

Downey, Charles, Dec'd

THIRD PARTY ACTIONS (RCW 51.24)

Surviving spouse's recovery for loss of consortium

When a surviving spouse becomes a beneficiary under the Act and becomes entitled to benefits as a result of the worker's death, independent of the claim of the deceased worker, the previous recovery made under her third party action for loss of consortium is subject to the offset provisions of RCW 51.24.060. ...***In re Charles Downey, Dec'd, BIIA Dec., 87 1718 (1989)*** [Editor's Note: Reversed, *Flanigan v. Department of Labor and Indus.*, 123 Wn.2d 418 (1994).]

Scroll down for order.

1 Although there is a dearth of authority on this particular point, we feel confident in answering the
2 question posed in the affirmative.
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4 As a result of exposure to asbestos during the course of his employment, Mr. Downey
5 contracted the occupational disease of asbestosis which resulted in a successful claim under the
6 Washington Industrial Insurance Act, and a successful tort action against manufacturers of the
7 asbestos products. As a result of the action against the manufacturers, a settlement was negotiated.
8 The recovery was apportioned as follows: 80% to Mr. Downey for his personal injuries, and the
9 remaining 20% to Mrs. Downey for loss of consortium. At the time that the settlement was achieved,
10 the Department of Labor and Industries asserted a lien against the portion of the recovery received by
11 Mr. Downey for his personal injuries, which was applied to offset the benefits paid under his workers'
12 compensation claim. However, no lie was asserted by the Department against the portion of the
13 recovery assigned to Mrs. Downey's claim for loss of consortium. Subsequently, Mr. Downey died on
14 February 27, 1987 as a result of the effects of his occupational disease, and Mrs. Downey filed an
15 application for a spouse's pension under the Act. By the order which is currently on appeal, Mrs.
16 Downey was placed upon the pension rolls as a surviving spouse and, as she had become a
17 beneficiary under the Industrial Insurance Act, the Department claimed the right to offset the amount
18 she received for loss of consortium against the benefits paid and payable to her under the Act.
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27 From the parties' briefs, pleadings, and stipulation it is clear that Mrs. Downey is not contesting
28 the Department's right to offset against the benefits she is currently receiving under the Act any future
29 sums she might recover from third party tortfeasors. In addition, the parties' stipulation establishes
30 that if the Department is entitled to apply the sums Mrs. Downey received during her husband's
31 lifetime in compensation for loss of consortium to offset benefits paid to her after his death, then the
32 Department's lien is \$11,369.57, rather than the higher sum of \$17,331.08 stated in the Department
33 order. Therefore, even though we have determined that the Department has a right to an offset, we
34 must reverse the order to correctly recite the amount of the Department's lien.
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39 An almost universal provision of workers' compensation laws is that the statutory remedy bars
40 all other civil remedies except as explicitly allowed by the particular workers' compensation law. RCW
41 51.04.010, the initial provision of Title 51, states: ". . . all civil actions and civil causes of action for . . .
42 personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished,
43 except as in this title provided." The Legislature also provided in RCW 51.32.010 that:
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1 "Each worker injured in the course of his or her employment, or his or her
2 family or dependents in case of death of the worker, shall receive
3 compensation in accordance with this chapter, and, except as in this title
4 otherwise provided, such payment shall be in lieu of any and rights of
5 action whatsoever against any person whomsoever..."
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7 Consideration of these statutory provisions leads to the inescapable conclusion that the State of
8 Washington's "exclusive remedy" provisions fall within the most restrictive category as described by
9 Professor Larson in his treatise on workers' compensation. 2A A. Larson, The Law of Workmen's
10 Compensation, § 66.10 (1988).
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12 The right of a wife to recover damages for loss of consortium because of her husband's injury
13 due to the negligent acts of another was established by the Washington Supreme Court in Lundgren v.
14 Whitney's Inc., 94 Wn.2d 91, 94 (1980). While that case did not involve an injury which resulted in the
15 payment of workers' compensation benefits, it did specifically overrule Ash v. S. S. Mullen, Inc., 43
16 Wn.2d 345 (1953) in respect to a wife's right to maintain an action for loss of consortium. Lundgren
17 established that a wife has a cause of action for loss of her husband's consortium due to the
18 negligence of a third party. However, Lundgren did not alter the holding of Ash, which barred a wife's
19 cause of action against her injured husband's employer. Further, while a wife now has a separate and
