Compromise of lien against third party recovery (RCW 51.24.060(3))

THIRD PARTY ACTIONS (RCW 51.24)

Compromise of lien

Board's review of the Department's discretionary decision regarding the compromise of its lien pursuant to RCW 51.24.060(3) is limited to determining whether or not the Department has abused its discretion. Department's decision not to compromise its lien because the industrial insurance fund was "not at risk" was not arbitrary and capricious, nor did it constitute an abuse of discretion. ***In re Johnny Smotherman, BIIA Dec., 87 0646 (1989)*** [Editor's Note: Compare, Hadley v. Department of Labor & Indus., 116 Wn.2d 889 (1991). The Board's decision was appealed to superior court under King County Cause No. 89-2-07005.]
IN RE: JOHNNY R. SMOTHERMAN ) DOCKET NO. 87 0646
CLAIM NO. H-677912 ) DECISION AND ORDER

APPEARANCES:

Claimant, Johnny R. Smotherman, by
David A. Kohles

Employer, Mohawk Northern Plastics, Inc.,
None

Department of Labor and Industries, by
The Attorney General, per
Thornton Wilson, Assistant

This is an appeal filed by the claimant on February 20, 1987 from an order of the Department of Labor and Industries dated February 12, 1987 which set aside and held for naught Department orders dated July 24, 1984 and October 3, 1984, recited the factors the Department considered in reaching a determination of whether to grant the claimant's request to compromise the Department's lien, declined to compromise the Department's lien, and ordered the proceeds from the third party recovery distributed pursuant to RCW 51.24.060 as follows: $12,971.97 to the attorney for the claimant; $11,629.78 to the claimant; and $10,398.25 to the Department. The order made a formal demand for reimbursement from the claimant in the amount of $10,398.25. AFFIRMED.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on October 21, 1988 in which the order of the Department dated February 12, 1987 was affirmed.

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

The issues presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order. While we agree with the factual determinations made by the Industrial Appeals Judge and concur in the ultimate result reached in the Proposed Decision and Order, we disagree with the Industrial Appeals Judge's analysis and conclusions regarding this Board's authority to review discretionary acts of the Department of Labor and Industries.
We have previously stated our authority to review discretionary acts of the Department. *In re Gary J. Manley*, BIIA Dec., 66,115 (1986). Additionally, we note that RCW 51.24.060(7) expressly grants to this Board the authority to review Department orders regarding third-party-suit awards and settlements, which necessarily includes the Department’s decision on lien compromise.

The Department’s decision regarding compromise of its lien is discretionary pursuant to the provisions of RCW 51.24.060(3). Our review is limited to determining whether or not the exercise of that authority was an abuse of discretion.

An abuse of discretion involves arbitrary and capricious conduct. *Farrell v. Seattle*, 75 Wn.2d 540, 452 P.2d 965 (1969). On a number of decisions the Washington Supreme Court has stated that arbitrary and capricious conduct is:

“Willful and unreasonable action, without consideration and a disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration, though it may be felt that a different conclusion might have been reached.”


Our review of the record indicates that the Department’s decision regarding the request for a lien compromise involved a review of the statutory criteria set forth in RCW 51.24.060(3), as well as other valid considerations, as discussed in the Proposed Decision and Order. The record also reflects that the claimant had decided to settle with the third party tortfeasor prior to seeking a lien compromise from the Department. While we agree with the Industrial Appeals Judge’s analysis of the facts regarding the Department’s decision, we believe it is also appropriate to comment on the underlying policy considerations which form the basis of the Department’s decision.

The Department’s policy on lien compromise is at the heart of the conflict between the claimant and the Department in this matter. The Department ranks protection of the state industrial insurance fund as one of its primary responsibilities in applying its discretionary authority to compromise. The policy, simply stated, is that the Department will not generally compromise its lien if the industrial insurance fund “is not at risk.” If the Department is able to recover monies on the lien without making a compromise, then generally speaking the Department will not make a compromise. The fund is not at risk. However, if the Department perceives a genuine risk that, should it fail to assist in a third party settlement it may recover no money, then the industrial insurance fund is at risk, and a compromise would be appropriate.
A clear example of this approach is seen in the situation where a settlement occurs first and the Department then is approached for a compromise of its lien. Under the Department policy, the Department would likely decide not to compromise the lien in that instance, since the "fund is not at risk." In essence, the Department knows it is going to be paid the amount due on its lien without compromise. Should the Department agree to a compromise, it would return additional monies to the claimant for no reason. The policy provides that the Department will not compromise the lien merely to enable the claimant to recover a larger amount of money by way of the third party settlement.

While the claimant perceives this policy as producing an opposite effect than intended by the legislation, it should be noted that RCW 51.24.060 merely provides the Department with the authority to enter into a lien compromise. The statute does not require the Department to enter into the lien compromise nor does the statute purport to place the monetary interest of the claimant above the Department's duty to preserve the integrity of the industrial insurance fund.

The policy of the Department regarding the lien compromise is neither arbitrary nor capricious, but represents a reasoned decision that there is no need to compromise the lien if settlement between the claimant and the third party tortfeasor is going to occur, regardless of whether the Department compromises. We agree with the factual determinations of the Industrial Appeals Judge which find that the Department's decision not to compromise was an individualized determination and involved a weighing of the appropriate criteria set forth in RCW 51.24.060(3), as well as other appropriate factors. The Department's decision was not arbitrary and capricious, nor did it constitute an abuse of discretion.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto and a careful review of the entire record before us, we are persuaded that the Department order denying the request for lien compromise is correct and should be affirmed.

We adopt the proposed Findings of Fact Nos. 1 through 4 and Conclusions of Law Nos. 1, 2, 3, and 5 as our final findings and conclusions. Proposed Conclusion of Law No. 4 is deleted and the following Conclusion of Law is entered in its stead:

**CONCLUSIONS OF LAW**

4. The Board of Industrial Insurance Appeals has jurisdiction to review the discretionary decision of the Department of Labor and Industries regarding whether to compromise the Department's lien pursuant to RCW 51.24.060(3). This review authority is expressly granted by RCW 51.24.060(7). The Department's decision to not compromise its lien against Mr. Smotherman's third party recovery was based on a reasoned
policy and on proper consideration of the statutory criteria of RCW 51.24.060(3)(a)(b) and (c), as well as other appropriate factors, and the decision was not arbitrary or capricious and was not an abuse of discretion.

It is so ORDERED.

Dated this 23rd day of January, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member