Kinonen, Kenneth

THIRD PARTY ACTIONS (RCW 51.24)

Recovery limited to injury caused by the third party

Where the worker was awarded a pension by the combined effects of three industrial injury claims and received a third-party recovery for one of the injuries, the Department may not offset benefits for excess recovery against the entire monthly pension benefit, but may only offset against the portion of benefits the worker is receiving due to the industrial injury for which the third-party recovery was made. **….*In re Kenneth Kinonen,* BIIA Dec., 13 19615 (2014)** [*Editor's Note:* The Board's decision was appealed to superior court under Clark County Cause No. 14-2-02838-9.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: KENNETH E. KINONEN	**)**	**DOCKET NO. 13 19615**
	)	
CLAIM NO. W-852973	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Kenneth E. Kinonen, by
English, Lane, Marshall & Vanderwood, PLLC, per
Donald L. English

Self-Insured Employer, City of Vancouver, by
None

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

The claimant, Kenneth E. Kinonen, filed a protest with the Department of Labor and Industries on July 18, 2013, from a Department letter dated June 25, 2013. The protest was transmitted to the Board of Industrial Insurance Appeals on August 13, 2013, to be treated as an appeal. In the June 25, 2013 letter, the Department stated that Mr. Kinonen had been placed on a pension effective August 16, 2010, due to the combined effects of Claim Nos. W852973, W588046, and W852885; the pension was being administered under Claim No. W852973; and it had come to the attention of the pension benefits specialist that Mr. Kinonen had received a third-party settlement on Claim No. W588046 and the Department determined on January 26, 2012, that no benefits were to be paid until the excess recovery of $58,229.32 was expended. The Department notified Mr. Kinonen that no further pension payments would be made to him or his child until the excess recovery was expended, and that the balance as of July 1, 2013, was $56,011.55. The Department determination is **REVERSED AND REMANDED**.

PROCEDURAL AND EVIDENTIARY 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 filed a timely Petition for Review of an April 15, 2014 Proposed Decision and Order, in which the industrial appeals judge affirmed the June 25, 2013 Department determination.

The Board has reviewed the evidentiary rulings in the record of proceedings. The parties filed cross Motions for Summary Judgment, describing and providing various Department orders. Scott Corvin inadvertently failed to attach a copy of the August 11, 2010 pension order to his

Declaration to support the Department's Motion for Summary Judgment. Instead, he provided the August 12, 2010 second injury fund order as part of Attachment B. On February 20, 2014, the assistant attorney general (AAG) faxed a letter to the Board, attaching the August 11, 2010 order and asking it be substituted for the August 12, 2010 order. The claimant "objected to the proposed attempt to change Mr. Corvin's sworn testimony"[1] and the AAG responded by e-mail.

In the Proposed Decision and Order, the industrial appeals judge did not list these additional documents or respond to the Department's request and the claimant's objection. Under CR 56(h) she designated the August 12, 2010 order as one of the documents she considered, but not the August 11, 2010 order.

The August 11, 2010, and August 12, 2010 orders are essential to resolve this appeal. We have therefore considered both orders. We find that no other prejudicial error was committed and all other rulings are affirmed.

Under CR 56(h) we designate the following documents and other evidence considered in reaching our decision:

- Jurisdictional History.
- Claimant's Motion for Summary Judgment, Attorney Fees, Costs and Sanctions.
- Memorandum of Authorities in Support of Claimant's Motion for Summary Judgment and Motion for an Award of Fees, Costs and Sanctions.
- Claimant's Affidavit.
- Department's Opposition to Claimant's Motion for Summary Judgment and Cross Motion for Summary Judgment.
- Declaration of Scott Corvin, with Attachments:

  A. January 18, 2011 Department order.

  B. (1) August 11, 2010 letter from Department to claimant.

  B. (2) August 12, 2010 Department order.

  C. Review Accident Fund Payments.

  D. January 27, 2012 Department order.

  E. December 21, 2011 Order on Agreement of Parties.
- Claimant's Opposition to Department's Cross Motion for Summary Judgment.

[1] February 20, 2014 letter.

We have also considered the February 20, 2014 letter from the AAG; the claimant's objections filed that same date, as well as the Department's responsive e-mail; and the August 11, 2010 order submitted by the Department on February 20, 2014.

