

Boney, Richard, Dec'd

THIRD PARTY ACTIONS (RCW 51.24)

Multiple beneficiaries

The third party recovery distribution is not altered when monies from third parties are received after a worker's death. Monies received after the death and a spouse's pension are not exempt from offset under the third party distribution scheme. ...*In re Richard Boney, Dec'd, BIA Dec., 99 15811, (2001)* [Editor's Note: The Board's decision was appealed to superior court under Pierce County Cause No. 01-2-13652-1.]

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

1 **IN RE: RICHARD L. BONEY, DEC'D**) **DOCKET NOS. 99 15811, 99 22615,**
2) **00 12121 & 00 12211**
3)
4 **CLAIM NO. T-683150**) **DECISION AND ORDER**

5
6 **APPEARANCES:**

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8 Joan Boney, Surviving Spouse of Richard L. Boney, Dec'd, by
9 Schroeter, Goldmark & Bender, per
10 Sidney S. Royer

11
12 Self-Insured Employer, City of Tacoma, by
13 Craig, Jessup & Stratton, per
14 Richard A. Jessup

15
16 Department of Labor and Industries, by
17 The Office of the Attorney General, per
18 Diane Hunter-Cornell, Assistant
19

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21 Joan Boney, the surviving spouse of Richard L. Boney, Dec'd, filed appeals with the Board of
22 Industrial Insurance Appeals to four orders of the Department of Labor and Industries.

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24 **Docket No. 99 15811:** Mrs. Boney filed a Notice of Appeal on May 26, 1999, with the Board
25 from an order of the Department of Labor and Industries dated April 21, 1999. The Department
26 order of April 21, 1999, allowed the claim for spousal pension and ordered that the pension benefits
27 would be deducted from the remaining third party recovery balance of \$190,467.36, until the total
28 sum had been expended in benefits. **AFFIRMED.**

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31 **Docket No. 99 22615:** Mrs. Boney filed an appeal on December 17, 1999, with the Board
32 from a Department order dated August 23, 1999. The Department order dated August 23, 1999,
33 determined that no benefits or compensation would be paid until such time as the excess recovery
34 totaling \$10,786.75 had been expended for costs incurred as a result of the conditions covered
35 under the claim. **AFFIRMED.**

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38 **Docket No. 00 12121:** Mrs. Boney filed an appeal on February 28, 2000, with the Board
39 from a Department order dated June 4, 1999. The Department order of June 4, 1999, determined
40 that no benefits or compensation would be paid until such time as the excess third party recovery
41 totaling \$13,084.76 had been expended for costs incurred as a result of conditions covered under
42 the claim. **AFFIRMED.**
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1 As the monies were received from the various settlements, the Department issued third party
2 distribution orders. These orders followed the statutory scheme calculating the amounts assigned
3 to attorneys' fees and costs, the dollars due the Department and self-insured employer, and
4 determined the excess recovery subject to offset.
5

6
7 On February 20, 1999, Mr. Boney died from mesothelioma. Subsequently, Mrs. Boney filed
8 a claim for spousal benefits. On April 21, 1999, the Department issued an order allowing
9 Mrs. Boney's claim for pension benefits. The order also determined that Mrs. Boney's pension
10 would be subject to the remaining third party recovery balance of \$190,467.36, until the total
11 amount was expended.
12

13
14 After Mr. Boney's death additional third party settlements were paid. These additional
15 recoveries were distributed by Department orders dated June 4, 1999, August 9, 1999, and
16 August 23, 1999. These orders determined there was an additional excess recovery subject to
17 offset in the amount of \$39,636.09.
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20 Third party actions allow an injured worker to recover damages from responsible third
21 parties, and, at the same time, seek industrial insurance benefits. The third party section of the
22 Industrial Insurance Act is Chapter 51.24 of the Revised Code of Washington. RCW 51.24.030
23 provides that:
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25
26 (1) If a third person, not in a worker's same employ, is or may become
27 liable to pay damages on account of a worker's injury for which benefits
28 and compensation are provided under this title, the injured worker or
29 beneficiary may elect to seek damages from the third person.
30

31 . . .

