

## Ravsten, Kevin

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### THIRD PARTY ACTIONS (RCW 51.24)

#### Interest

The Department incorrectly demanded interest payable from the date of recovery in third party recovery distribution order since RCW 51.24.060(7) permits recovery of interest only from the date the lien order becomes final. ...***In re Kevin Ravsten, BIIA Dec., 88 3859 (1991)*** [*Editor's Note: Affirmed, Ravsten v. Department of Labor & Indus., 72 Wn. App. 124 (1993) review denied, 123 Wn.2d 1030 (1994).*]

Scroll down for order.



1 recalculate benefits due to Mr. Ravsten within the meaning of RCW 51.24.060 and to take other action  
2 as authorized under the law.  
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4 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no  
5 prejudicial error was committed and said rulings are hereby affirmed.  
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### 7 DECISION

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9 The matter of third party proceeds distribution in Mr. Ravsten's claim has previously been  
10 before this Board and is the subject of Ravsten v. Dep't of Labor & Indus., 108 Wn.2d 143, 736 P.2d  
11 265 (1987). The Supreme Court specifically approved of the Board's method of third party distribution  
12 calculation. 108 Wn.2d at 159. However, the court disagreed with the Board's finding that Mr.  
13 Ravsten had not shown entitlement to attendant care services under RCW 51.32.060, when  
14 considering benefits payable in this claim for purposes of calculating the Department's proportionate  
15 share of the third party action attorney's fees and costs. The court determined "[I]t is apparent that the  
16 time will come, if it has not already arrived, when attendant care will be required." 108 Wn.2d at 155.  
17 The court further determined that Mr. Ravsten had not established by competent testimony in that  
18 record the actual date upon which attendant care would be, or had become, necessary. The court  
19 thus remanded the matter in order that this determination and the projected costs of such care could  
20 be made, and the Department's proportionate share of third party action attorney's fees and costs be  
21 appropriately calculated.<sup>1</sup>  
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28 The present appeal before this Board is taken by Mr. Ravsten from the Department's third party  
29 proceeds distribution order issued after the Department's consideration of the matter again, pursuant  
30 to the court's remand in Ravsten, supra. We reject Mr. Ravsten's counsel's request that we involve  
31 ourselves in recalculating his third party action attorney's fees based upon evidence presented and  
32 legal argument made in the present appeal concerning past and future costs of Mr. Ravsten's  
33 attendant care. The present matter, as did the appeal considered by the Ravsten court, concerns only  
34 the amount of the Department's proportionate share of attorney's fees and costs incurred by Mr.  
35 Ravsten in obtaining the third party recovery. Counsel's attorney's fees for that recovery were  
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42 <sup>1</sup> At 108 Wn.2d at 155 the court indicated it was proper that the cause be remanded to the  
43 Department while, in contrast, later in the decision the court held "The cause is remanded for  
44 further proceedings before the Board ..." 108 Wn.2d at 160. In any event, the parties agreed on  
45 mandate in superior court that the matter should be remanded to the Department. The present  
46 appeal before this Board, then, is taken by Mr. Ravsten from the subsequent order of the  
47 Department after remand to the Department.

