Hrebeniuk, Peter

THIRD PARTY ACTIONS (RCW 51.24)

Allocation of fault

Where a worker asserts that the Department cannot assert its lien against a settlement on the basis that the employer had been found partially at fault by a mediator who helped develop the settlement, the Board noted that the mediator's fault determination is not a determination of fault within the meaning of RCW 4.22.070(1). For that reason, the Board returned the matter to the Department to consider the distribution of recovery after the parties have an opportunity to have fault apportionment hearing at court. ***….In re Peter Hrebeniuk*, BIIA Dec., 91 2764 (1992)** [*Editor's Note:* The Board declined the worker's request to refer this matter to the superior court with instructions to determine fault allocation. The Board's decision was appealed to superior court under King County Cause No. 93-2-01774-0. Application of principle limited to cases settled before *Clark v. Pacificorp* 1118 Wn.2d 167 (1991) by *In re Michael McQuirk*, BIIA Dec., 93 1355 (1994).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PETER N. HREBENIUK	**)**	**DOCKET NO. 91 2764**
	)	
CLAIM NO. K-123276	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Peter N. Hrebeniuk, by
William M. Pease, Attorney at Law

Employer, The Erection Co., by
None

The Department of Labor and Industries, by
The Attorney General, per
Jack S. Eng, Assistant

This is an appeal filed by the claimant, Peter N. Hrebeniuk, on May 20, 1991 from an order of the Department of Labor and Industries dated March 20, 1991 which affirmed a prior order dated January 14, 1991. That order distributed proceeds from a third party litigation settlement, as follows: 1) Net share to the attorney for fees and costs, $95,386.14; 2) Net share to the claimant, $119,408.57; and, (3) Net share to the Department, $50,205.29. The Department order further declared a statutory lien of $78,439.59, and demanded reimbursement of $50,205.29 and an overpayment sum of $471.02. The order also stated that no benefits would be paid until the excess recovery of $77,005.10 had been expended by the claimant for costs incurred due to claim related conditions. The Department order is **REVERSED**.

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 to a Proposed Decision and Order issued on July 14, 1992 in which the order of the Department dated March 20, 1991 was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The claimant contends, in part, that the Department should not be allowed to assert a lien against his settlement from a third party since a mediation conference was held in which his employer was found partially at fault. If the Board finds that the mediation conference was not a proper apportionment proceeding and did not affect the Department's lien, then the claimant argues that the matter should be remanded for an apportionment hearing before the Superior Court. We conclude

that the Proposed Decision and Order properly found that the mediation conference did not meet the requirements for a fault hearing under RCW 51.24.060(1)(f) and RCW 4.22.070(1). However, we believe that the matter should be remanded to the Department to allow the parties to request that the Superior Court hold a hearing in order to apportion fault.

The Proposed Decision and Order has a summary of the claim and third party litigation beginning at page 3, and a brief history will follow here. On May 8, 1987 while employed by The Erection Co., Mr. Hrebeniuk fell at a construction site and was seriously injured. He filed an industrial insurance claim and received benefits thereunder. Mr. Hrebeniuk also elected to file a personal injury suit against the general contractor, Paschen Contractors, Inc. and so notified the Department. The parties to the third party suit agreed to participate in private mediation with retired Superior Court Judge Gerald Shellan. The Department was advised of the mediation, but it chose not to participate. In the October 5, 1990 mediation conference, Gerald Shellan gave the opinion that The Erection Co. and its employees were 35% to 60% at fault. On October 24, 1990, Mr. Hrebeniuk and Paschen Construction Co. settled the third party suit with a recovery of $265,000.00 for Mr. Hrebeniuk. After the Department was advised of the settlement by the parties, it issued the order here on appeal, distributing the third party suit recovery.

