

Mason, William, Dec'd

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Reduction of benefits by prior permanent partial disability award

A spousal pension may not be reduced by the amount of a permanent partial disability award paid to a worker under RCW 51.32.080.*In re William Mason, Dec'd, BIIA Dec., 13 14578 (2014)* [Editor's Note: The Board's decision was appealed to superior court under Clark County Cause No. 14-2-03007-3.]

THIRD PARTY ACTIONS (RCW 51.24)

Lien

RCW 51.24.030(2) does not require the Department or a self-insured employer to file a lien in order to perfect their rights of recovery in third-party settlement proceeds.*In re William Mason, Dec'd, BIIA Dec., 13 14578 (2014)* [Editor's Note: The Board's decision was appealed to superior court under Clark County Cause No. 14-2-03007-3.]

Compromise of lien

RCW 51.24.060 does not give the Department the right to compromise a self-insured employer's interest in third-party settlement proceeds.*In re William Mason, Dec'd, BIIA Dec., 13 14578 (2014)* [Editor's Note: The Board's decision was appealed to superior court under Clark County Cause No. 14-2-03007-3.]

Scroll down for order.

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

1 **IN RE: WILLIAM D. MASON, DEC'D**) **DOCKET NOS. 13 14578, 13 14975,**
2) **13 18374 & 13 18872**
3)
4 **CLAIM NO. S-873414**) **DECISION AND ORDER**
5

6 **APPEARANCES:**
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8 Beneficiary, Estate of William D. Mason, Dec'd, per
9 Parham, Hall & Karmy, by
10 Jill A. Karmy
11

12 Self-Insured Employer, Fort James Corporation, by
13 Law Office of Gress & Clark, LLC, per
14 James L. Gress
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16 Department of Labor and Industries, by
17 The Office of the Attorney General, per
18 Scott T. Middleton
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20 In Docket No. 13 14578, the beneficiary, Estate of William D. Mason, Dec'd, filed an appeal
21 with the Board of Industrial Insurance Appeals on April 11, 2013, from an order of the Department
22 of Labor and Industries dated February 12, 2013. In Docket No. 13 14975, the self-insured
23 employer, Fort James Corporation, filed an appeal with the Board of Industrial Insurance Appeals
24 on April 18, 2013, from the same order. In this order, the Department adhered to the provisions of
25 its orders dated January 11, 2013, January 14, 2013, and January 15, 2013, in which the
26 Department distributed third party settlement proceeds. The Department order is **REVERSED AND**
27 **REMANDED.**
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32 In Docket No. 13 18374, the self-insured employer, Fort James Corporation, filed an appeal
33 with the Board of Industrial Insurance Appeals on June 26, 2013, from an order of the Department
34 of Labor and Industries dated June 3, 2013. In Docket No. 13 18872, the beneficiary, Estate of
35 William D. Mason, Dec'd, filed an appeal with the Board of Industrial Insurance Appeals on July 9,
36 2013, from the same order. In this order, the Department affirmed its March 19, 2013 order, which
37 took action under the direction of the Clark County Superior Court and affirmed the spousal
38 pension; created an overpayment for the 1991 permanent partial disability award, and closed the
39 claim. The Department order is **REVERSED AND REMANDED.**
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DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on May 23, 2014, in which the industrial appeals judge affirmed the Department's February 12, 2013 order and reversed and remanded the Department's June 3, 2013 order. The contested issues addressed in this order include date of manifestation as it relates to permanent partial disability; whether distribution orders issued under a separate asbestos monitoring claim number were res judicata to this claim; whether the self-insured employer is bound by the Department's decision to allocation a portion of the third party settlement to loss of consortium and pain and suffering; and whether the Industrial Insurance Act permits the offsetting of permanent partial disability awards paid to a worker against a death benefit paid to a surviving spouse

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

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FACTS

William D. Mason worked approximately 35 years as a millwright at a paper manufacturing plant in Camas, Washington. Over his career, the plant was owned by different companies, including Georgia-Pacific and Fort James Corporation. These employers are self-insured.