1 previously determined by the Board and affirmed by the court as correct. Ravsten, 108 Wn.2d at  
2 157-159. The cost, past and/or future, of attendant care in this claim has no bearing upon the amount  
3 of attorney's fees and costs incurred by Mr. Ravsten in his third party action. Rather, the cost of  
4 attendant care could have bearing only upon the Department's proportionate share of Mr. Ravsten's  
5 third party action attorney's fees and costs, as well-reflected in the Ravsten decision:  
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9 . . . The Department recognizes that where an injured worker pursues a  
10 third party action and recovers, the Department is required to bear its  
11 proportionate share of attorney's fees and costs to the extent of the  
12 benefits paid or payable under RCW Title 51. In order to determine the  
13 benefits payable under RCW Title 51, there must be a projection of the  
14 benefits to which a claimant will be entitled in the future. The benefits  
15 payable cannot be computed, nor can the Department's proportionate  
16 share of attorney's fees and costs be computed until the date is  
17 established when attendant care will be required, as contemplated by  
18 RCW 51.32.060(14). Therefore, it is appropriate and proper that the  
19 cause be remanded to the Department for (a) the establishment of the  
20 date upon which attendant care will be required and (b) the duration of  
21 such care, based upon competent medical testimony.  
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23 Ravsten, 108 Wn.2d at 155-156 (Emphasis supplied).  
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25 For purposes of distribution of Mr. Ravsten's third party recovery, the costs of attendant care  
26 have now become moot because the Department's August 8, 1988 distribution order is premised  
27 upon, and accounts for, the Department paying 100% of Mr. Ravsten's attorney's fees and costs  
28 incurred in the third party action due to the recovery therein being a deficiency recovery under RCW  
29 51.24.010 as in effect on February 17, 1977, which was the date of Mr. Ravsten's on-the-job injury by  
30 third parties. See, Ravsten, supra, 108 Wn.2d at 144-145; and, Whalen v. Dep't of Labor & Indus., 35  
31 Wn.App. 283, 286, 665 P.2d 1389 (1983).  
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34 "The questions the board may consider and decide are fixed by the order from which the  
35 appeal was taken (citations omitted) as limited by the issues raised by the notice of appeal." Lenk v.  
36 Dep't of Labor & Indus., 3 Wn.App. 977, 982, 478 P.2d 761 (1970). " . . . [A]lthough the evidence  
37 before the board might take a wide range, the board cannot enlarge the lawful scope of the  
38 proceedings, which is limited strictly to the issues raised by the notice of appeal. . . ." Brakus v. Dep't  
39 of Labor & Indus., 48 Wn.2d 218, 220, 292 P.2d 865 (1956). The Ravsten court, as we earlier  
40 indicated, made a final determination of the attorney's fees and costs related to the third party action.  
41 Since the Department has agreed and accounted for its payment of all of these fees and costs in its  
42 August 8, 1988 order, there was no need for our industrial appeals judge to consider evidence  
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1 concerning the cost of attendant care, past or future, nor was it appropriate to remand the matter to  
2 the Department with instructions to further consider such costs, as was done in the Proposed Decision  
3 and Order<sup>2</sup>  
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5 We do, however, find the Department's August 8, 1988 distribution order incorrect because the  
6 order makes demand upon Mr. Ravsten for interest "from the date of recovery" on the otherwise  
7 properly determined amount of \$89,961.46 reimbursable to the Department by Mr. Ravsten.<sup>3</sup> We do  
8 not know of any authority which would allow the Department to assess interest at this time on that  
9 amount. RCW 51.24.060(7) does allow the Department to file a warrant in superior court, which  
10 becomes a judgment of the court, in a sum representing the Department's unpaid lien stated in its  
11 order "plus interest accruing from the date the order became final". The Department's present  
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17 <sup>2</sup> We are mindful of potentially confusing language in the Ravsten decision:  
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19 We hold that the computation of attorney's fees is to be upon the present  
20 value of the total award to the claimant, including permanent attendant  
21 care when the need is established. An attorney is entitled to fees based  
22 upon benefits secured by the claimant which result from the attorney's  
23 efforts, but an attorney is not entitled to fees based upon benefits which  
24 would have been paid to the claimant in any event.  
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26 108 Wn.2d at 160 (Emphasis supplied). This language could appear to confuse attorney's fees for  
27 obtaining additional benefits from the Department with fees incurred in obtaining recovery from a  
28 third party. The two are entirely separate. This Board is involved in setting attorney's fees for the  
29 obtaining of additional benefits (such as attendant care services) only where such additional  
30 benefits are obtained "on appeal to the board". RCW 51.52.120(2). The Director of the  
31 Department of Labor and Industries, upon application, fixes reasonable fees for services before the  
32 Department. RCW 51.52.120(1). When additional relief is granted to a worker or beneficiary  
33 through appeal to the court, the court fixes the attorney's fee for such services. RCW 51.52.130.  
34 From our review of the Ravsten decision, it appears that Mr. Ravsten's right to attendant care (as  
35 an additional benefit) may have been established in the courts and it may be the case that the  
36 superior court would involve itself pursuant to the mandate in Ravsten, if necessary, to determine  
37 whether any additional fees are owing to counsel related directly to establishing the right to  
38 attendant care benefits. In any event, this is immaterial to the correctness of the Department's  
39 August 8, 1988 distribution order and otherwise falls outside the scope of this Board's authority in  
40 this appeal.  
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43 <sup>3</sup>An amount of \$89,961.46 is reimbursable to the Department due to the Department's lien of  
44 \$117,238.85 being reduced by \$27,277.39 which was the balance still owed by the Department for  
45 100% of the third party action attorney's fees and costs in light of prior payments which the  
46 Department had made toward those attorney fees and costs. See, Third Party Recovery  
47 Worksheet, July 22, 1988, Exhibit No. 10.