The employer of an injured worker is generally immune from an action at law for damages resulting from an on-the-job injury even if the employer or its employees were negligent and caused the injury. RCW 51.04.010, and RCW 51.32.010. The Department and self-insurers have the right to be reimbursed for their payments under a claim if a recovery is made from a third party determined to have caused the industrial injury. Chapter 51.24 RCW. As a result of the Tort Reform Act of 1986, the Department or self-insured employer has its third party lien right affected if the injured worker's employer or its employees were at fault. RCW 51.24.060(1)(f) now states, "If the employer or a co-employee are determined under RCW 4.22.070 to be at fault . . . benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person." RCW 4.22.070(1) provides,

> In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, <u>entities immune from liability to the claimant</u> and entities with any other individual defense against the claimant. (Emphasis added)

Is a mediator's statement attributing fault a "determination of fault" by a "trier of fact" within the meaning of the phrase in RCW 4.22.070(1)? A "trier of fact" can either be a judge in a court trial or a jury in a jury trial. The following definitions taken from Black's Law Dictionary (5th rev. ed. 1979) at p. 1348, 1350, and 885, respectively, are helpful.

> **Trial.** A judicial examination and determination of issues between parties to action. **Trier of fact.** Term includes (a) the jury and (b) the court when the court is trying an issue of fact other than one relating to the admissibility of evidence . . . Commonly refers to judge in jury waived trial or jury which, in either case, has the exclusive obligation to make findings of fact in contrast to rulings of law which must be made by judge. **Mediation.** Intervention; interposition; the act of a third person in intermediating between two contending parties with a view to persuading them to adjust or settle their dispute. Settlement of dispute by action of intermediary (neutral party). (citations omitted)

By definition, for there to be a trier of fact there must also be a trial. While both a trial and a mediation involve adverse parties who come before an independent person, the independent person is different in each forum. A jury, or a judge who makes findings of fact, does so as part of a judicial proceeding in a constitutionally created court. Those findings are binding on the parties unless overturned on appeal. A mediator attempts to persuade parties in a proceeding outside of the constitutionally created courts. The mediator's opinion is not binding. When it enacted RCW 4.22.070, the legislature could have allowed the fault to be apportioned by a mediator's recommendation, an arbitration award, or by agreement of the parties. It did not. In Clark v. Pacificorp, 118 Wn. 2d 167, 186 (1991), the Supreme Court commented on the two statutes in question here and stated, "Bringing all parties before the court in one fault determination hearing prevents manipulation by any one party." (emphasis added) Clark recognized that the legislature intended to have the court determine the fault of the parties to avoid having parties inappropriately attribute fault to a worker's employer thereby affecting the Department or self-insurer's lien under Chapter 51.24 RCW. We are convinced that under RCW 4.22.070, attributions of fault must be made by either a judge or a jury in conjunction with a third party judicial proceeding. Since a judicial trier of fact did not attribute fault in Mr. Hrebeniuk's suit against the Paschen Construction Co., the comments by the mediator and the settlement by the parties cannot be used to affect the third party lien rights of the Department.

Is the claimant prohibited from having a court hearing to attribute or apportion fault because a hearing was not held prior to the settlement between Mr. Hrebeniuk and Paschen Construction Co.? The claimant asks that, if the mediation and settlement do not constitute a proper fault determination under RCW 4.22.070, that the Board remand the matter to Superior Court. This Board is not itself an appellate court and we certainly do not have the statutory authority to remand a matter directly to the Superior Court. Our jurisdiction is over appeals from Department of Labor and Industries orders, and we are allowed to remand matters to the Department to allow the parties and the Department to reconsider issues. Thus, we believe it is possible to return this matter to the Department to further consider the third party distribution, after allowing the parties the opportunity to have a hearing before the Superior Court to apportion fault. This procedure is not specifically prohibited by the statutes in question, and there is precedent for similar remands. In Clark v. Pacificorp, supra, the Supreme Court remanded a companion case to Superior Court for a hearing to determine fault even though the parties had already settled the third party litigation. At pages 194 & 195, the court stated,

> While a determination of fault by a trier of fact should be made before settlement and before any damages are awarded, Whitten has already settled with Associated Building Components. In view of our finding of substantial compliance with the notice requirement [service of third party complaint], we affirm the court's decision as to the determination of fault, affirm the decision to allow the Department to intervene, and remand to the Superior Court for determination of the reimbursement issue, consistent with this opinion.