Mr. Mason's work as a millwright caused him to be exposed to asbestos, chlorine and sulfites. He also smoked cigarettes until about 1980. Mr. Mason last worked on April 30, 1986, retiring effective May 1, 1986, because of significant breathing difficulties that made it hard for him to work.

Two years after he retired, Mr. Mason filed an occupational disease claim because of continuing and worsening breathing problems he attributed to work exposures to chemicals and substances that affected his lungs. That claim is identified by Claim No. S-873414 ("S Claim"). His claim, while initially rejected, was allowed on May 5, 1989. Mr. Mason filed a second state-fund claim, Claim No. Y-141164 ("Y Claim"), besides the claim he filed with his employer. That claim was filed with the Department for asbestos-related health testing/monitoring.

On September 9, 1991, the Department issued an order directing Mr. Mason's employer to pay him a permanent partial disability award based on a Category 6 air passage impairment and Category 5 respiratory impairment with an April 30, 1986 date of manifestation. That order never became final. Mr. Mason's employer did, however, pay him \$60,000, the amount then prescribed

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1 by RCW 51.32.080(3), in installments that included interest totaling \$5,946.72. In this appeal, the
2 parties presented the stipulated testimony of Carl A. Brodtkin, M.D. on the subject of the extent of
3 Mr. Mason's permanent partial disability. According to Dr. Brodtkin, Mr. Mason had impairment of
4 lung function attributable in part to his employment and in part to his decades of smoking cigarettes.
5 He thought Mr. Mason's occupationally-related disability was equal to a Category 5 respiratory
6 impairment. Dr. Brodtkin rated Mr. Mason's non-occupational smoking-related impairment as a
7 Category 6 air passage impairment.
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11 In 2001 or 2002, the Masons retained attorney James D. Burns to represent them in
12 personal injury litigation related to Mr. Mason's work-related asbestos exposure. In their personal
13 injury lawsuit, Mr. and Mrs. Mason named numerous entities as being responsible for Mr. Mason's
14 asbestos exposure. The lawsuit was settled in mediation in 2004, without allocation for loss of
15 consortium or pain and suffering.
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19 Mr. Mason died on December 14, 2006. His wife, Mary, survived him. Mrs. Mason applied
20 for the spousal death benefit (spousal pension) provided for by RCW 51.32.050. The Department
21 granted her application.
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24 Between April 2004 and December 2009, Mr. Burns received settlement payments from the
25 numerous entities that were parties to the mediated settlement. Mr. Burns notified the Department
26 of each settlement payment. The first check was distributed by an order dated April 1, 2004, issued
27 under the Y Claim. In that order, the Department allocated 20 percent to Mrs. Mason for loss of
28 consortium and distributed the balance, recovering the total amount of its lien. This order is not the
29 subject of either of the orders on appeal.
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33 Mr. Burns notified the Department of the receipt of settlement checks and the Department
34 issued distribution orders between August 10, 2004, and February 23, 2009. The orders were
35 issued only under the Y Claim. Most orders allocated 20 percent of the settlement to Mrs. Mason
36 for loss of consortium. The final five orders allocated 40 percent of the gross settlement amount to
37 loss of consortium and pain and suffering. The final five orders stated they were a temporary
38 pending final resolution of the *Tobin*¹ appeal. None of the orders were sent to the self-insured
39 employer even though the Department's third party adjudicator knew of the S Claim by April 13,
40 2005. The Masons did not protest or appeal any of the orders.
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¹ *Tobin v. Department of Labor & Indus.*, 169 Wn.2d 396 (2010).