ISSUE

When a worker is being paid a combined effects pension as a result of three industrial injuries and there is an excess third-party recovery for one of the injuries under RCW 51.24.060(1)(e), may the Department offset the excess recovery against the full monthly pension payment owed because of all three injuries? Or is the Department limited to offsetting the excess recovery against benefits paid solely because of the injury for which the third-party recovery was received?

DECISION

Mr. Kinonen was placed on a combined effects pension based on three industrial injuries occurring during the course of his employment with the self-insured employer, the City of Vancouver, on October 2, 2002 (W-588046), April 16, 2003 (W-852973), and December 2, 2003 (W-852885). The Department determined that the pension would be administered under Claim No. W852973, the claim with the highest wage rate, and granted the self-insured employer second injury fund relief under RCW 51.16.120.

Mr. Kinonen received a third-party recovery from the tortfeasor responsible for the October 2, 2002 injury and the parties agreed there was an excess recovery of $58,229.32, within the meaning of RCW 51.24.060(1)(e). Based on the parties' agreement, the Department issued a third-party recovery distribution order on January 26, 2012, in Claim No. W-588046, stating that "no benefits or compensation will be paid to or on behalf of the claimant or beneficiary as defined in RCW 51.08.020 until such time as the excess recovery totaling $58,229.32 has been expended by the claimant or beneficiary for costs incurred as a result of the condition(s), injuries, or death covered under this claim."

Full pension benefits were paid from August 16, 2010, until June 15, 2013. At that point, a Department pension benefits specialist learned of the January 26, 2012 Department order distributing the third-party recovery and terminated Mr. Kinonen's pension benefits, mailing him a letter on June 25, 2013, stating:

> It has been brought to my attention that you received a Third Party Settlement on claim W588046. Please see Order and Notice dated 01/26/2012. No benefits were to be paid to you until the excess recovery of $58,229.32 has been expended. No

> further pension payments will be made to you or your child until the excess third party recovery has been expended. Your current pension rate of $4292.44 and your child's rate of $143.09 is being used to expend the excess. The balance of the excess recovery is $56,011.55 effective 07/01/2013.

Mr. Kinonen appealed and the parties filed cross Motions for Summary Judgment. The industrial appeals judge affirmed the Department's June 25, 2013 determination.

In his Petition for Review, Mr. Kinonen argues that the Department is barred from taking the offset because the pension is being administered under Claim No. W-852973, for the April 16, 2003 industrial injury, and the other two claims were closed with no permanent partial disability awards. There is no merit to this argument. The pension was awarded under Claim No. W-852973 for administrative purposes only because the Department cannot administer a combined effects pension under multiple claim numbers. Mr. Kinonen benefited from the Department's decision to use Claim No. W-852973 because that was the claim with the highest wage rate, resulting in the highest monthly pension benefit.

Mr. Kinonen also contends that the Department may not use a combined effects pension as a mechanism for offsetting an excess recovery against benefits owed for other injuries for which no third-party recovery has been received. He argues: "Absent specific statutory authority allowing the Department to offset excess recovery from one incident to another, the Department is prohibited from doing so."[2] He also notes that the industrial appeals judge failed to discuss the interplay between RCW 51.16.120 and RCW 51.24.060 in the Proposed Decision and Order.

Under RCW 51.24.030(1), "[i]f a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person." Mr. Kinonen did that here and as of January 26, 2012, there was a remaining balance subject to offset of $58,229.32 attributable to his October 2, 2002 industrial injury.

When there is an excess recovery or remaining balance subject to offset, RCW 51.24.060(1)(e) provides that "no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees in regards to the remaining balance." RCW 51.24.030(3) defines "injury." "For the purposes of this chapter, 'injury'

[2] Petition for Review, 3.

shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title." As we have previously held,[3] the lien or offset under RCW 51.24.060(1)(e) is limited to compensation and benefits payable for the injury that resulted in the third party recovery. Notably, this differs from RCW 51.32.240(1)(a), which provides that a recipient shall repay an overpayment of benefits and that recoupment "may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be."

