Buckles, David

THIRD PARTY ACTIONS (RCW 51.24)

Settlement of action

The worker cannot challenge the amount of a third party settlement in an appeal to the Board from a third party distribution order. Any challenge to the third party settlement has to be in superior court. ***….In re David Buckles,* BIIA Dec., 12 15919 (2015)** [*Editor's Note:* The Board's decision was appealed to superior court under King County Cause No. 15-2-04959-3-KNT.]

Where the third party settlement does not allocate any of the recovery to pain and suffering, but the Department nevertheless allocates a portion of the recovery to pain and suffering in the distribution order, the worker cannot challenge the sufficiency of the allocation. ***….In re David Buckles,* BIIA Dec., 12 15919 (2015)** [*Editor's Note:* The Board's decision was appealed to superior court under King County Cause No. 15-2-04959-3-KNT.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID E. BUCKLES	**)**	**DOCKET NO. 12 15919**
	)	
CLAIM NO. AJ-12677	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, David E. Buckles, by
Smith Freed & Eberhard, P.C., per
Gordon C. Klug

Employer, RayNProof Roofing,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Scott T. Middleton

The claimant, David E. Buckles, filed an appeal with the Board of Industrial Insurance Appeals on May 23, 2012, from an order of the Department of Labor and Industries dated April 16, 2012. In its April 16, 2012 order, the Department declared it had recovered $190,000 from the third party, and of that amount, $15,000 had been allocated to pain and suffering; the statutory distribution of the $190,000 recovery after the allocation was: (1) Net share to attorney for costs and fees $93,756.24; (2) Net share to claimant $20,310.94; and (3) Net share to Department $60,932.82. The Department declared it had paid benefits of $143,409.59, and asserted $130,039.96 against the recovery; and declared that whereas, the Department remitted attorneys fees and costs in the sum of $63,333.33 under RCW 51.24.050(4)(a); whereas, the Department remitted to the claimant $20,310.94, under RCW 51.24.050(4)(b); and that now therefore, the lien against this recovery had been satisfied, and there remained no further liability arising from this third party recovery. The Department order is **AFFIRMED**.

PRELIMINARY MATTERS

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant and Department filed timely Petitions for Review of a Proposed Decision and Order issued on August 22, 2014, in which the industrial appeals judge reversed and remanded the Department order dated April 16, 2012. We have granted review because we disagree with the determination of our industrial appeals judge that the Department's distribution in

its April 16, 2012 order was incorrect, and conclude that the April 16, 2012 order should be affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings. The parties stipulated to the use of discovery depositions as evidence in this appeal. The industrial appeals judge admitted the January 25, 2011 discovery deposition of James Schick as Exhibit No. 47, and the January 25, 2011 discovery deposition of Josh Shattuck as pages 043 through 099 of Exhibit No. 49. However, our review of the September 5, 2013 hearing record shows that the industrial appeals judge intended to publish the discovery depositions. We conclude that the January 25, 2011 discovery depositions of James Schick and Josh Shattuck should be removed as exhibits, and are published as a part of the record.

Our further review of the record shows that Exhibit No. 10 is a duplicate of Exhibit No. 5, and Exhibit No. 19 is a duplicate of Exhibit No. 12. Exhibit Nos. 10 and 19 are rejected. Exhibit Nos. 44 and 46 were misidentified in the record. Exhibit No. 44 is correctly identified as the February 27, 2012 account statement from Attorney Coluccio's office. Exhibit 46 is correctly identified as the November 5, 2008 Kilkelly AMR Report. We have redacted the claimant's social security number at Exhibits 46, 49, and 51. No other prejudicial error was committed, and all other rulings are affirmed.

We agree with our industrial appeals judge who granted partial summary judgment to the Department dismissing Mr. Buckles' claims for violations of the Consumer Protection Act and the Insurance Fair Conduct Act. Our jurisdiction over industrial insurance claims is appellate only, not original, and we are limited by the order under appeal. The Board lacks jurisdiction to apply the Consumer Protection Act and the Insurance Fair Conduct Act to the facts of the settlement, and Mr. Buckles' claims for violations of the Consumer Protection Act and the Insurance Fair Conduct Act were properly dismissed. In the Proposed Decision and Order, the industrial appeals judge failed to mention the partial grant of summary judgment. We also grant review in part to add Findings of Fact and Conclusions of Law. We find that no other prejudicial error was committed and all other rulings are affirmed.

FACTS

The Proposed Decision and Order summarized the issues and evidence in this appeal. We highlight some of the key facts.

David E. Buckles worked as a sales manager for RayNProof Roofing. On November 5, 2008, Mr. Buckles was doing a roofing estimate at GM Construction's job location in Seattle. He climbed up a ladder, and when descending the ladder, fell, landed on his back and head, and suffered a traumatic brain injury. Mr. Buckles has no memory of the accident and cannot describe what happened to him. Mr. Buckles applied for benefits, the claim was allowed, and benefits were provided.

