

## Funston, James

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### THIRD PARTY ACTIONS (RCW 51.24)

#### **Reduction of lien due to employer fault (RCW 51.24.060(1)(f))**

Where a UIM recovery was made by settlement and there has been no determination of fault by the trier-of-fact as required by RCW 4.22.070, the Department's lien cannot be extinguished under RCW 51.24.060(1)(f). ...*In re James Funston*, BIIA Dec., 88 2863 (1990)

#### **Underinsured motorist insurance policy owned by employer**

The 1986 amendments to RCW 51.24.030 apply to UIM recoveries made after the effective date of the amendments. Citing *O'Rourke v. Department of Labor & Indus.*, 57 Wn. App. 374 (1990) review denied 115 Wn.2d 1002 (1990). ...*In re James Funston*, BIIA Dec., 88 2863 (1990)

The Department has a lien against a worker's recovery made under his employer's UIM policy, even though the worker was the son of the corporation president, the policy was issued to the corporation and the president individually, and the corporate policy covered the president's family automobiles as well. ...*In re James Funston*, BIIA Dec., 88 2863 (1990)

Scroll down for order.

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

1     **IN RE: JAMES C. FUNSTON**                     )  
2   )  
3     **CLAIM NO. J-565481**                     )     **DOCKET NO. 88 2863**  
4   )     **DECISION AND ORDER**

5 APPEARANCES:

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7             Claimant, James C. "Kimo" Funston, by  
8             Paul J. Burns, P.S., per  
9             Paul J. Burns

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11            Employer, Funston Tire Service, Inc., by  
12            None

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14            Department of Labor and Industries, by  
15            Office of the Attorney General, per  
16            Jacquelyn Findley, Stephanie Farrell and  
17            Donald Verfurth, Assistants, and Toni Lorien,  
18            Paralegal

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20            This is an appeal filed by the claimant, James C. Funston, on July 15, 1988 from an order of  
21 the Department of Labor and Industries dated June 30, 1988 which declared a statutory lien against  
22 claimant's third party recovery in the amount of \$13,578.82, demanded reimbursement to the  
23 Department in the amount of \$8,415.13 and ordered no benefits or compensation be paid on behalf of  
24 the claimant until such time as the excess recovery totaling \$8,500.29 has been expended by the  
25 claimant for costs incurred as a result of the conditions covered under this claim. **AFFIRMED.**

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29   **PRELIMINARY MATTERS**

30            Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
31 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order  
32 issued on January 10, 1990 in which the order of the Department dated June 30, 1988 was reversed  
33 and the matter remanded to the Department of Labor and Industries with direction to issue an order  
34 setting aside and holding for naught the provisions of the order dated June 30, 1988.

35            This appeal involves the question of whether the Department has a lien on the worker's  
36 recovery under the underinsured motorist (UIM) provisions of an insurance policy.

