## See, Richard

### **THIRD PARTY ACTIONS (RCW 51.24)**

#### **Settlement for nuisance value**

Where a third party action settles for "nuisance value", the recovery is subject to Department's statutory lien. ....In re Richard See, BIIA Dec., 90 0943 (1991) [Editor's Note: Because action was for medical malpractice, the Department has a lien arguably only to the extent the malpractice caused further payment of benefits.]

Scroll down for order.

# BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

IN RE: RICHARD R. SEE	)	<b>DOCKET NO. 90 0943</b>
	)	
CL AIM NO 1-181306	1	DECISION AND ORDER

### APPEARANCES:

Claimant, Richard R. See, by Longfelder, Tinker, Kidman & Flora, P.S., per Lawrence L. Longfelder

Employer, Evergreen Thinning & Reforestation, by None

Department of Labor and Industries, by The Office of the Attorney General, per Jacquelyn R. Findley, Assistant and Gary W. McGuire, Paralegal

This is an appeal filed by the claimant with the Department on November 27, 1989 and forwarded to this Board on February 21, 1990 from an order of the Department of Labor and Industries dated November 2, 1989 which provided:

Pursuant to the order of the Board of Industrial Insurance Appeals of June 22, 1989, the order of October 14, 1988, is reversed and further consideration has been given to the facts.

WHEREAS, claimant has recovered \$25,000, and RCW 51.24.060 requires distribution of the settlement proceeds as follows: 1) net share to attorney for fees and costs (\$8,370.14); 2) net share to claimant (\$8,333.33); and, 3) net share to Department (\$8,296.53).

WHEREAS, the Department of Labor and Industries declares a statutory lien against the claimant's third party recovery for the sum of \$27,655.20;

NOW THEREFORE, demand is hereby made upon the claimant to reimburse the Department in the amount of \$8,296.53.

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 Department of Labor and Industries to a Proposed Decision and Order issued on April 2, 1991 in which the order of the Department dated November 2, 1989 was reversed and the matter remanded to the Department with direction to reassess computation of the statutory lien amount with respect to the deficiency recovery obtained and

to further reassess the potential compromise of that lien with due consideration of recent appellate court decisions, and to take further action as indicated by the law and facts.

The sole issue presented by this appeal is whether the Department of Labor and Industries is entitled to maintain a lien pursuant to RCW 51.24 against a recovery in a third party action brought by a claimant when, as here, the settlement was for "nuisance value" only and the claimant was unable to sustain his burden of proof in his medical negligence allegation. The Proposed Decision and Order went considerably beyond this sole issue framed by the parties on which the stipulated statement of facts was based.

Our State has long recognized the exclusivity of the industrial insurance act with respect to injuries occurring in the work place. All civil actions and civil causes of actions for such personal injuries have been abolished, except as provided in Title 51. RCW51.04.010; RCW 51.32.010. The right to sue third parties is a purely statutory right and it is within the power of the legislature to limit that right. RCW 51.24.030 authorizes injured workers to seek damages for injuries which were negligently caused by third parties not in the same employ. Any such recovery by the worker is subject to the distribution requirements of RCW 51.24.060. Bankhead v. Aztec Construction, 48 Wn.App. 102, 105, 737 P.2d 1291, (1987). Since Mr. See was dependent upon RCW 51.24.030 to even maintain the third-party action, he is also subject to the requirements of RCW 51.24.060, which requires that "any recovery shall" be distributed.

The statute does not make exception for a third-party suit which settles for so-called "nuisance value." Had Mr. See not been permitted by RCW 51.24.030 to file the lawsuit, even the "nuisance value" would not have been recovered. "Nuisance value" comes within the "any recovery" language of RCW 51.24.060. It is therefore subject to the Department's statutory lien, and we so hold.

After a careful review of the entire record before us, we are convinced that the order of the Department dated November 2, 1989 is supported by the stipulated statement of facts and is correct as a matter of law. There being no contested issues of fact, no formal Findings of Fact need be entered. RCW 51.52.106.

The order of the Department of Labor and Industries dated November 2, 1989 which ordered distribution of the claimant's third party recovery in the sum of \$25,000.00 and which made demand for reimbursement by the claimant to the Department in the amount \$8,296.53 and which further declared a statutory lien in the sum of \$27,655.20, is correct and is hereby affirmed.

It is so ORDERED.

Dated this 6<sup>th</sup> day of August, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/	
FRANK E. FENNERTY, JR.	Member
/s/	
PHILLIP T. BORK	Member