32
33 (3) For the purposes of this chapter, "injury" shall include any physical or
34 mental condition, disease, ailment or loss, including death, for which
35 compensation and benefits are paid or payable under this title.
36

37 . . .

38
39 (5) For the purposes of this chapter, "recovery" includes all damages
40 except loss of consortium.
41

42
43 RCW 51.24.060 provides for the method of the distribution of the amounts recovered under
44 the third party statute. RCW 51.24.060(1)(e) provides that:

45 Thereafter no payment shall be made to or on behalf of a worker or
46 beneficiary by the department and/or self-insurer for such injury until the
47

1 amount of any further compensation and benefits shall equal any such
2 remaining balance Thereafter, such benefits shall be paid by the
3 department and/or self-insurer to or on behalf of the worker or
4 beneficiary as though no recovery had been made from a third person.
5

6 Our reading of the provisions of the third party chapter, RCW 51.24, reveals a legislative
7 scheme that all excess third party recoveries must be exhausted before benefits, including surviving
8 spouse benefits, are paid under the Industrial Insurance Act. The mandatory distribution scheme
9 requires that excess third party recoveries related to the injury or disease that is the subject of the
10 third party action, be used to offset industrial insurance benefits. In this case, Mrs. Boney's pension
11 benefits are undisputedly related to Mr. Boney's occupational disease and subsequent death. The
12 mandatory distribution scheme is not altered simply because a portion of the third party funds were
13 paid before Mr. Boney's death.
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18 We fail to recognize a principled reason for treating settlement funds recovered prior to
19 Mr. Boney's death differently from funds recovered after his death. This is especially true in light of
20 the fact that all funds were recovered as a result of the worker's injury. (See RCW 51.24.030) Both
21 the worker's and the beneficiary's right to bring a third party action and the beneficiary's right to
22 receive industrial insurance benefits flow from the worker's injury (or disease). To the extent that
23 the *Guyette* decision suggests that a spouse's pension is a separate claim for third party distribution
24 purposes, it is overruled.
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28 The plain language of the third party chapter establishes that the Department was correct
29 when it offset Mrs. Boney's spousal pension against all of the remaining balance of excess third
30 party recoveries, including those received by Mr. Boney before his death.
31
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33 The Department orders are correct and should be affirmed.
34

35 **FINDINGS OF FACT**

- 36
37 1. On March 13, 1996, the Department of Labor and Industries received an
38 application for benefits filed on behalf of the claimant alleging an
39 occupational disease of asbestos-related mesothelioma. The claim was
40 subsequently allowed and benefits were paid to the claimant.
41

42 On July 20, 1998, the Department issued a third party distribution order
43 distributing third party recoveries received by Mr. Boney in the amount
44 of \$581,500, of which the self-insured employer received \$84,550.69
45 and the Department received \$2,641.94 for their statutory liens, and
46 determined an offset of excess recovery in the amount of \$128,199.87.
47

1 On December 9, 1998, the Department issued an order distributing an
2 additional third party recovery by Mr. Boney of \$180,000 and
3 determining an excess recovery in the amount of \$54,847,994. On
4 December 14, 1998, the Department issued an order distributing an
5 additional third party recovery in the amount of \$60,000 and determining
6 an additional offset against excess recovery in the amount of
7 \$23,998.13. An additional order was issued on December 14, 1998,
8 distributing an additional third party recovery of \$72,000 and determining
9 an offset of against excess recovery in the amount of \$23,998.13. On
10 December 24, 1998, the Department issued an order distributing an
11 additional third party recovery of \$10,000 and establishing a further
12 offset against excess recovery in the amount of \$4,161.31.
13