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38            Initially, claimant's Notice of Appeal raised a single issue. He contended that, because a  
39 co-employee was partially at fault for his injuries, the Department's third party lien was extinguished  
40 under the provisions of RCW 51.24.060(1)(f). Based on that allegation, the Department filed a Motion  
41 to Dismiss on March 17, 1989 pursuant to CR 12(b)(6). However, by the time of the March 29, 1989  
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1 conference, the claimant had expanded the issues to include the question of whether the lien applied  
2 under the provisions of RCW 51.24.030(4) with respect to recovery under an employer's UIM policy.  
3 On May 8, 1989, the claimant filed a Motion for Summary Judgment, arguing that no lien applied  
4 because his UIM recovery was not by virtue of his employment relationship with his father, but rather  
5 was the consequence of the father/son relationship.  
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9 After the claimant filed his Motion for Summary Judgment, the Industrial Appeals Judge  
10 determined that the Department's original Motion to Dismiss should also be treated as a Motion for  
11 Summary Judgment. She was correct in that determination, since CR 12(b)(6) states:  
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13 If, on a motion asserting the defense numbered (6) to dismiss for failure of  
14 the pleading to state a claim upon which relief can be granted, matters  
15 outside the pleading are presented to and not excluded by the court, the  
16 motion shall be treated as one for summary judgment and disposed of as  
17 provided in Rule 56, and all parties shall be given reasonable opportunity  
18 to present all material made pertinent to such a motion by Rule 56.  
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20 Thus, we currently have before us the claimant's and Department's opposing Motions for  
21 Summary Judgment pursuant to CR 56. In reaching our decision we have relied upon the following:  
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- 23 1. Claimant's Notice of Appeal.
- 24 2. The Department's Motion to Dismiss.
- 25 3. The Department's Memorandum of Authorities in Support of Motion to  
26 Dismiss, including attachments.
- 27 4. Claimant's Memorandum in Opposition to Department's Motion to Dismiss,  
28 including attachments.
- 29 5. Claimant's Motion for Summary Judgment.
- 30 6. Affidavit of Paul J. Burns, with attachments.
- 31 7. Affidavit of Cherita Koetje, with attachment.
- 32 8. Affidavit of James P. Funston.
- 33 9. Claimant's Memorandum of Authorities in Support of Motion for Summary  
34 Judgment.
- 35 10. Department's Response to Claimant's Motion for Summary Judgment  
36 Regarding Department's Lien.  
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- 1 11. Department's Response to Claimant's Memorandum of Authorities in
- 2 Support of Motion for Summary Judgment.
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- 4 12. Stipulated Facts dated October 10, 1989, including exhibits.
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- 6 13. Exhibit No. 1 and transcripts of all proceedings.
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- 8 14. Department's Petition for Review.
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10 At the outset we note that the statutory scheme which sets forth the Department's right to a lien  
11 against a recovery in a third party action was amended in 1986, with the addition of the following  
12 underlined language to RCW 51.24.030:  
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15 (1) If a third person, not in a worker's same employ, is or may become  
16 liable to pay damages on account of a worker's injury for which benefits  
17 and compensation are provided under this title, the injured worker or  
18 beneficiary may elect to seek damages from the third person.

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20 (3) Damages recoverable by a worker or beneficiary pursuant to the  
21 underinsured motorist coverage of an insurance policy shall be subject to  
22 this chapter only if the owner of the policy is the employer of the injured  
23 worker. [In 1987, this paragraph became subparagraph 4.]  
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25 Laws of 1986, ch. 58, § 1, p. 189.

26 The 1984 amendment to the statute contained an applicability section, providing that:

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28 This act applies to all causes of action against third persons in which  
29 judgment or settlement of the underlying action has not taken place before  
30 June 7, 1984.

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32 RCW 51.24.902.