Mr. Buckles testified extensively about the changes in his life caused by his head injury. Prior to his injury he worked a 50-hour week; found time to coach his sons' baseball teams; and perform remodeling and construction work on the side. He was highly energetic, and fun-loving. Since the accident, Mr. Buckles has changed jobs to one where he has a flexible schedule, and is not expected to work full-time. This is to accommodate his frequent debilitating headaches, and significant concentration and short term memory issues. Mr. Buckles is bothered by overstimulation from sound; light; too many people; and too much activity. While he still drives, Mr. Buckles testified to safety issues with his driving. Mr. Buckles' wife, two sons, father and a co-worker, corroborated the changes in his life since the head injury in their testimony.

Just about three months after the injury, the Department sent Mr. Buckles a form regarding the third party recovery, and asked him to make an election to pursue the claim himself, or assign the recovery rights to the Department. Mr. Buckles assigned the right to pursue the third party recovery to the Department, but testified he has no memory of signing the form. Mr. Buckles received a letter dated May 22, 2009, from Susan Baker at the Department that indicated attorney Kevin Coluccio had been retained as a Special Assistant Attorney General to represent the Department and pursue the recovery. Mr. Buckles was concerned that his interests would not be protected, so he retained attorney Mark O'Halloran. Mr. O'Halloran consulted with the Department and Mr. Coluccio, and advised Mr. Buckles to stick with his assignment, and have the Department pursue the case and bear the costs of litigation. The Department provided assurances that Mr. Buckles' interests would be considered. Mr. Buckles had the Department pursue the case.

Mr. Buckles believed Mr. Coluccio was his attorney and Mr. Coluccio held himself out as Mr. Buckles' attorney to others. Mr. Coluccio sued in King County Superior Court in Mr. Buckles' name under Cause No. 10-2-38052-3 SEA.

In May 2011, an initial mediation session was held. The case was not settled. Mr. Buckles became concerned about whether Mr. Coluccio was representing him adequately. Mr. Buckles

testified that in December 2011, Mr. Coluccio yelled at him in a phone conversation, and talked to him like an insurance adjuster instead of like his lawyer. Mr. Buckles consulted attorney Gordon C. Klug, who represented Mr. Buckles. Although Mr. Klug was informed by Mr. Coluccio he was not welcome, he accompanied Mr. Buckles to the next mediation session on March 1, 2012. Mr. and Mrs. Buckles and Mr. Klug were put in a separate conference room at the mediation; not included or consulted; and told by the mediator that while the case had been settled, the mediator could not divulge the settlement. Mr. Buckles called Mr. Coluccio, who did not return his call. Mr. Buckles contacted the Department and was told that they could not yet share the settlement amount with him.

On March 20, 2012, a Notice of Settlement Authorization to Clerk to Strike Trial date was filed in the King County Superior Court Case. On March 23, 2012, the King County Superior Court entered an Order of Dismissal with Prejudice.

On April 16, 2012, the Department issued an order in Mr. Buckles' claim, which provided that the case had been settled for $190,000, and detailed the distribution. Mr. Buckles' receipt of the April 16, 2012 distribution order was the first time he learned the amount of the settlement. This appeal followed.

DECISION

It is uncontested that David E. Buckles assigned his industrial insurance claim related right to recovery from G M Construction, the third party employer, to the Department of Labor and Industries. At issue is Mr. Buckles' dissatisfaction with the settlement, with the amount allocated to his pain and suffering, and with Mr. Coluccio's representation of the third party claim as a Special Assistant Attorney General. The Department seeks a ruling that Mr. Buckles lacks standing to challenge the settlement, or to have the Board evaluate the settlement under an abuse of discretion standard or to have its order deemed correct and affirmed.

Having reviewed the record, we determine that the parties' arguments are largely misplaced. In this appeal, the threshold question is whether the settlement itself is a decision of the Department as contemplated by RCW 51.52.050 and RCW 51.52.060, and subject to appeal. We conclude that the settlement is a negotiated decision, not an independent decision of the Department subject to appeal as contemplated by RCW 51.52.050 and RCW 51.52.060. Because the settlement itself involves parties other than the Department, the law of contracts, and the law of assignment, the Board cannot provide a remedy to any of the parties to the settlement who believe

they are aggrieved by the settlement itself, and their remedies lie in superior court. Likewise, the Board does not have authority to address Mr. Buckle's concerns about Mr. Coluccio's role in the settlement process. In addition, any party who believes they are aggrieved by violations of the Consumer Protection Act and the Insurance Fair Conduct Act must pursue their remedy in superior court. We reach no conclusion as to Mr. Buckles' standing to challenge the settlement, or under what standard the settlement may be evaluated by another tribunal.