In addition, because the Department placed Mr. Kinonen on a combined effects pension, some portion of the monthly pension benefit was related to the April 16, 2003, and December 2, 2003 injuries. Based on the current record, it is not clear how much was attributable to each injury. The August 12, 2010 second injury fund order under Claim No. W-852973 provides some information. In that order the Department determined that:

> Second Injury Fund Relief is applicable in this case. The permanent partial disability caused by this injury would have resulted in an award of $59787.51 which represents category 3 mental health less category 2 paid under claim T421091 plus 19% total bodily impairment for TMJ plus 11.56% binaural hearing loss as calculated in claim W852885. It is therefore ordered that the self-insured employer submit a check payable to the Department of Labor and Industries….The balance of the pension reserve required to pay this pension shall be charged against the Second Injury account.

While the order is not entirely clear, the Department appears to determine that the April 16, 2003, and December 2, 2003 injuries resulted in some permanent partial disability (PPD). Any PPD related to those injuries and contributing to Mr. Kinonen's permanent total disability could not be attributable to the October 2, 2002 industrial injury. Nor would the third-party recovery received because of the October 2, 2002 injury have compensated him for disability caused by the other two injuries. The Department was therefore required to determine what benefits were being paid solely because of the October 2, 2002 industrial injury, and to only offset those benefits.

Several cases support this approach. In *In re Carma Newton*,[4] the worker received a third-party recovery due to medical malpractice. After a lengthy discussion, we held that the excess recovery could not be offset against **all** of the benefits payable under the claim, but only against the benefits the self-insured employer had to pay because of the medical malpractice. Likewise, the

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[3] *In re Carma Newton*, BIIA Dec., 00 13742 (2001); *In re Joseph C. Cole*, Dckt. No. 03 16278 (October 26, 2004).
[4] BIIA Dec., 00 13742 (2001).

excess recovery here cannot be offset against the entire monthly pension benefit, but only against any portion attributable to the October 2, 2002 industrial injury if that can be determined.

Similarly, in *In re Joseph C. Cole*,[5] the worker was involved in a motor vehicle accident (MVA) as he traveled to a medical visit related to his industrial injury. He ultimately received a third-party recovery. The Department asserted a lien without determining what benefits it had paid because of the MVA. We held: "Those benefits provided to Mr. Cole which were not attributable to the motor vehicle accident and which were not a part of the settlement, may not [be] included as part of the Department's lien."[6] Because the record did not establish what benefits had been paid because of the MVA, we remanded to the Department "to undertake an investigation and determine which benefits were provided to Mr. Cole by the Department following the motor vehicle accident of December 27, 2001, and which medical procedures, hospitalization, and recovery costs were the basis for and included in the settlement between Mr. Cole and the insurer of the third party at fault in the motor vehicle accident."[7]

The Department itself adopted an apportionment approach in *In re Darrin Tharaldson*.[8] Mr. Tharaldson suffered an industrial injury to his back on September 17, 2001. A month later, he was involved in an MVA caused by a third party. Like the industrial injury, the accident affected his back. He sued and settled for $50,000. The medical evidence established that Mr. Tharaldson's need for treatment after the MVA was caused by both injuries. The Department asserted a lien against the MVA recovery under RCW 51.24.060, calculating that 60 percent of the benefits it paid after the MVA were attributable to the accident, and reducing its lien accordingly.

On appeal, Mr. Tharaldson challenged the Department's authority to assert a lien against the MVA recovery, and the 60 percent apportionment. The Board affirmed the Department order. The Board's decision was appealed to superior court and from there to the Court of Appeals, resulting in an unpublished decision.[9] Because the decision is unpublished, it has no precedential value. But our discussion would be incomplete if we did not acknowledge the outcome on appeal.

The superior court agreed with the Board that the Department could assert a lien against the recovery for the subsequent MVA. But the superior court held that "'there is no foundation for

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[5] Dckt. No. 03 16278 (October 26, 2004).
[6] Dckt. No. 03 16278, at 8.
[7] Dckt. No. 03 16278, at 12.
[8] BIIA Dec., 04 19948 (2005).
[9] *Tharaldson v. Department of Labor & Indus.*, 2007 Wn. App. LEXIS 2352 (August 7, 2007).

proving that [L&I] paid for something it wouldn't otherwise have had to pay for.'"[10] The superior court therefore vacated the reimbursement demand, finding that the Department incurred no additional expense traceable to the MVA.