The "reimbursement issue" referred to by the court concerned the extent to which the Department's lien was extinguished based upon the percentage of fault attributable to the worker's employer. Here, even though the parties should have had a Superior Court hearing prior to settlement which attributed percentages of fault, it is appropriate to allow them to now seek such a hearing. This outcome is compelling since there is no evidence of intent to avoid the Department's reimbursement rights. The parties invited the Department to participate in the mediation and advised it of their settlement. The Proposed Decision and Order refers to our decision of In re James C. Funston, Dckt. No. 88 2863 (August 16, 1990). In that decision, we affirmed the Department's lien against a settlement recovery under an underinsured motorist claim. At page 7, we stated that since the settlement was made without the statutorily required fault determination, the Department's lien was not extinguished. However, in Funston, we were not asked to remand the matter to allow the parties to petition the Court for a judicial trier of fact determination. Thus, that decision addressed a related, but

different issue. The fault hearing described in RCW 4.22.070(1) must take place in Superior Court, possibly as an ancillary proceeding under the original court docket number. We will remand to the Department with instructions to allow the parties to petition for a court hearing attributing fault within a reasonable period and have the result of the hearing forwarded to the Department. The Department can then issue a new and appropriate order asserting a lien as may be indicated, if it is not extinguished.

In implementing a subsequent judicial determination of fault, the Department should apply the analysis of RCW 51.24.060(1)(f) made by the Supreme Court in Clark v. Pacificorp, supra. In that case, the court stated at page 191, "we hold that where the employer's share of fault exceeds the benefits paid, the Department must continue to pay benefits, to the extent that benefits are payable, until they equal the employer's share of fault. If the employer's share of fault exceeds that of the third party, the right to reimbursement is eliminated." It also summarized at page 194, "A finding of employer or co-employee fault pursuant to RCW 51.24.060(1)(f) and RCW 4.22.070 should be interpreted as requiring a reduction of the Department's right to reimbursement in proportion to the employer's share of fault. The right is eliminated if this share of fault exceeds the third party award."

In conclusion, we hold that a mediator's comments on fault do not constitute a fault determination under RCW 51.24.060(1)(f) and RCW 4.22.070. The Department order of March 20, 1991 is reversed and the matter is remanded to the Department to allow the parties reasonable time to ask for a fault determination hearing in Superior Court and to then issue a further order concerning the distribution of the claimant's third party recovery and the extent of the Department's lien right based on that determination. We adopt proposed Findings of Fact Nos. 1, 2, 3, 4, 5, and 6, and proposed Conclusions of Law Nos. 1, 2, and 3. In addition, we enter the following additional Conclusions of Law:

CONCLUSIONS OF LAW

4. The claimant, employer, and the Department of Labor and Industries pursuant to RCW 51.24.060 (1)(f) and RCW 4.22.070 should have the opportunity to have a hearing in Superior Court to have a trier of fact determine the percentage of total fault for the industrial injury of May 8, 1987 attributable to every entity, including the claimant, The Erection Co., Paschen Construction Co., and the claimant's co-employees. The comments of mediator Gerald Shellan concerning percentages of fault did not constitute a fault determination under RCW 4.22.070.

5. The Department orders of March 20, 1991 and January 14, 1991 are reversed. The March 20, 1991 order adhered to the January 14, 1991

order that determined that the claimant had recovered $265,000.00 and distributed the proceeds as follows: (1 Net share to the attorney for fees and costs of $95,386.14; 2) Net share to the claimant $119,408.57; and 3) Net share to the Department $50,205.29. The order declared a statutory lien against the claimant's third party recovery for the sum of $78,439.59, made demand on the claimant to reimburse the Department in the amount of $50,205.29 plus the overpayment of $471.02, and further ordered that no benefits or compensation would be paid to or on behalf of the claimant until such time as the excess recovery of $77,005.10 had been expended by the claimant for costs incurred. The claim is remanded to the Department with instructions to allow the parties a reasonable time to seek a hearing in Superior Court to determine the percentage of total fault attributable to each entity involved in the injury of May 8, 1987. The Department will then issue a further order setting out the distribution of the third party settlement recovery, and setting forth the extent of the Department's lien reimbursement right.

It is so **ORDERED**.

Dated this 18th day of December, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
S. FREDERICK FELLER Chairperson

/s/
PHILLIP T. BORK Member