20 independent cause of action for loss of consortium, the injury leading to this claim is derivative from
21 the husband's original injury. Reichelt v. Johns-Manville Corporation, 107 Wn.2d 761, 774 (1987).
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23 Absent the specific provisions of Chapter 51.24 RCW, the "exclusive remedy" provisions
24 contained in RCW 51.04.010 and RCW 51.32.010 would have precluded Mrs. Downey from asserting
25 her common law loss of consortium claim against the third party tortfeasors. It is clear that the
26 Washington Industrial Insurance Act bars an action by a wife against her husband's employer or fellow
27 employee for loss of consortium as a result of their negligence, even though ". . . the injury for loss of
28 consortium was incurred by the wife, separate and distinct from the injury incurred by her husband."
29 Ash, at 347-48." Provost v. Puget Sound Power & Light Co., 103 Wn.2d 750, 754 (1985). This is true
30 because the Act provides the exclusive remedy for workers' families as well as workers. A cursory
31 perusal of Sections 66.20 and 66.21 of 2A A. Larson, The Law of Workmen's Compensation (1988)
32 reveals that this is not a position which is unique to the State of Washington. In addition, the restrictive
33 nature of our statute's "exclusive remedy" provision is also clearly established by two decisions which
34 barred wrongful death actions by the nondependent parents of children killed during the course of
35 employment. West v. Zeibell, 87 Wn.2d 198 (1976); Ledesma v. A. F. Murch Co., 87 Wn.2d 203
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1 (1976). Thus, the Industrial Insurance Act is the exclusive remedy even for a worker's parents who
2 are not beneficiaries under the Act.
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4 Because of the exclusive remedy provisions of the Industrial Insurance Act, Mrs. Downey is
5 totally dependent upon the permissive provisions of Chapter 51.24 RCW to assert any civil claim
6 arising out of her husband's disease of asbestosis. Absent the provisions of RCW 51.24.030, which
7 allow an injured worker or beneficiary to seek damages from a third party "not in a worker's same
8 employ", Mrs. Downey could not have maintained an action for loss of consortium against the
9 asbestos products manufacturers. Since she was dependent upon that provision to maintain her claim
10 for loss of consortium, she is also subject to the provisions of RCW 51.24.060. That statutory section
11 provides for distribution of awards or settlements recovered by an injured worker or beneficiary in the
12 third-party action. At the time that she received the portion of the settlement which was to compensate
13 her for loss of consortium, she was not a beneficiary under the Act and the Department was not then
14 entitled to any of these funds as it had paid none on her behalf. Following her husband's death she
15 successfully applied for benefits under the Act, became a beneficiary, and as such is subject to the
16 provisions of RCW 51.24.060. Once she became a beneficiary and began receiving benefits under
17 her own claim, independent of the claim of her late husband, the money received under the third-party
18 settlement to compensate her for loss of consortium was subject to the Department's lien.
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20 Although this precise issue has not been previously considered by the appellate courts in this
21 jurisdiction, we feel that the Legislature's intent is clearly established by the provisions of RCW
22 51.04.010, 51.32.010, and Chapter 51.24 RCW. Damages recovered as a result of injuries which
23 result in the payment of benefits under the Industrial Insurance Act are to be at least in part offset
24 against the benefits paid under the Act. When she became a beneficiary under the Act, Mrs.
25 Downey's recovery for loss of consortium fell within the purview of these provisions. The Department
26 therefore may offset those settlement proceeds against any benefits she may receive under the Act, in
27 accordance with the provisions of RCW 51.24.060. However, we must reverse the Department order
28 to reduce the excess third party recovery subject to offset from \$17,331.08 to \$11,369.57, the latter
29 amount being established by the parties' stipulation.
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1 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto,
2 the briefs of the parties, the Stipulation of Facts and Issue, and a careful review of the entire record
3 before us, we hereby enter the following:
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7 **FINDINGS OF FACT**

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9 1. On September 12, 1968 an accident report from the claimant was
10 received by the Department of Labor and Industries alleging asbestosis,
11 right lung, arising out of employment with The Brower Company.

12 Various time loss compensation orders were issued. On July 17, 1986 the
13 Department issued an order which determined the claimant's new monthly
14 rate of compensation effective July 1, 1986, determined an overpayment
15 in the amount of \$387.30 and determined it would be deducted from future
16 awards at \$30.00 per month.

