RETROACTIVITY OF STATUTORY AMENDMENTS

Underinsured motorist insurance recovery (RCW 51.24.030)

THIRD PARTY ACTIONS (RCW 51.24)

Underinsured motorist insurance policy owned by employer

The 1986 amendments to RCW 51.24.030 were clarifying amendments, at least insofar as they explicitly stated that the Department or self-insured employer has a lien against a worker's recovery under the employer's underinsured motorist coverage. Thus, the 1986 amendments are retroactive, as a legislative interpretation of the original Act, and the Department or self-insurer has a lien against the worker's recovery under the employer's underinsured motorist policy. *...In re Dale Goers*, **BIIA Dec.**, **88 0661 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-02137-2.]; *In re Lowell Taylor*, **BIIA Dec.**, **87 3817 (1989)** [*Editor's Note*: Contra, *Department of Labor & Indus. v. Cobb*, 59 Wn. App. 360 (1990) *review denied* 116 Wn.2d 1031 (1991). *Cf. O'Rourke v. Department of Labor & Indus.*, 57 Wn. App. 374 (1990) *review denied* 115 Wn.2d 1002 (1990).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

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IN RE: DALE F. GOERS

DOCKET NO. 88 0661

CLAIM NO. J-501066 APPEARANCES:

DECISION AND ORDER

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Claimant, Dale F. Goers, by Rudolf V. Mueller

Employer, Gelco Corporation, None

Department of Labor and Industries, by The Attorney General, per Laurel J. Anderson, Paralegal and Thornton Wilson, Assistant

This is an appeal filed by the claimant, Dale F. Goers, on December 28, 1987 with the Department of Labor and Industries which was transmitted by the Department to the Board of Industrial Insurance Appeals on February 12, 1988. The claimant appeals an order of the Department of Labor and Industries dated November 3, 1987 adhering to the provisions of a Department letter dated August 24, 1987 stating that no further payments would be made by the Department to Dale F. Goers until she had expended \$93,366.87, present value, for costs related to the industrial injury occurring November 2, 1984; that distribution of settlement proceeds in Ms. Goers' action against the third party for damages incurred as a result of the injury of November 2, 1984 be made in accordance with RCW 51.24.060, and that Ms. Goers' net share of recovery is \$149,761.94, present value, of which\$93,366.87, present value, is subject to excess offset. The Department order is **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, and a response filed by the Department, to a Proposed Decision and Order issued on August 10, 1988 in which the order of the Department dated November 3, 1987 was affirmed.

Resolution of this appeal is based upon a stipulation of facts. No briefs were filed by the parties.

The issue before us is whether the Department of Labor and Industries has a lien against the claimant's recovery under the underinsured motorist coverage (UMC) provisions of her employer's insurance policy. There is no substantial dispute regarding the facts in this case. Dale Goers was injured while in the course of her employment on November 2, 1984. This injury was caused by an uninsured third party. Ms. Goers filed an industrial insurance claim with the Department for the

November 2, 1984 injury and was paid industrial insurance benefits under Claim No. J-501066. On or about July 16, 1987 Ms. Goers recovered for a damage claim under the UMC provisions of her employer's insurance policy. The parties agree that if the Department has a legal right to reimbursement from Ms. Goers' UMC recovery, the Department has correctly calculated its share of the recovery under RCW 51.24.060 of \$24,981.52¹, and has correctly denied future benefits until the excess recovery of \$93,366.87, present value, has been expended.

We begin with an overview of the historical framework of this issue, both in the case law and in legislation. On March 15, 1985, the Board issued a Decision and Order in <u>In re Michael Morrissey</u>, BIIA Dec., 66,831 (1985), with then Chairman Michael Hall and Board Member Frank E. Fennerty signing the majority opinion, and Phillip T. Bork dissenting.

The third party statute applicable in <u>Morrissey</u> read as follows:

"If the injury to a worker is due to the negligence or wrong of a third person not in the same employ, the injured worker or beneficiary may elect to seek damages from the third person.

"Laws of 1977, 1st ex.sess., ch. 85, § 1, p. 364. The Board majority concluded in <u>Morrissey</u> that the Department did not have a lien against the claimant's recovery under his employer's UMC policy provisions. The Department appealed, the Superior Court granted summary judgment in claimant's favor, and the Department appealed to the Court of Appeals.

In the meantime, during the very next legislative session, and apparently in response to the Board's Decision and Order in <u>Morrissey</u>, the Legislature amended Chapter 51.24 as follows:

(1) If ((an injury to a worker)) <u>a third person, not in a worker's same</u> 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 ((is due to the negligence or wrong of a third person not in the same employ)), the injured worker or beneficiary may elect to seek damages from the third person.

(3) <u>Damages recoverable by a worker or beneficiary pursuant to the</u> <u>Underinsured motorist coverage of an insurance policy shall be subject to</u> <u>this chapter only if the owner of the policy is the employer of the injured</u> <u>worker</u>.

Laws of 1986, ch. 58, § 1, p. 189.