The Department appealed and the court of appeals agreed that "if L&I pays benefits for which a third party is responsible, it is entitled to recover those payments from any settlement with the third party."[11] But the court did not consider the medical testimony sufficient to establish that 60 percent of the post MVA benefits paid by the Department were incurred because of the accident. Absent a reasonable basis for determining what benefits were paid because of the initial injury and what benefits were paid because of the MVA for which the worker had received the third-party recovery, the court affirmed the superior court order granting summary judgment to Mr. Tharaldson.

Like the workers in *Newton*, *Cole*, and *Tharaldson*, Mr. Kinonen is receiving benefits due to the combined effects of several injuries. RCW 51.24.060(1)(e) allows the Department only to offset benefits it is paying because of the injury for which the third-party recovery was received. The Department's January 26, 2012 third party recovery distribution order in Claim No. W-588046 acknowledged as much, limiting any offset to benefits paid "for costs incurred as a result of the condition(s), injuries, or death covered under this claim." That's consistent with RCW 51.24.060(1)(e), which limits the offset to benefits paid "for such injury.**"** Based on the January 26, 2012 order, the statutory language, and our prior decisions, the Department cannot offset the excess recovery received for the October 2, 2002 industrial injury against any benefits it is paying for the other two injuries. It can only offset the excess recovery against benefits attributable to the October 2, 2002 industrial injury.

The claimant's Motion for Summary Judgment is granted; the June 25, 2013 Department determination is reversed; and the matter is remanded to the Department to determine whether Mr. Kinonen is receiving any compensation or benefits attributable solely to the October 2, 2002 industrial injury. If so, the Department may stop those benefits until the excess recovery received because of the October 2, 2002 injury is expended. The Department may not stop any benefits payable as a result of the April 16, 2003, and December 2, 2003 injuries, for which no third-party recovery was received.

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[10] *Tharaldson*, 2007 Wn. App. LEXIS 2352 at 4.
[11] *Tharaldson*, 2007 Wn. App. LEXIS 2352 at 7.

FINDINGS OF FACT

1. On December 3, 2013, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Kenneth E. Kinonen sustained three industrial injuries during the course of his employment with the City of Vancouver, on October 2, 2002 (Claim No. W-588046), April 16, 2003 (Claim No. W-852973), and December 2, 2003 (Claim No. W852885). On August 11, 2010, all three claims were open.

3. On August 11, 2010, Mr. Kinonen was placed on a pension effective August 16, 2010, due to the combined effects of the injuries he sustained under Claim Nos. W-852973, W-588046, and W-852885, to be administered under Claim No. W-852973. After a protest, the Department reversed the August 11, 2010 order on January 18, 2011, again placing Mr. Kinonen on a pension effective August 16, 2010, due to the combined effects of the injuries he sustained under Claim Nos. W-852973, W-588046, and W-852885, to be administered under Claim No. W-852973, but indicating that authorization for medical treatment after the effective date of the pension was being considered by the supervisor of industrial insurance.

4. On August 12, 2010, the Department issued an order under Claim No. W-852973, providing second injury fund relief. The Department determined that "the permanent partial disability caused by this injury would have resulted in an award of $59787.51 which represents category 3 mental health less category 2 paid under claim T421091 plus 19% total bodily impairment for TMJ plus 11.56% binaural hearing loss as calculated in claim W852885." The self-insured employer had to pay $59,787.51 to the Department, with the balance of the pension reserve to be charged against the second injury account.

5. Mr. Kinonen began receiving pension benefits on or about August 16, 2010, and continued to receive those benefits until June 15, 2013.

6. The October 2, 2002 industrial injury in Claim No. W588046 resulted from the acts of a third-party tortfeasor and Mr. Kinonen recovered $240,000 from the third party for that injury.

7. On October 13, 2010, the Department issued an order distributing the third-party recovery for the October 2, 2002 industrial injury in Claim No. W588046. After the claimant protested, the Department affirmed the October 13, 2010 order on May 18, 2011.

8. Mr. Kinonen appealed the May 18, 2011 order to the Board of Industrial Insurance Appeals and, on December 21, 2011, the Board issued an Order on Agreement of Parties establishing there was an excess recovery or remaining balance subject to offset of $58,229.32.

9. On January 26, 2012, the Department issued a revised distribution order consistent with the December 21, 2011 Order on Agreement of Parties. The January 26, 2012 order stated that "no benefits or compensation will be paid to or on behalf of the claimant or beneficiary as defined in RCW 51.08.020 until such time as the excess recovery totaling $58,229.32 has been expended by the claimant or beneficiary for costs incurred as a result of the condition(s), injuries, or death covered under this claim."