17 On July 25, 1986 the Department issued an order which corrected and
18 superseded the Department order dated July 17, 1986 and determined
19 that no overpayment exists for the period from July 1, 1986 to July 31,
20 1986 inclusive.
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22 On April 3, 1987 the Department issued an order which approved the
23 surviving-spouse's claim for benefits and ordered that ongoing benefits be
24 deducted from an excess third party recovery in the amount of \$17,331.08
25 until that sum has been expended in entitlement.

26 On June 1, 1987 a notice of appeal from the surviving-spouse petitioner
27 was received by the Board of Industrial Insurance Appeals.
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29 On June 30, 1987 the Board issued an order granting the appeal,
30 assigning Docket No. 87 1718.

- 31 2. Charles Downey contracted asbestosis as a result of his work. He
32 received industrial insurance benefits from the Department in Claim No. F-
33 723788.
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35 3. Mr. Downey died on February 27, 1987. Miriam Downey is his surviving
36 spouse.
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38 4. Before his death, Mr. and Mrs. Downey brought a tort action against
39 several asbestos product manufacturers, seeking damages for Mr.
40 Downey's asbestosis and for loss of consortium.
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42 5. Before Mr. Downey died, the Downeys had recovered a total of
43 \$184,875.00 in their third-party lawsuit.
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45 6. The Department policy in asbestos cases, which is not contested, is that
46 80% of the recovery may be allocated to the worker and 20% may be
47 allocated to the spouse for loss of consortium.

- 1 7. Pursuant to the Department's policy for allocating the recovery, Mrs.
2 Downey's share of the \$184,875.00 recovery was \$35,225.00.
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- 4 8. The Department asserted a lien against Mr. Downey's 80% share of the
5 recovery, for compensation paid to him or on his behalf. The Department
6 did not assert a lien before Mr. Downey's death, against Mrs. Downey's
7 20% share of the recovery.
- 8 9. After Mr. Downey died, Mrs. Downey applied for and was awarded a
9 surviving spouse's pension.
- 10 10. The Department order on appeal determined that Mrs. Downey's 20%
11 share of the third-party recovery must be used to offset her pension
12 benefits. The Department order does not offset Mrs. Downey's share of
13 the recovery against the compensation and benefits paid to or on behalf of
14 Mr. Downey during his lifetime.
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- 16 11. The Department order failed to calculate the Department's share of Mrs.
17 Downey's attorney fees and costs. When those items are taken into
18 consideration, the correct offset amount is \$11,369.57, not \$17,331.08.

CONCLUSIONS OF LAW

- 19 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
20 and the subject matter of this appeal.
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- 22 2. At the time Mrs. Downey received her loss of consortium recovery in the
23 third party action against the asbestos manufacturers, she was not an
24 "injured worker" or a "beneficiary" within the meaning of RCW 51.08.020
25 and Chapter 51.24 RCW.
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- 27 3. Miriam Downey became a beneficiary within the meaning of RCW
28 51.08.020 and Chapter 51.24 RCW when her claim for a pension as the
29 surviving spouse of Charles H. Downey was allowed on April 3, 1987.
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- 31 4. Miriam Downey is a beneficiary within the provisions of Chapter 51.24
32 RCW, and the Department of Labor and Industries has a lien under the
33 provisions of that chapter against any recoveries made by Mrs. Downey
34 for claims arising out of the occupational disease of her husband, which
35 gave rise to her right to benefits under the Act.
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- 37 5. The Department of Labor and Industries is entitled, under the provisions of
38 RCW 51.24.060, to offset Mariam Downey's recovery for loss of
39 consortium prior to her husband's death against any benefits paid or
40 payable as the result of her receiving a pension as a surviving spouse.
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- 42 6. The order of the Department of Labor and Industries dated April 3, 1987
43 which approved the surviving-spouse's claim for benefits and ordered that
44 benefits be deducted from an excess third party recovery in the amount of
45 \$17,331.08 until that sum has been expended in entitlement, is incorrect
46 and is reversed and the claim is remanded to the Department of Labor
47 and Industries with directions to enter an order approving the
surviving-spouse's claim for benefits and ordering that the excess third

1 party recovery, in the amount of \$11,369.57, be offset against benefits
2 payable under the Act until the sum of \$11,369.57 has been expended in
3 entitlement.
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5 It is so ORDERED.

6 Dated this 31st day of May, 1989.
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9 BOARD OF INDUSTRIAL INSURANCE APPEALS

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11
12 /s/
13 SARA T. HARMON _____ Chairperson
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16 /s/
17 PHILLIP T. BORK _____ Member
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