1 Mr. Mason's claim on May 5, 1989. That order became final and binding. The jurisdictional
2 stipulation does not show that the May 5, 1989 order included a date of manifestation
3 determination. We next looked at Exhibit 12, which is a copy of the Proposed Decision and Order
4 in a prior appeal in this claim under Docket Nos. 08 12779, 08 12847 and 08 15075. We denied
5 review and affirmed the Department's award of a spousal pension in an amount based on
6 Mr. Mason's wages his last day of work. That decision was ultimately appealed and affirmed by the
7 Court of Appeals.³ At the beginning of the Decision section on page 11 of the Proposed Decision
8 and Order, our industrial appeals judge wrote that the Department's May 5, 1989 claim allowance
9 order "allowed a lung condition with an effective date of manifestation as of April 30, 1986," and that
10 the order became final and binding. Finding of Fact No. 1 also indicates that the May 5, 1989 order
11 determined an April 30, 1986 manifestation date. With the record suggesting that date of
12 manifestation was res judicata, but the issues on appeal indicating otherwise, we reviewed the
13 Department file under the authority of *In re Mildred Holzerland*.⁴ We found that the May 5, 1989
14 order stated an "injury date" of May 1, 1986, not April 30, 1986. Where that date is stated, though
15 is among the administrative information in the heading portion of the document, not in the
16 substantive portion of the order.

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25 Res judicata effect of a prior order will not be applied unless the order apprises parties "in
26 clear and unmistakable terms" what is being adjudicated.⁵ Based on discussion in our decisions in
27 *Rick Yost*, *Louise Scheeler* and *Roger Crook*, and the history of protests and appeals of
28 Department orders, res judicata effect for date of manifestation purposes cannot be given to the
29 May 1, 1986 date appearing in the final and binding May 5, 1989 order. The 1991 permanent
30 partial disability order, which according to the jurisdictional history facts determined the award
31 based on an April 30, 1986 injury [*sic manifestation*] date, never became final.

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36 Turning to the evidence in the record relating to date of manifestation, it shows that
37 Mr. Mason retired effective May 1, 1986. In Mr. Burns' words, Mr. Mason "quit work at a relatively
38 young age because he couldn't go on" due to breathing difficulties caused by Mr. Mason's
39 occupational exposures to chlorine and other chemicals, and his years of smoking.⁶ While
40 Mr. Mason had not been diagnosed with asbestosis at the time of his retirement, he had years of

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44 ³ *Mason v. Georgia Pacific and Department of Labor & Indus.*, 166 Wn. App. 859 (Div. II, 2012).

45 ⁴ BIIA Dec., 15,729 (1965).

46 ⁵ *In re Rick Yost, Sr.*, BIIA Dec., 01 24199 (2003); *In re Roger Crook*, BIIA Dec., 04 10691 (2005), *In re Louise*
47 *Scheeler*, BIIA Dec., 89 0609 (1990).

⁶ 3/21/14 Tr. at 22.

1 employment-related asbestos exposure. Mr. Burns' testimony also shows that Mr. Mason had been
2 hospitalized in 1983 due to a severe chlorine exposure and that from 1983 on he treated with a
3 pulmonologist due to the effects of smoking and work-related chemical exposures had on his lungs.
4 Dr. Brodkins' testimony identifies no manifestation date. It only identifies a date by which he
5 concluded Mr. Mason's industrially-caused lung condition was disabling. This date is
6 unsubstantiated by other evidence in the record. We are persuaded that Mr. Mason's
7 industrially-caused lung conditions manifested by April 30, 1986 given his 1983 hospitalization, his
8 years of treating with a pulmonologist, and his decision to retire due to breathing difficulties.

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10 Turning to the matter of permanent partial disability proximately caused by industrial
11 exposures, the evidence shows that Mr. Mason's employment caused a Category 5 respiratory
12 impairment. According to Dr. Brodkin, the previously awarded Category 6 air passage impairment
13 was due to cigarette smoking, not work. Permanent partial disability to which he was entitled
14 based on an April 30, 1986 date of manifestation was 65 percent of the unspecified total bodily
15 impairment under WAC 296-20-680(8).