¹ Both parties stipulated that the November 3, 1987 Department order demanded that the claimant reimburse the Department in the amount of \$24,981.52. We have reviewed the November 3, 1987 order and the August 24, 1987 letter and find no such reference. However, the sole issue before us is the legal propriety of the Department's lien, not the amount.

On October 5, 1987, the Court of Appeals, Division I, decided <u>Morrissey</u>, reversing the Superior Court's affirmance of the Board Decision and Order and concluding that, even under the statute as it read prior to the 1986 amendments, the Department was entitled to a lien on the claimant's recovery under his employer's UMC policy provisions. At that time, the Court of Appeals decided not to publish its decision. However, on October 12, 1988 the court determined that the <u>Morrissey</u> decision would be of precedential value and entered an Order Granting Motion to Publish. Thereafter, on November 1, 1988, the court reversed itself and entered an Order Withdrawing Publication. Thus, there is no binding reported appellate court decision on the issue which is before us.² <u>See State v. Fitzpatrick</u>, 5 Wn.App. 661, 668 (1971).

The 1986 amendments are not explicitly made retroactive. However, if the 1986 amendments are considered to be clarifying amendments, then they are "effective from the date of the original act even in the absence of a provision for retroactivity. "<u>Overton v. Economic Assistance Authority</u>, 96 Wn.2d 552, 558 (1981). Because Ms. Goers was injured on November 2, 1984 and settled her third party action on July 16, 1987, RCW 51.24.030 as amended in 1984 would ordinarily be applicable. <u>See</u> RCW 51.24.902. However, if the 1986 amendments are retroactive, then they would apply to this claim. Thus, there are two questions before us: 1) whether, under RCW 51.24.030, as amended in 1984, the Department is entitled to a lien against Ms. Goers' July 16, 1987 recovery under her employer's UMC policy provisions; and 2) whether the 1986 amendments are retroactive.

RCW 51.24.030(1) as amended in 1984 read as follows:

(1) If ((the)) an injury to a worker for which benefits and compensation are provided under this title is due to the negligence or wrong of a third person not in the same employ, the injured worker or beneficiary may elect to seek damages from the third person.

Laws of 1984, ch. 218, § 3, p. 1105, effective June 17, 1984.

The Industrial Insurance Act is the exclusive remedy for workers injured during the course of employment. There is no remedy outside the Act for a worker who is entitled to workers' compensation benefits, except as specifically permitted by the Act. <u>Bankhead v. Aztec Construction</u>, 48 Wn.App. 102, 104-105 (1987). Indeed it is difficult to imagine more extensive exclusivity provisions than those contained in RCW 51.04.010 and RCW 51.32.010.

² The Supreme Court denied review at 110 Wn.2d 1015 (1988).

RCW 51.04.010 provides as follows:

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

(Emphasis added).

RCW 51.32.010 provides as follows:

Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.

(Emphasis added).

Given the exclusivity of the Act, the only source for Ms. Goers' right to recover under the UMC provisions of her employer's policy must be pursuant to the provisions of Chapter 51.24, the "third party chapter". But, with that right, Chapter 51.24 also imposes a lien in favor of the Department. Ms. Goers cannot, on the one hand, rely on Chapter 51.24 to permit her to recover under her employer's UMC policy provisions and, at the same time, contend that the lien set forth in Chapter 51.24 does not apply to the recovery.

The problem in the interpretation of RCW 51.24.030 arises because, prior to the 1986 amendments, that section contained the following language: "if an injury . . . is due to the negligence or wrong of a <u>third person</u>" the worker "may elect to seek damages from the <u>third person</u>." (Emphasis added). Because of this language, the argument can be made that Chapter 51.24 contemplated

actions sounding in tort, not in contract. Since the UMC carrier is not, technically speaking, a third person tortfeasor, the argument can be made that the Department has no lien against Ms. Goers' recovery.

However, in our view, the focus must be broader. The underinsured motorist statute, RCW 48.22.030, requires that every vehicle insurance policy contain coverage "for the protection of persons insured thereunder who are <u>legally entitled</u> to recover damages from owners or operators of underinsured motor vehicles." (Emphasis added). Thus, only those persons "legally entitled to recover" from the underinsured tortfeasor may recover under the UMC provisions of the insurance policy.

The UMC carrier may assert any defense available to the underinsured tortfeasor. The carrier "stands . . . in the shoes of the uninsured motorist." <u>State Farm Mutual Auto Insurance Company v.</u> <u>Bafus</u>, 77 Wn.2d 720, 724 (1970). If the injured person is statutorily barred from recovering damages from the underinsured tortfeasor, no recovery can be had against the carrier. <u>Sayan v. United Services Automobile Association</u>, 43 Wn.App. 148, <u>rev. denied</u>, 106 Wn.2d 1009 (1986). (Tortfeasor was an army officer and therefore was immune from suit; held: plaintiff could not recover under UMC provisions of policy.)

Ms. Goers was only "legally entitled to recover" from the uninsured tortfeasor because RCW 51.24.030 specifically so provided. It is only because of that legal entitlement, created by RCW 51.24.030, that she was able to recover under her employer's UMC policy provisions. Had Chapter 51.24 not provided an exception to the exclusive remedy, Ms. Goers would have been barred from recovering under her employer's UMC policy provisions. <u>See Sayan</u>. Thus, Ms. Goers' UMC recovery was authorized by Chapter 51.24 and the concomitant lien in the Department's favor must also apply.