33 Neither the 1986 nor the 1987 amendments, contained an applicability section. Thus the  
34 question arises as to whether the 1986 amendment applies to this claim, where the industrial injury  
35 occurred on April 15, 1985 and the third party recovery occurred in June 1988.  
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38 Any uncertainty as to whether the 1986 amendment applies to a third party UIM recovery  
39 resulting from an industrial injury that occurred before the effective date of the amendment was laid to  
40 rest in the recent case of O'Rourke v. Dep't of Labor & Indus., 57 Wn.App. 374 review denied 115  
41 Wn.2d 1002 (1990). In that case, Division I of the Court of Appeals held that the "relevant date for  
42 application of the statutory scheme before us [i.e., the 1986 version of RCW 51.24.030] is the date of  
43 recovery of the UIM settlement." O'Rourke, at 379. Under the reasoning in O'Rourke, it is clear that  
44 the Department may assert a lien here, so long as the UIM recovery occurred after June 11, 1986, the  
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1 effective date for the 1986 amendment. In June of 1988, Mr. Funston received \$47,500.00 from the  
2 Travelers Indemnity Company of America in settlement for claims arising out of the industrial injury.  
3 Thus, under O'Rourke, the 1986 amendment to RCW 51.24.030 applies.  
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5 The stipulated facts and pleadings establish that James P. Funston was the president of  
6 Funston Tire Inc. and his son, James C. Funston, was an employee. While at work on April 15, 1985  
7 the younger Funston was injured when an uninsured automobile driven by another employee struck  
8 him while he was within the course of his employment. He filed a claim for industrial insurance  
9 benefits, which was allowed. He also made a claim under the underinsured motorist provisions of an  
10 insurance policy which was issued to Funston Tire Services Inc. and James P. Funston and Robert E.  
11 Holder individually.  
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13 James P. Funston, the claimant's father, had an endorsement attached to the corporate policy  
14 which would cover the Funston family automobiles. It was under this endorsement that the claimant  
15 was able to collect underinsured motorist benefits from Travelers Indemnity Company of America.  
16 This recovery was only forthcoming after Mr. Funston had successfully filed a declaratory judgment  
17 action against Travelers Indemnity, seeking an order holding Travelers liable for coverage to the  
18 plaintiff for the injuries suffered on April 15, 1985.  
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20 RCW 51.24.030 provides that the Department shall have a lien against the worker's UIM  
21 recovery "if the owner of the policy is the employer of the injured worker". Under the clear and  
22 unambiguous language of this statute, if we find that Funston Tire Service Inc. is the owner of the  
23 policy, then the Department has a right to assert its lien against the claimant's recovery under that  
24 policy.  
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26 The parties have agreed to all of the underlying facts and there is, therefore, no dispute  
27 regarding any material fact. What is in dispute, however, is the interpretation to be placed on the  
28 agreed facts. Our industrial appeals judge concluded that Funston Tire Service Inc. was not the owner  
29 of the policy, because Mr. Funston recovered under the UIM endorsement as a resident of his father's  
30 household related by blood, and not as an employee of Funston Tire. The Proposed Decision and  
31 Order stressed that no other employee of Funston Tire Service would have been entitled to recover  
32 under the Funston family automobile endorsement. We interpret the agreed facts somewhat  
33 differently. In our view, Funston Tire Service, Inc. was indeed the owner of the policy under which  
34 James C. Funston made his third party recovery.  
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1 The insurance policy was clearly issued to Funston Tire Service Inc. and to James P. Funston  
2 individually and Robert E. Holder individually. See Exhibit No. 1 to Stipulated Facts dated October 10,  
3 1989. The "General Declarations" on that policy indicate that it is a "risk complex" policy, issued to "a  
4 tire sales & service station business". In that policy, Travelers agreed to provide insurance under the  
5 following sections of the policy: property, inland marine, general liability, automobile liability,  
6 automobile physical damage, crime, and garage liability. James C. Funston was able to recover  
7 pursuant to an endorsement covering the Funston family automobiles under this corporate policy.  
8 This endorsement became part of the policy. See RCW 48.18.190. The addition of a family auto  
9 endorsement to the corporate policy did not change the ownership of the policy. Although the senior  
10 Funston undoubtedly used his influence over the corporate affairs to obtain coverage of family  
11 automobiles under the corporate policy, this action in no way changed the true ownership of the policy.  
12 We therefore conclude that Funston Tire Service Inc. was the owner of the policy under which  
13 claimant made his recovery.  
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15 Although we do not agree with the industrial appeals judge's conclusion with respect to  
16 ownership of the insurance policy, the emphasis on the fact that claimant's recovery was premised on  
17 the father/son relationship, not the employer/employee relationship, is reasonable. By amending  
18 RCW 51.24.030 in 1986 the legislature may well have intended to restrict the lien to situations where  
19 the UIM recovery resulted from an employer/employee relationship. However, the language of RCW  
20 51.24.030(3) (now(4)) is clear and unambiguous in stating that the Department shall have a lien "if the  
21 owner of the policy is the employer of the injured worker". (Emphasis added) In this case, the owner  
22 of the policy is Funston Tire Service Inc., which also happens to be the employer of James C.  
23 Funston. The Department, therefore, is entitled to a lien against Mr. Funston's third party UIM  
24 recovery.  
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26 Finally, the argument has been made that even if the Department has a lien under RCW  
27 51.24.030(4), that lien is extinguished pursuant to RCW 51.24.060(1)(f) which provides:

28 If the employer or a co-employee are determined under RCW 4.22.070 to  
29 be at fault, (c) and (e) of this subsection do not apply and benefits shall be  
30 paid by the department and/or self- insurer to or on behalf of the worker or  
31 beneficiary as though no recovery had been made from a third person.  
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33 RCW 4.22.070 requires that the determination of fault be made by a trier- of-fact. In the present case,  
34 the recovery was made as a result of a settlement with Travelers Insurance Company; a determination  
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1 of co- employee fault was never made by a trier-of-fact. Without such a determination, RCW  
2 51.24.060(1)(f) does not extinguish the Department's lien.  
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4 After careful consideration of the Proposed Decision and Order, the Department's Petition for  
5 Review, and the entire record before us we are persuaded that the Department order under appeal is  
6 correct and should be affirmed. We enter the following findings and conclusions.  
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### 8 **FINDINGS OF FACT**