1 distribution order, as was true of its prior distribution order, was appealed and has not become final.  
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3 RCW 51.52.060; State ex rel Crabb v. Olinger, 191 Wash. 534, 538, 71 P.2d 545 (1937); Hunter v.  
4 Dep't of Labor & Indus., 190 Wash. 380, 388-389, 68 P.2d 224 (1937); and, In re Daniel Bauer, BIIA  
5 Dec., 47,841 (1977). The August 8, 1988 order is incorrect insofar as it makes demand for interest on  
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7 the otherwise reimbursable amount.

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9 We adopt from the Proposed Decision and Order Finding of Fact No. 1 and Conclusion of Law  
10 No. 1 and, in addition, make the following Conclusions of Law:

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12 **CONCLUSIONS OF LAW**

- 13 2. The amount of attorney's fees and costs incurred by Mr. Ravsten in  
14 furtherance of making his third party recovery under RCW 51.24.010 as in  
15 effect February 17, 1977 was finally determined by the court in Ravsten v.  
16 Dep't of Labor & Indus., 108 Wn.2d 143, 736 P.2d 265 (1987). The  
17 amount of benefits paid and payable for attendant care under RCW  
18 51.32.060 is not material to a determination of the Department's  
19 proportionate share of these third party action attorney's fees and costs  
20 because the Department is already paying 100% of the attorney's fees  
21 and costs due to the recovery being a deficiency recovery under RCW  
22 51.24.010 as existing on the date of injury, February 17, 1977.
- 23 3. The Department's distribution order of August 8, 1988 did not become  
24 final, nor did any prior order of the Department claiming third party  
25 distribution reimbursement from Mr. Ravsten, and the Department, under  
26 RCW 51.24.060(7) or any prior or existing statute, lacks authority to  
27 charge interest to Mr. Ravsten on the reimbursable amount.
- 28 4. The order of the Department dated August 8, 1988 which determined the  
29 claimant recovered \$1,100,113.05 in a third party action and which  
30 directed distribution of proceeds: (1) net share to attorney for fees and  
31 costs \$376,179.59; (2) net share to claimant \$633,972.00; and, (3) net  
32 share to Department \$89,961.46 plus interest from the date of recovery,  
33 which declared a statutory lien for the sum of \$117,238.85 and which  
34 indicated the Department had paid the claimant and his attorney for fees  
35 and costs in the sum of \$348,902.20, leaving a balance of \$89,961.46 due  
36 the Department plus interest from the date of recovery and which made  
37 demand for \$89,961.46 plus interest from the date of recovery and which  
38 ordered that no benefits or compensation will be paid to or on behalf of the  
39 claimant until such time as the excess recovery totalling \$606,694.61 has  
40 been expended by the claimant for costs incurred as a result of the  
41 conditions covered under the claim, is incorrect and is reversed. The  
42 matter is remanded to the Department of Labor and Industries with  
43 directions to issue a new distribution order containing the same terms and  
44 provisions as contained in the order of August 8, 1988, but omitting  
45 therefrom the Department's claim for interest on the amount of \$89,961.46  
46 reimbursable by Mr. Ravsten to the Department, i.e., omitting the phrase  
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"plus interest from date of recovery" from the three places where said phrase had appeared in the order dated August 8, 1988.

It is so **ORDERED**.

Dated this 18<sup>th</sup> day of September, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ \_\_\_\_\_  
S. FREDERICK FELLER                      Chairperson

/s/ \_\_\_\_\_  
FRANK E. FENNERTY, JR.                      Member

/s/ \_\_\_\_\_  
PHILLIP T. BORK                              Member

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