16 **Distribution rights in third party settlement proceeds**

17 **1. The orders issued by the Department between August 2004 and December 2009** 18 **are not res judicata under this claim.**

19 Mrs. Mason argues that the distribution orders issued by the Department between
20 August 2004 and December 2009 are final and binding as to both the Department and the
21 self-insured employer for benefits paid under the S Claim. We disagree for several reasons. First,
22 the Department communicated none of the distribution orders it issued under the Y Claim to the
23 self-insured employer. Second, many of the orders stated that they were temporary, not final
24 orders. Finally, the orders issued under the S Claim, were issued as temporary orders and were
25 protested by the self-insured employer.

26 The time for appealing an order does not run until the order is communicated to a party.⁷
27 Since the Y Claim, orders were never communicated to the self-insured employer, it could not be
28 bound by them. In addition, these orders only determined the Department's lien rights under the
29 Y Claim. True, the Department's third party adjudicator knew of the S Claim in April 2005, but the
30 fact remains that the Department did not take action to adjudicate any distribution rights under the
31 S Claim with its Y Claim orders and neither it nor the self-insured employer can be bound by them.

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⁷ *In re Pamela Miller*, BIIA Dec., 05 12252 (2006).

1 The analysis for the S Claim orders, issued and communicated to the self-insured employer
2 is different. We begin by noting that the Masons did not protest the Department's allocation
3 decision as to its interest in the third party settlement proceeds. We understand Mrs. Mason's
4 position in these appeals to be that she is bound by the allocation decision, but **not** the decision
5 regarding recovery of spousal pension payments, which we discuss below.
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8 The self-insured employer protested the S Claim distribution orders and so the Department's
9 allocation decision did not become final and binding as to it.
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11 **2. The Department and self-insured employer have mandatory rights of recovery**
12 **against third party settlement proceeds.**
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14 As an alternative to her argument that the distribution orders are binding, Mrs. Mason
15 asserts that the self-insured employer should be precluded from receiving any of the settlement
16 proceeds because it did not file a notice of lien. With this argument, Mrs. Mason seeks to have the
17 Board construe the word "lien" as it is used in RCW 51.24.060 to mean that the Department's and
18 self-insured employer's legal status is as a creditor whose interest is unperfected absent the filing a
19 notice, such as described in RCW 51.24.030. We believe such a construction contradicts
20 chapter 51.24 RCW and case law.
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22 A. RCW 51.24.030(2) does not require filing a lien to perfect rights of recovery in third party
23 settlement proceeds.
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25 Mrs. Mason's efforts to bar the self-insured employer's ability to recover benefits it paid is
26 based on RCW 51.24.030(2), which states:
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28 In every action brought under this section, the plaintiff shall give notice to the
29 department or self-insurer when the action is filed. The **department or self-insurer**
30 **may file a notice of statutory interest** in recovery. When such notice has been filed
31 . . . , the parties shall thereafter serve copies of all notices, motions, pleadings, and
32 other process on the department or self-insurer. (Emphasis added.)
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34 Nothing in that language makes filing a notice of statutory interest (lien notice) a prerequisite to
35 either the Department's or a self-insured employer's ability to enforce the interest chapter 51.24
36 RCW grants in a third party lawsuit. It only makes it discretionary and suggests that a lien notice
37 would be filed where the Department or self-insured employer wants to monitor the progress.
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39 Even if the second sentence of RCW 51.24.030(2) could be construed as requiring the
40 self-insured employer to file a lien notice, the first sentence imposes a triggering prerequisite on the
41 worker or worker's beneficiary: the worker or beneficiary must give notice to the self-insured
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1 employer when the third party lawsuit is filed. RCW 51.24.080 also imposes an affirmative notice
2 obligation on the worker.
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4 Because it is Mrs. Mason who contends that self-insured employer should be barred from
5 recovery (assuming this was even legally possible), she is the party who must prove that it received
6 notice. RCW 51.24.080 provides clear guidance on how notice may be accomplished. There is no
7 evidence in the record showing notice occurred in a manner consistent with RCW 51.24.080, or any
8 other manner when the lawsuit was filed or when it was settled. The evidence shows that the
9 Masons' named Georgia Pacific as one defendant. Mr. Burns' testimony suggests this should
10 constitute the notice required by RCW 51.24.030 and/or RCW 51.24.080. The record also shows,
11 though, that Mr. Mason worked at the mill for decades and that over his work career, the mill was
12 owned by many companies, including the named employer in these appeals: Fort James
13 Corporation. We note that the employer named in the May 5, 1989 claim allowance order was
14 James River Corporation. Nothing in the record shows when Georgia-Pacific's ownership
15 commenced, or if it succeeded to or assumed any of the predecessor owners' workers'
16 compensation liabilities.
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18 B. Chapter 51.24 RCW permits the Department and self-insured employer to recover all
19 benefits paid to a workers and beneficiaries.
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21 The language of chapter 51.24 RCW applies to recoveries made by injured workers and
22 beneficiaries. Specifically, RCW 51.24.040 guarantees that benefits provided for any worker or
23 beneficiary by any provision of the Industrial Insurance Act will be paid, regardless of any election
24 or recovery made under chapter 51.24 RCW. And RCW 51.24.060(1) mandates that, "[i]f the
25 injured worker or beneficiary elects to seek damages from the third person, **any recovery** made
26 **shall** be distributed" under the four tier process described in that section.
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28 Mrs. Mason is a beneficiary under the Act. This is so by the definition provided in
29 RCW 51.08.020, which defines beneficiary as including "a husband, wife, child, or dependent of a
30 worker in whom shall vest a right to receive payment under this title," and by her receipt of the
31 spousal pension under RCW 51.32.050.
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33 The Washington Supreme Court construed the relative interest of the Department or
34 self-insured employer in third party recoveries under chapter 51.24 RCW in *Maxey v. Department of*
35 *Labor and Industries*.⁸ There, the court was asked to decide the priority of an IRS lien versus the
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47 ⁸ 114 Wn.2d 542 (1990).