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- 10 1. On April 17, 1985 the Department of Labor and Industries received from  
11 the claimant, James C. "Kimo" Funston, a claim for benefits alleging an  
12 industrial injury on April 15, 1985 while in the course of his employment  
13 with Funston Tire Service, Inc. On May 7, 1985 the Department issued an  
14 order allowing the claim, and beginning monthly time-loss compensation  
15 and other benefits. On July 25, 1987 the Department issued an order  
16 awarding the claimant a permanent partial disability award equal to 10%  
17 as compared to totally bodily impairment for dorso-lumbar and  
18 lumbosacral impairments, paid at 75% of the monetary value thereof  
19 pursuant to RCW 51.32.080, 5% of the amputation value of the left leg  
20 above the knee joint with short thigh stump (3 inches or less below the  
21 tuberosity of ischium), time- loss compensation as paid, with deduction of  
22 overpayment, and closed the claim.  
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24 On August 18, 1987 the Department received from the claimant a letter of  
25 protest and request for reconsideration of its order dated July 25, 1987.

26 On September 23, 1987 the Department issued an order holding in  
27 abeyance its order dated July 25, 1987. On February 19, 1988 the  
28 Department issued an order adhering to the provisions of its order dated  
29 July 25, 1987, the claim to remain closed. No appeal was taken from that  
30 order by the claimant.  
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32 On June 30, 1988 the Department issued an order which declared a  
33 statutory lien against claimant's third party recovery in the amount of  
34 \$13,578.82, demanded reimbursement to the Department in the amount  
35 of \$8,415.13 and ordered no benefits or compensation be paid on behalf  
36 of the claimant until such time as the excess recovery totaling \$8,500.29  
37 has been expended by the claimant for costs incurred as a result of the  
38 conditions covered under this claim.

39 On July 15, 1988 the Board of Industrial Appeals received from the  
40 claimant a notice of appeal of the Department order dated June 30, 1988,  
41 and assigned the appeal Docket No. 88 2863. On August 4, 1988 the  
42 Board issued an order granting the appeal and directed that proceedings  
43 be held on the issue raised in the claimant's notice of appeal.  
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- 45 2. The claimant, James C. Funston, was injured on April 15, 1985 during the  
46 course of his employment with Funston Tire Service, Inc.  
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3. As a result of his injuries received on April 15, 1985, Mr. Funston applied for and received industrial insurance benefits under Claim No. J-565481.
  4. On July 20, 1987 Mr. Funston filed a Declaratory Judgment Action against Travelers Indemnity Company of America, Inc., seeking an order holding Travelers liable for coverage to the plaintiff for injuries sustained in the April 15, 1985 accident. In June of 1988, Mr. Funston settled with Travelers Indemnity Company of America in the amount of \$47,500 and advised the Department accordingly. On June 30, 1988 the Department asserted a third party lien as stated in Finding of Fact No. 1.
  5. Neither the employer nor any co-employee was determined by a trier-of-fact to be at fault in the April 15, 1985 accident.
  6. Claimant's employer, Funston Tire Service, Inc., was the owner of the insurance policy under which the claimant made his UIM recovery.

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**CONCLUSIONS OF LAW**

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
  2. Under the provisions of RCW 51.24.030 as amended in 1986, the Department of Labor and Industries is entitled to a lien against Mr. Funston's recovery under the UIM provisions of the insurance policy issued to Funston Tire Service Inc.
  3. Because neither the employer nor any co-employee was determined by a trier-of-fact to be at fault in the April 15, 1985 accident within the meaning of RCW 4.22.070, the Department's lien against claimant's UIM recovery was not extinguished under the provisions of RCW 51.24.060(1)(f).
  4. The Department order of June 30, 1988 which asserted a lien against claimant's third party recovery for the sum of \$13,578.82 and demanded reimbursement of the amount of \$8,415.13, and which provided that no benefits or compensation will be paid until such time as the excess recovery totaling \$8,500.29 has been expended by the claimant for costs incurred as a result of the conditions covered under this claim, is correct and is affirmed.

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It is so ORDERED.

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Dated this 16<sup>th</sup> day of August, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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/s/  
SARA T. HARMON Chairperson

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/s/  
PHILLIP T. BORK Member