Furthermore, the purpose of the underinsured motorist statute is to allow an injured person to recover those damages that would have been recovered had the tortfeasor maintained liability insurance. <u>Finney v. Farmer's Insurance Co.</u>, 92 Wn.2d 748, 751, 600 P.2d 1272 (1979). In this case, if the tortfeasor had maintained liability insurance, there is no question that any recovery made by Ms. Goers would have been subject to the Department's lien. If Ms. Goers is allowed to keep her underinsured motorist recovery without reduction by the Department's lien, she will recover more than she would have if the tortfeasor had maintained liability insurance. Such a result would be contrary not only to the purpose of RCW Chapter 51.24, but also to the underinsured motorist statute. <u>See Sayan</u>.

In concluding that the statute as it read prior to the 1986 amendments permitted the Department to assert a lien against a worker's recovery under the UMC provisions of his or her employer's policy, we are concluding that the 1986 amendments were clarifying and retroactive, at least insofar as they explicitly provided that the Department or self-insurer has a lien against a worker's UMC recovery under his or her employer's policy. Obviously, the amendments also represent a <u>change</u> in the statute insofar as the lien is now <u>limited</u> to a UMC recovery under the <u>employer's policy</u>.

In determining that the 1986 amendments were "clarifying", we have considered a number of factors: 1. <u>Ambiguity of RCW 51.24.030</u>. Overton v. Economic Assistance Authority, 96 Wn.2d 552 (1981). RCW 51.24.030, prior to the 1986 amendments, was ambiguous, since it did not explicitly provide for a lien against a worker's UMC recovery under the employer's policy and since the statutory language was susceptible of more than one reasonable interpretation; 2. <u>Legislative action in response to controversy over interpretation of the statute</u>. Johnson v. Continental West, Inc., 99 Wn.2d 555 (1983). As detailed above, the 1986 amendments were in response to the controversy engendered by our decision in <u>Morrissey</u>. Thus, we regard the 1986 amendments as legislative interpretation of the statute. <u>Ridder v. Department of Revenue</u>, 43 Wn.App 21 (1986). The 1986 amendments conformed with the Department's prior interpretation of the statute; and 4. <u>Conformity of the amendments are compatible with the interpretation of the statute</u>. Johnson. The 1986 amendments do not depart from any Supreme Court interpretation of the statute. To the contrary, the 1986 amendments are compatible with the interpretation placed on Chapter 51.24 by the Supreme Court in <u>Lundeen v. Department of Labor and Industries</u>, 78 Wn.2d 66 (1970).

In that case, the Supreme Court was faced with the question of whether a recovery under the Military Claims Act (under which relief is not predicated upon the negligence or wrong of another) constituted a third party recovery pursuant to RCW 51.24, and was therefore subject to the Department's lien. The statute in effect at that time contained essentially the same language that is at issue here under the 1984 version of RCW 51.24.030, i.e., "if the injury to a workman is due to negligence or wrong of another not in the same employ . . . the injured workman . . . shall elect whether to take under this title or seek a remedy against such other" In Lundeen, the Supreme Court concluded that the Department did have a lien against the recovery even though the cause of action did not sound in tort. The 1986 amendments to Ch. 51.24 are therefore compatible with Lundeen.

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For the foregoing reasons, we find no difficulty in concluding that the 1986 amendments were clarifying amendments, at least insofar as they explicitly stated that the Department or self-insured employer has a lien against a worker's UMC recovery under his or her employer's policy. Thus the 1986 amendments are retroactive to this claim and clearly provide for a Department lien against Ms. Goers' UMC recovery.

Finally, while not dispositive, it is worth noting that the employer here has paid both industrial insurance premiums and premiums for UMC coverage. If there were no lien, then not only would the employer have provided two overlapping coverages, but the employer would also lose any benefit with respect to the impact of a third party recovery on the evaluation of actual losses under the claim pursuant to WAC 296-17-870(4).

After careful consideration of the Proposed Decision and Order, claimant's Petition for Review, the Department's response thereto, and the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the facts and is correct as a matter of law. We hereby adopt Findings of Fact Nos. 1 through 5 and Conclusion of Law No. 1 as this Board's final Findings and Conclusions. The following additional conclusions are entered:

CONCLUSIONS OF LAW

- 2. Pursuant to the provisions of RCW 51.24.030, either as amended in 1984 or 1986, the Department is entitled to a lien against Ms. Goers' recovery under the UMC provisions of her employer's policy.
- 3. The Department order of November 3, 1987 which adhered to the letter of August 24, 1987 which ordered no benefits or compensation to be paid to or on behalf of Ms. Goers until the excess recovery totaling \$93,366.87 has been expended for costs incurred as a result of conditions covered under Claim J-501066, is correct and is hereby affirmed.

It is so ORDERED.

Dated this 13th day of March, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

<u>/S/_____</u> SARA T. HARMON

Chairperson

<u>/S/</u> PHILLIP T. BORK

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Member