1 Department's interest in third party lawsuit settlement proceeds. The court framed the issue as
2 whether an injured worker had a property interest or a right to a property interest in third party
3 lawsuit proceeds to which an IRS lien may attach. The court held that the Department stood first in
4 line on any recovery and that the worker had no property right or interest in the lawsuit settlement
5 proceeds for the amount that the Department or self-insured employer was to be reimbursed.⁹ The
6 Court explained its holding, saying that "[t]he Department [and self-insured employer have] a
7 **vested right** [in third party litigation proceeds] thereto by virtue of the mandatory distribution which
8 must be made to it under RCW 51.24.060(1)(c)."¹⁰ The Court's reasoning noted three fundamental
9 legal provisions of the Industrial Insurance Act: (1) the state of Washington, by exercise of its
10 police powers, made all rights of an injured worker covered by the Act entirely statutory; (2) all civil
11 causes of action of the injured worker are abolished except as allowed by the Act and
12 RCW 51.24.060 provides a **mandatory order of distribution** of any third party recovery.
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19 Mrs. Mason's argument she has no interest in the settlement proceeds is unpersuasive. The
20 weight of evidence in the record shows she was a party to the third party action. Mr. Burns testified
21 that he represented both Mr. and Mrs. Mason, suing on behalf of both. That Mrs. Mason was a
22 party to the action is further evidenced by the Department's discretionary decision to allocate
23 20 percent of the recovery to loss of consortium and her acceptance of that decision. The
24 phraseology used the Stipulation of Testimony of Mary Mason to suggest that Mr. Mason was the
25 sole party to the lawsuit(s), is self-serving to the outcome sought in these appeals, and so is of little
26 import.
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31 As an additional argument, Mrs. Mason's claims that her spousal pension is a separate claim
32 for third party distribution purposes. She cites RCW 51.32.050 and our 1990 decision of *In re*
33 *Lawrence Guyette, Dec'd*¹¹ in support. Her reliance on *Guyette* is misplaced. In 2001, we
34 overruled *Guyette's* suggestion that a spouse's pension is a separate claim for third party
35 distribution purposes in *In re Richard Boney, Dec'd*.¹² The Department may recover spousal
36 pension benefits paid to Mrs. Mason.
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40 C. Both the permanent partial disability and spousal pension awarded under the claim are
41 recoverable against third party settlement proceeds.
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45 ⁹ *Maxey* at 545.

