he inserted language to the effect that acceptance and deposit of the check constituted full reimbursement of any amounts owed to the self-insured employer.

Ms. Nelson testified that she knew what factors to consider in the event of a lien compromise request. However, she did not consider them in this case because the September 28, 1994 letter did not directly request a compromise. This is an unpersuasively narrow interpretation of the letter. The letter indicated a clear intent on the part of the claimant to have the self-insured employer compromise the lien. The self-insured employer was obliged to consider at least the statutory

factors outlined in RCW 51.24.060, and make a determination on the issue of compromise. *Hadley v. Department of Labor & Indus.*, 116 Wn.2d 897 (1991). Instead, Ms. Nelson simply deposited the check. In June 1995, she requested the Department to calculate the self-insured employer's lien. The Department did so, including the time-loss compensation paid between February 28, 1994 and October 11, 1994. The total lien amounted to $18,679.54. In August and September 1995, Ms. Nelson requested that the claimant pay the balance of the lien.

The claimant raised the defense of accord and satisfaction, alleging that the self-insured employer's deposit of the $8,059.73 check in September 1994 constituted acceptance of the claimant's lien calculations. Accord and satisfaction is a doctrine of contract law, a means by which disputed voluntary transactions may be compromised. The cases cited by the claimant in her Petition for Review all involve contract disputes. Even though one of the parties to the contract in *Department of Fisheries v. J-Z Sales Corp.,* 25 Wn. App. 671 (1980) was a state agency, the relationship between the parties arose out of a voluntary sale and purchase of fish eggs. As a party to a commercial transaction, a state agency is bound by the laws governing contracts of sale, including the doctrine of accord and satisfaction. The Workers' Compensation Act is not the equivalent of a contract. It is a creature of statute. *Crown Zellerbach Corp. v. Department of Labor & Indus*., 98 Wn.2d 102 (1982). As such it is not subject to the ordinary rules of commerce or common law. *Rector v. Department of Labor & Indus.*, 61 Wn. App. 385 (1991). Accord and satisfaction does not apply to third party lien transactions under the Industrial Insurance Act.

The claimant also seeks to characterize any time-loss compensation amounts paid after February 1994 as overpayments recoverable only under RCW 51.32.240 as if paid erroneously. However, the claimant did not provide any evidence in the record to establish that the payments were erroneous. She asserts that wage loss was not an item included in the settlement of the third party claim. The point of this assertion seems to be that any time-loss compensation she received

does not, therefore, constitute a double recovery to the claimant. This allegation has no impact on the determination of whether the self-insured employer was legally obligated to make the time-loss compensation payments. Having made them as required by law in the administration of the claim, the self-insured employer is entitled to reimbursement for them. Ms. Nelson testified as to the legal and factual basis on which the payments were made and their relationship to the accepted condition. The amounts were properly included in the Department's calculation of the lien.

The Department order of February 8, 1996, should be reversed and the claim remanded to the Department with direction to require the self-insured employer to consider the statutory factors in RCW 51.24.060 and respond to the claimant's request for lien compromise. Upon receipt of that response, the Department should issue a further third party distribution order consistent with the self-insured employer's decision.

FINDINGS OF FACT

1. On December 17, 1992, the Department of Labor and Industries received an application for benefits alleging an industrial injury to the claimant on November 25, 1992, during the course of her employment with Central Kitsap School. The claim was allowed and benefits paid. On July 17, 1995, the Department issued an order that distributed the proceeds of a $45,000 third party settlement as follows: $15,192.40 net share for attorney fees and costs; $11,128.06 net share to the claimant; and $18,679.54 net share to the self-insured employer. The order declared a statutory lien of $28,199.10 and determined the claimant would be paid no further benefits until an excess of $2,434.94 was expended. Following a timely protest from the claimant, the Department issued a February 8, 1996 order that adhered to the provisions of the July 17, 1995 order. The claimant mailed her Notice of Appeal from the February 8, 1996 order to the Board of Industrial Insurance Appeals on April 9, 1996. The Board received the Notice of Appeal on April 10, 1996.

2. The September 28, 1994 letter from the claimant's counsel to the self-insured employer's administrator outlined the claimant's request for lien compromise following settlement of third party litigation regarding the claimant's November 25, 1992 industrial injury.

3. The self-insured employer did not consider the statutory factors outlined in RCW 51.24.060 and respond to the claimant's request for lien compromise.

4. The self-insured employer complied with Department orders that directed payment of industrial insurance benefits for the period February 28, 1994 through October 11, 1994, and for a permanent partial disability award. These orders and payments were not protested or appealed by either the claimant or the self-insured employer.

5. The claimant presented no evidence disputing the accuracy of the calculations in the February 8, 1996 order of the Department of Labor and Industries.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this timely filed appeal.

2. The common law contract doctrine of accord and satisfaction does not apply to the distribution of third party settlement proceeds because that is governed by statute, RCW 51.24.060.

3. The self-insured employer was legally obligated to administer the claim through the issuance and payment of time-loss compensation orders for the period from February 28, 1994 through October 11, 1994. These orders were not protested and became final.

4. The Department of Labor and Industries correctly calculated the distribution of the third party settlement proceeds for Ms. Brown's November 25, 1992 industrial injury, absent an agreement by the self-insured employer to compromise its lien against the proceeds of the third party settlement.

5. The self-insured employer is legally obligated to consider the claimant's request for compromise of its lien against the proceeds of the third party settlement, specifically considering the statutory factors outlined in RCW 51.24.060, and to thereupon respond to the claimant's request for lien compromise.

6. The February 8, 1996 order is incorrect and is reversed. The claim is remanded to the Department with direction to issue a further order requiring the self-insured employer to consider the claimant's request for compromise of its lien against the proceeds of the third party settlement, specifically considering the statutory factors outlined in RCW 51.24.060, and to thereupon respond to the claimant's request for lien compromise.

Upon receipt of the self-insured employer's response to the claimant's compromise request, the Department should issue a further distribution order that takes into account the self-insured employer's compromise agreement, if any.

It is so ORDERED.

Dated this 4th day of March, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member