14 On April 21, 1999, the Department issued an order placing Joan Boney,
15 the surviving spouse of a totally and permanently disabled worker, on
16 the pension rolls, effective February 20, 1999. On April 21, 1999, the
17 Department issued an additional order allowing the spouse's claim for a
18 pension and then deducting her benefits from the remaining third party
19 recovery balance of \$190,467.36. On May 26, 1999, Mrs. Boney filed a
20 Notice of Appeal with the Board of Industrial Insurance Appeals from the
21 April 21, 1999 Department order. On July 11, 1999, the Board issued
22 an order granting the appeal, assigned Docket No. 99 15811, and
23 ordered that further proceedings be held.
24

25 On June 4, 1999, the Department issued an order distributing an
26 additional third party recovery in the amount of \$40,000 and determining
27 an excess recovery in the amount of \$13,084.76. On or after January 5,
28 2000, the claimant received the Department order dated June 4, 1999.
29 On February 28, 2000, Mrs. Boney filed a Notice of Appeal with the
30 Board of Industrial Insurance Appeals from the Department order dated
31 June 4, 1999. On March 14, 2000. The Board issued an order granting
32 the appeal, assigned Docket No. 00 12121, and ordered that further
33 proceedings be held.
34

35 On August 9, 1999, the Department issued an order distributing an
36 additional third party recovery in the amount of \$45,200 and determining
37 an offset against the excess recovery in the amount of \$15,764.58. On
38 or after January 5, 2000, the claimant received the August 9, 1999
39 Department order. On February 28, 2000, Mrs. Boney filed a Notice of
40 Appeal with the Board of Industrial Insurance Appeals from the
41 Department order dated August 9, 1999. On March 14, 2000, the Board
42 issued an order granting the appeal, assigned Docket No. 00 12211,
43 and ordered that further proceedings be held.
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2 On August 23, 1999, the Department issued an order distributing a
3 further third party recovery in the amount of \$25,570.40 and determined
4 a further offset against excess recovery in the amount of \$10,786.75.
5 On or after November 24, 1999, the claimant received the Department
6 order dated August 23, 1999. On December 17, 1999, Mrs. Boney filed
7 a Notice of Appeal with the Board of Industrial Insurance Appeals from
8 the Department order dated August 23, 1999. On January 14, 2000, the
9 Board issued an order granting the appeal, assigned Docket
10 No. 99 22615, and ordered that further proceedings be held.
11

- 12 2. Richard L. Boney contracted asbestos-related mesothelioma. This
13 condition constitutes an occupational disease under the Washington
14 State Industrial Insurance Act.
15
- 16 3. On September 6, 1996, Richard L. Boney signed a third party election
17 form pursuant to RCW 51.24.030. Subsequently Richard and Joan
18 Boney made a third party recovery against several asbestos
19 manufacturers.
20
- 21 4. Twenty percent of the total third party recovery consisted of Mrs. Joan
22 Boney's claim for loss of consortium.
23
- 24 5. Richard L. Boney died on February 20, 1999, as a result of the effects of
25 his occupational disease.
26
- 27 6. The third party recovery was received in part prior to Mr. Boney's death
28 and part after his death. The excess third party recovery received prior
29 to his death and subject to offset at the time of his death was the
30 amount of \$190,467.36. The amount of excess third party recovery
31 received after his death and subject to offset was the amount of
32 \$39,636.09.
33
- 34 7. Mrs. Joan Boney, as the surviving spouse of a deceased worker whose
35 death resulted from the occupational disease, is entitled to benefits
36 pursuant to RCW 51.32.050.
37

CONCLUSIONS OF LAW

- 38 1. The Board of Industrial Insurance Appeals has jurisdiction over the
39 parties and the subject matter to these appeals.
40
- 41 2. Pursuant to RCW 51.24.060, the Department and the self-insured
42 employer are entitled to offset all excess third party recovery against the
43 benefits paid or payable to Joan Boney under the provisions of
44 RCW 51.32.050.
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3. The orders of the Department of Labor and Industries dated April 21, 1999, June 4, 1999, August 9, 1999, and August 23, 1999, are correct, and are affirmed.

It is so **ORDERED**.

Dated this 24th day of October, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
JUDITH E. SCHURKE Member