46 ¹⁰ *Maxey* at 545 (Emphasis added).

47 ¹¹ BIIA, Dec., 89 0832 (1990).

¹² BIIA, Dec., 99 15811 (2001).

1 Mrs. Mason argues that the self-insured employer should be precluded from recovering the
2 permanent partial disability award to Mr. Mason because the lawsuit was for an asbestos related
3 disease and the permanent partial disability award was based primarily on toxic work exposures
4 other than asbestos. To support her argument, she points to Mr. Burns' testimony. Mr. Burns,
5 although not a medical expert, testified about his knowledge of Mr. Mason's medical condition from
6 his perspective as the Masons' attorney in the third-party lawsuit. He said that Mr. Mason had
7 pleural plaquing in the 1990s, and that the plaquing was forerunner of asbestosis. By 2002,
8 Mr. Mason had severe asbestosis. Dr. Bordkin's stipulated testimony was that Mr. Mason had a
9 Category 5 respiratory impairment due to work exposures. He did not parse what exposures
10 caused the impairment. The evidence on the whole indicates Mr. Mason was exposed to asbestos
11 and toxic chemicals throughout his employment. A preponderance of the evidence does not
12 support Mrs. Mason's contention that Mr. Mason's Category 5 respiratory impairment is due to
13 exposures other than asbestos. The self-insured employer may recover the permanent partial
14 disability award of 65 percent of the unspecified total bodily impairment under WAC 296-20-680(8)
15 from the third party settlement proceeds.

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24 D. RCW 51.24.060 does not give the Department the right to compromise a self-insured
25 employer's interest in third party settlement proceeds.

26 The self-insured employer objects to the Department's allocation of a portion of the Masons'
27 settlement to loss of consortium or pain and suffering when the settlement itself failed to do so and
28 because it compromised the self-insured employer's interest without authority. We agree that
29 nothing in RCW 51.24.060 gives the Department the authority to act to compromise a self-insured
30 employer's interest in a third party settlement without its consent. We find no other authority in
31 chapter 51.24 RCW that would give such authority to the Department. The February 12, 2013
32 order is remanded so the self-insured employer's rights and interest in the settlement procedure
33 and proceeds may be addressed.

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38 **The Industrial Insurance Act does not authorize reducing benefits awarded under**
39 **RCW 51.32.050 by the amount of a permanent partial disability awarded under**
40 **RCW 51.32.080.**