What is squarely before us in this appeal of the April 16, 2012 Department order, is whether the Department correctly distributed the settlement under the statute. We first note that the industrial appeals judge incorrectly applied RCW 51.24.060 to this case. A plain reading of the statute leads us to conclude that RCW 51.24.060 applies when an injured worker pursues the third party action on his or her own, and addresses the Department's lien on any recovery. However, because Mr. Buckles assigned his third party action to the Department for recovery, the applicable statute is RCW 51.24.050. The statute provides the method of distribution of any monies recovered from a third party. RCW 51.24.050(4)[1].

We note that the statute is silent on any monies allocated for the worker's pain and suffering. Here, the Department on its own initiative allocated $15,000 to Mr. Buckles for his pain and suffering. Because the Department is not required by statute to provide any portion of the settlement to Mr. Buckles for his pain and suffering, we cannot find that Mr. Buckles is aggrieved by the allocation of an amount. We recognize that Mr. Buckles is dissatisfied with the amount allocated to his pain and suffering, but as we find no authority requiring the Department to make a distribution in the first place, we cannot find Mr. Buckles' to be aggrieved by the allocation of an amount, which appears to be an additional benefit.

In making its distribution, the Department followed the Washington Supreme Court ruling that a pain and suffering award is not considered in making a distribution in a third party settlement

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[1] RCW 51.24.050(4) provides:

(4) Any recovery made by the department or self-insurer shall be distributed as follows:

(a) The department or self-insurer shall be paid the expenses incurred in making the recovery including reasonable costs of legal services;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the recovery made, which shall not be subject to subsection (5) of this section: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the compensation and benefits paid to or on behalf of the injured worker or beneficiary by the department and/or self-insurer; and

(d) The injured worker or beneficiary shall be paid any remaining balance.

case.[2] In its calculations in the April 16, 2012 order, the Department correctly first reduced the settlement amount by the pain and suffering allocation; reduced the amount by attorney fees and costs; and then allocated 25 percent to Mr. Buckles and the remaining 75 percent to itself. We note that had the Department made no allocation for pain and suffering, the total amount Mr. Buckles received would have been less as he would have been limited by statute to a 25 percent share of the recovery after attorney fees and costs were paid.[3]

We conclude that the Department order correctly distributed the settlement proceeds as provided by RCW 51.24.050(4), and must be **AFFIRMED**.

FINDINGS OF FACT

1. On September 10, 2012, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History, as amended, in the Board record solely for jurisdictional purposes.

2. David E. Buckles sustained an industrial injury on November 5, 2008, when he fell from a ladder onto a deck, hitting his back and the back of his head while he was performing a roof estimate in the course of his employment with RayNProof Roofing at the job site of GM Construction. Mr. Buckles sustained a mild traumatic brain injury with evidence of a hematoma.

3. Mr. Buckles filed an industrial insurance claim and received benefits.

4. Mr. Buckles assigned his interest in pursuing a legal claim for his industrial injuries against GM Construction to the Department of Labor and Industries.

5. The Department of Labor and Industries assigned Kevin Coluccio, a Special Attorney General, to pursue the third party action against GM Construction. Mr. Coluccio sued in King County Superior Court.

6. The Department of Labor and Industries and GM Construction settled the third party action for $190,000.

7. The Department awarded Mr. Buckles $15,000 for pain and suffering.

8. Mr. Buckles received a distribution of $20,310.94, representing his 25 percent share of the settlement calculated after reduction for the pain and suffering amount of $15,000, and attorney fees and costs associated with the third party recovery of $93,756.24.

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[2] *Tobin v. Department Labor & Indus.*, 169 Wn.2d 396 (2010).

[3] In the distribution detailed in the April 12, 2012 Department order, Mr. Buckles received $15,000, plus $20,310.94, for a total of $35,310.94. Our calculations show that Mr. Buckles would have received less from the settlement amount calculated by taking the total settlement of $190,000, less $93,756.24, for a subtotal of $96,243.76. Mr. Buckles' twenty-five percent share of this amount would be $24,060.94.

9. In its April 16, 2012 order, the Department declared that its lien against the recovery had been satisfied, and there remained no further liability arising for this third party recovery.

CONCLUSIONS OF LAW

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

2. The Board does not have jurisdiction to hear claims arising under the Consumer Protection Act or the Insurance Fair Conduct Act.

3. The settlement reached by the Department and GM construction under RCW 51.24.050 is not an appealable decision as contemplated under RCW 51.52.050 and RCW 51.52.60.

4. David E. Buckles assigned his right to bring a third party lawsuit to the Department under RCW 51.24.050.

5. The Department exercised its authority to prosecute or compromise the action in its discretion in the name of the injured worker under RCW 51.24.050.

6. The Department distributed the third party recovery settlement proceeds under RCW 51.24.050 and *Tobin v. Department Labor & Indus.*, 169 Wn.2d 396 (2010).

7. The Department order dated April 16, 2012, is correct and is affirmed.

Dated: February 3, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

/s/_____
JACK S. ENG Member