10. On June 15, 2013, the Department temporarily stopped Mr. Kinonen's pension benefits because of the excess recovery subject to offset under Claim No. W588046.

11. On June 25, 2013, the Department's pension unit mailed a letter to Mr. Kinonen stating that he had been placed on a pension effective August 16, 2010, due to the combined effects of Claim Nos. W-852973, W-588046, and W-852885; the pension was being administered under Claim No. W-852973; and it had come to the attention of the pension benefits specialist that Mr. Kinonen had received a third party settlement on Claim No. W-588046 and the Department determined on January 26, 2012, that no benefits were to be paid until the excess recovery of $58,229.32 was expended. The Department notified Mr. Kinonen that no further pension payments would be made to him or his child until the excess recovery was expended, and that the balance as of July 1, 2013, was $56,011.55.

12. The pleadings and evidence submitted by the parties demonstrate there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

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

2. Mr. Kinonen is entitled to a decision as a matter of law as contemplated by CR 56.

3. When a worker is being paid a combined effects pension based on three industrial injuries, and there is an excess third-party recovery for one of the injuries under RCW 51.24.060(1)(e), the Department may not offset that excess recovery against the full monthly pension payment owed based on all three injuries combined. The Department may only offset the excess recovery against compensation and benefits payable solely because of the injury for which the recovery was made.

4. The June 25, 2013 Department determination is incorrect and is reversed. The matter is remanded to the Department to determine whether Mr. Kinonen is receiving any compensation or benefits attributable solely to the October 2, 2002 industrial injury. If so, the Department may stop those benefits until the excess recovery received because of the October 2, 2002 injury is expended. The Department

may not stop any benefits payable as a result of the April 16, 2003 and December 2, 2003 injuries, for which no third-party recovery was received.

DATED: September 11, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

DISSENT

I disagree with the analysis and the result set forth in the majority opinion, and therefore, I must dissent. The majority decision relies on a number of cases that deal with similar offset issues, however, none of the prior cases cited in the majority opinion deal with a combined effects pension. The cases cited in the majority's decision stand for the proposition that the Department can only offset benefits paid on a claim for conditions associated with a third-party recovery for conditions associated with that claim. That is a correct statement of the law.

The majority opinion then determines that the Department may only offset the excess third-party recovery in this combined effects pension against compensation and benefits payable **solely** as a result of the injury for which the recovery was made. The direction that the majority opinion sends to the Department is for the Department to determine whether Mr. Kinonen is receiving any compensation or benefits attributable **solely** to the injury for which the third-party recovery was made. But Mr. Kinonen is receiving a combined effects pension based on three separate industrial injuries. The benefits Mr. Kinonen is receiving are the monthly pension benefits, so the only offset would be against the monthly pension payments. Because this is a combined effects pension, all three claims form the basis for the pension. Each claim provides support for the pension. In this situation I believe it is impossible to determine that any portion of the pension payment is **solely** due to the injury for which there was a third-party recovery.

The majority opinion provides the foundation necessary to defeat the purpose of the third-party recovery statute. The Department and the self-insured employer have a statutory interest in recovering to protect the State Fund; to ensure that industrial insurance claims are not charged for damages caused by third parties; and to prevent the worker from making a double recovery. But the majority opinion requires the Department to accurately determine a percentage that one injury contributes to the pension when there are multiple causes for the conditions producing the total permanent disability. I do not believe medical science is exact enough to make that determination. Nor is there any provision in the Industrial Insurance Act to support this apportionment of proximate cause.

I also believe the majority opinion will result in more litigation. Different medical professionals can, and will, disagree as to the percentage one cause contributed to the pension when there are multiple proximate causes for the total permanent disability.

Finally, the majority opinion defeats the purpose of the Industrial Insurance Act's requirement that there be sure and certain relief. By remanding this matter to the Department to determine the benefits paid which are **solely** due to the injury for which there was a third-party recovery, the majority lays the foundation for continued litigation on this issue.

I find that the only practical and reasonable resolution in compliance with the Industrial Insurance Act's third-party recovery provisions is to off-set the excess recover against one-third of the pension payments given the facts of this case which establish that the pension payments are the product of three separate claims. This is a fair approach and easily applied.

Dated: September 11, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
JACK S. ENG Member