41 The parties disagree with how the Department dealt with Mr. Mason's permanent partial
42 disability award in its June 3, 2013 order, and how it factored into the reserve payment required of
43 the self-insured employer related to Mrs. Mason's spousal pension. Mrs. Mason argues that the
44 Department wrongly applied RCW 51.32.080(4) to offset her spousal pension, which is a death
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1 benefit authorized to persons other than an injured worker under RCW 51.32.050. We agree with
2 Ms. Mason.
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4 RCW 51.32.080(4) is limited to instances where a permanent total disability determination is
5 made after a worker has received a permanent partial disability award.
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7 **If permanent partial disability compensation is followed by permanent total**
8 **disability compensation**, all permanent partial disability compensation **paid to the**
9 **worker** under the claim or claims for which total permanent disability compensation is
10 awarded shall be, at the choosing of the injured worker, either: (a) Deducted from the
11 worker's monthly pension benefits until the total award or awards paid are recovered;
12 or (b) deducted from the pension reserve of such injured worker and his or her
13 monthly compensation payments shall be reduced accordingly. Any interest paid on
14 any permanent partial disability compensation may not be deducted from the pension
15 benefits or pension reserve. The provisions of this subsection apply to all permanent
16 total disability determinations issued on or after July 1, 2011. (Emphasis added.)
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18 No language in that subsection, nor anywhere else in RCW 51.32.080, indicates the Legislature
19 intended to have subsection (4)'s offsetting of permanent partial disability benefits apply to any
20 other benefit payable under the Industrial Insurance Act. To the extent this case discloses a
21 perceived conflict between RCW 51.32.080 and RCW 51.32.050, rules of statutory construction say
22 that specific statutes will control over general ones, and, in cases of conflicting Industrial Insurance
23 Act statutes, doubts are resolved in the worker's favor.¹³
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25 The statutory construction analysis made by the Court of Appeals in *Mason v.*
26 *Georgia-Pacific Corp.*¹⁴ is instructive here. That court's decision clarifies that the death benefit
27 provided for under RCW 51.32.050 is separate and distinct from disability benefits provided for
28 injured workers. This is so despite their flowing from the same claim. As the Court of Appeals held
29 in *Mason*,
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34 Although the legislature made no express statement, it is reasonable to conclude that
35 the legislature intended to provide different benefits for workers and survivors.¹⁵
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37 Following rules of construction, and applying the *Mason* decision, we conclude that the Industrial
38 Insurance Act does not allow the Department to reduce a spousal pension under RCW 51.32.050
39 by the amount of a permanent partial disability award paid to a worker under RCW 51.32.080
40 because the spousal pension benefit is separate from the worker's benefits and nothing in the act
41 otherwise gives the Department offset authority.
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45 ¹³ *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467 (1987).
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47 ¹⁴ 166 Wn. App. 859.

¹⁵ *Mason* at 866.

1 **Calculation of overpayment and number of distribution orders**

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3 The self-insured employer asks that the Board calculate the overpayment of permanent
4 partial disability benefits to Mr. Mason and that interest be included in the calculation. It also asks
5 that we direct the Department to issue one distribution order covering all settlement payments. For
6 the Board to grant the relief requested, it must be within matters determined by the Department
7 orders on appeal.¹⁶ If the matters were not passed upon by the Department, the Board would
8 invade the province of the Department and usurp its original jurisdiction to do so in an appeal.¹⁷
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11 The Department's June 3, 2013 order adopted the permanent partial disability determination
12 made in 1991. As we have decided here, that determination, and hence the June 3, 2013 order,
13 was incorrect. The Department has not yet passed on any overpayment, whether interest should
14 be included for overpayment or how it will administer recovery of the overpayment under
15 RCW 51.32.240(4).
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19 As regards the February 12, 2013 order relating to distribution of third party settlement
20 proceeds, it is for the Department to consider how it will address the separate interest and rights of
21 the self-insured employer under chapter 51.24 RCW.
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23 **FINDINGS OF FACT**

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- 25 1. On October 9, 2013, an industrial appeals judge certified that the parties
26 agreed to include the Jurisdictional History in the Board record solely for
27 jurisdictional purposes.
 - 28 2. William D. Mason worked approximately 35 years as a millwright at a
29 paper manufacturing plant until he retired on May 1, 1986. Mr. Mason's
30 last day of work was April 30, 1986. During his work as a millwright,
31 Mr. Mason was exposed to chlorine, sulfite and asbestos.
 - 32 3. In 1983, William D. Mason was hospitalized due to severe exposure to
33 chlorine. From 1983 and continuing thereafter, Mr. Mason treated with a
34 pulmonologist due to occupational exposures and cigarette smoking.
35 Mr. Marson had pleural plaquing in the 1990.
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 - 37 4. William D. Mason's occupationally-related exposures to chlorine,
38 sulfites, and asbestos caused occupationally-related respiratory disease
39 conditions that manifested themselves on April 30, 1986.
 - 40 5. On September 9, 1991, the Department ordered Mr. Mason's
41 self-insured employer to pay him a permanent partial disability benefit
42 equal to a Category 5 respiratory impairment under WAC 296-20-680(8)
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45 ¹⁶ *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970).

46 ¹⁷ *In re Janet Lord*, BIIA Dec., 93 6147 (1996).
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1 and a Category 6 air passage impairment under WAC 296-20-680(10).
2 Mr. Mason protested that order. Pending resolution of the protest,
3 Mr. Mason's employer paid the benefit according to RCW 51.32.080(6).
4

- 5 6. William D. Mason had a permanent partial disability proximately caused
6 by his occupationally-caused respiratory conditions equal to a
7 Category 5 respiratory impairment under WAC 296-20-680(8).
- 8 7. William D. Mason was overpaid permanent partial disability benefits in
9 an amount equal to the difference between what he was paid by his
10 self-insured employer under the September 9, 1991 order and the
11 amount attributable to the Category 5 respiratory impairment under
12 WAC 296-20-680(8,) based on an April 30, 1986 date of manifestation.
- 13 8. Prior to his death, William D. Mason elected, as provided by
14 RCW 51.24.030, to pursue recovery from third parties for injuries
15 caused by his work-related asbestos exposure. Both he and his wife,
16 Mary Mason, filed a third party lawsuit against numerous asbestos
17 manufacturers. The lawsuit was settled in mediation. The settlement
18 agreement(s) did not allocate any portion(s) of the recoveries to
19 categories of damages exempt from chapter 51.24 RCW.
- 20 9. William D. Mason died on December 14, 2006, because of the effects of
21 his occupational diseases.
- 22 10. Mary Mason, as the surviving spouse of a deceased worker whose
23 death resulted from an occupational disease, is entitled to benefits
24 under RCW 51.32.050. This benefit is not a benefit paid to a worker, but
25 is a separate benefit authorized by the Legislature as payable under
26 William D. Mason's occupational disease claim.
- 27 11. As of February 12, 2013, the Department had paid Mary Mason
28 \$132,954.16 in spousal death benefits.
- 29 12. In the distribution orders the Department issued, affirmed by its
30 February 12, 2013 order, the Department's distribution determination for
31 William D. Mason's self-insured employer was based on the Department
32 allocating a portion of the gross settlement proceeds to Mary Mason's
33 loss of consortium and/or William D. Mason's pain and suffering, which
34 are categories of damages exempt from chapter 51.24 RCW. The
35 self-insured employer did not consent to compromising its recovery right
36 by allocating any portion of the settlement to these exempt categories of
37 damages.

38 **CONCLUSIONS OF LAW**

- 39 1. The Board of Industrial Insurance Appeals has jurisdiction over the
40 parties and subject matter in these appeals.
- 41 2. As provided by RCW 51.24.060, the Department and the self-insured
42 employer may recover from the proceeds of William D. and Mary
43 Mason's third party lawsuit all benefits paid or payable to either William
44 D. Mason or Mary Mason under Claim No. S-873414.

- 1 3. William D. Mason's self-insured employer may recover an overpayment
2 of permanent partial disability benefits under one of the means provided
3 by RCW 51.32.240(4).
4
5 4. The benefit Mary Mason may receive under RCW 51.32.050 is not
6 subject to offset by the permanent partial disability benefit paid to
7 William D. Mason under RCW 51.32.080
8
9 5. RCW 51.24.060 does not give the Department the authority to
10 compromise a self-insured employer's right to recover benefits it has
11 paid from proceeds of a third party settlement without the self-insured
12 employer's consent.
13
14 6. The Department order dated February 12, 2013, is incorrect and is
15 reversed.
16
17 7. The Department order dated June 3, 2013, is incorrect and is reversed.
18
19 8. These matters are remanded to the Department to issue further orders
20 consistent with the findings and conclusions above.

21 DATED: September 25, 2014.

22 BOARD OF INDUSTRIAL INSURANCE APPEALS

23
24
25 /s/
26 DAVID E. THREEDY Chairperson

27
28
29
30 /s/
31 JACK S. ENG Member