

In the Matter of the Compensation of
LORRAINE I. MCKINNON, Claimant

WCB Case No. 09-00006TP

ORDER ON REVIEW

Kahn & Kahn, Claimant Attorneys

MacMillan Scholz & Marks, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Herman.

Liberty Northwest Insurance Company (Liberty) petitions the Board for resolution of a dispute concerning its entitlement to a share of proceeds from a settlement between claimant and a private insurer.¹ We conclude that Liberty is not entitled to such a share.

FINDINGS OF FACT²

In October 2006, claimant sustained a compensable injury while driving her employer's medical transport vehicle. Liberty, the employer's workers' compensation insurer, paid \$48,755 in workers' compensation benefits. Claimant proceeded with an action for damages against the "third-party" allegedly responsible for her injury. The third-party insurer tendered its policy limits (\$25,000) to settle the lawsuit.

¹ Liberty has requested oral argument. OAR 438-011-0015(2). We may allow oral argument where the case presents an issue of first impression that could have a significant impact on the workers' compensation system. *See* OAR 438-011-0031(2); *Joe R. Ray*, 48 Van Natta 325, *recons*, 48 Van Natta 458 (1996); *Jeffrey B. Trevitts*, 46 Van Natta 1767 (1994). The decision to grant such a request is solely within our discretion. OAR 438-011-0031(3).

Through their respective written arguments, the parties have adequately addressed the issues before us. As such, we are not persuaded that oral argument would assist us in reaching our decision. Accordingly, we decline to grant the request for oral argument.

² At the outset of this proceeding, the parties were specifically reminded that Board decisions under the third-party law must be made on a written record sufficient to sustain judicial review under ORS 656.298. *See Blackman v. SAIF*, 60 Or App 446, 448 (1982). The parties were further advised in what form evidence should be offered. The parties, however, submitted no documentary or testimonial evidence. Nor did they stipulate to the facts of this case, or submit a joint statement of facts or statement of agreement. Instead, they each included a "statement of facts" in their respective briefs.

We are mindful of the *Blackman* rationale, as well as the court's remand authority under ORS 183.482(8)(c) when an order is not supported by substantial evidence in the record. Nevertheless, based on the parties' uncontested and un rebutted representations in their briefs regarding the factual background leading to their dispute, we have treated their representations as stipulated facts regarding what is a legal issue concerning the interpretation of several potentially applicable statutes.

In February 2009, Liberty approved the proposed settlement. Claimant distributed, and Liberty accepted, approximately \$10,500 as its share of the settlement.

Claimant then pursued a claim against the insurer of the automobile she was driving for underinsured motorist (UIM) benefits, which was settled for \$60,000. Claimant did not seek approval of the settlement from Liberty, nor did she distribute any of the proceeds to Liberty. Thereafter, Liberty petitioned for a ruling that it is entitled to a share of claimant's recovery under the UIM policy.

CONCLUSIONS OF LAW AND OPINION

In support of its position, Liberty cites *Toole v. EBI Companies*, 314 Or 102 (1992). In *Toole*, the Supreme Court addressed the issue of whether the statutory lien of a carrier on the proceeds of an injured worker's recovery against a negligent third party extends to the proceeds of a malpractice action against an attorney based on the attorney's mishandling of the worker's third-party negligence action.

The *Toole* court held that, because the claim against the claimant's attorney was derived from the claim against the third party and because the recoverable damages were the damages that the claimant would have recovered from the third party, an action for attorney malpractice based on the attorney's negligent failure to recover compensation for an injured worker directly from a responsible third party is a third-party action under ORS 656.593 to which a paying agency's lien extends. The Supreme Court reasoned that damages recoverable in a malpractice action would be the damages that the claimant would have recovered in the original third-party action but for his or her attorney's negligence. *Id.* at 112.

Liberty argues that, like the malpractice claim in *Toole*, the UIM claim is derived from the claim against the third party tortfeasor. It contends that the UIM claim arose when the at-fault driver's liability limits did not cover claimant's damages. Liberty asserts that all the recoverable damages under the UIM claim are damages that would have been recoverable against the tortfeasor and that no recovery under the UIM insurance would be possible without a showing of the tortfeasor's liability. Had there been sufficient liability coverage, Liberty observes, there would be no question as to its entitlement to additional reimbursement.

Liberty's contentions notwithstanding, *Toole* is distinguishable in at least one important respect.³ It did not concern application of ORS 742.504(4)(c), which addresses UIM coverage.⁴ That statute provides:

“This [UIM] coverage does not apply so as to inure directly or indirectly to the benefit of any workers’ compensation carrier, any person or organization qualifying as a self-insurer under any workers’ compensation or disability benefits law or any similar law or the State Accident Insurance Fund Corporation.”

Therefore, by its terms, ORS 742.504(4)(c) states that a workers’ compensation carrier is not to benefit directly or indirectly from UIM coverage. Under that statute, Liberty is not entitled to a lien on claimant’s UIM recovery.

Liberty argues, however, that ORS 742.504(7)(c)(B) requires that the UIM recovery be reduced by amounts paid by a workers’ compensation carrier to presumably avoid double recovery by the insured.⁵ That statutory provision does not assist Liberty because the UIM carrier is statutorily authorized to take claimant’s workers’ compensation benefits into account before calculating its obligation to its insured. *See generally Bergmann v. Hutton*, 337 Or 596, 610 (2004) (discussing offset of worker’s compensation benefits under ORS 742.504(7)(c)(B)).

³ Apart from the respect discussed below, *Toole* is also distinguishable for the following reasons. In *Toole*, the foundation of the malpractice recovery was the value of the third-party cause of action. By contrast, here, the UIM recovery was expressly contingent on the separate third party recovery (and any workers’ compensation benefits). In other words, the UIM recovery did not exist until there was a separate third-party settlement. In *Toole*, however, the malpractice and the third-party action/recovery were one and the same.

⁴ The *Toole* court cited *Shipley v. SAIF*, 79 Or App 149, rev den 301 Or 338 (1986) as support for its reasoning. In *Shipley*, the Court of Appeals held that a paying agency’s lien applied to the claimant’s recovery from a third party tortfeasor’s liability insurer which wrongfully denied coverage. That case is also distinguishable because it did not involve application of ORS 742.504(4)(c).

⁵ ORS 742.504(7) provides:

“(c) Any amount payable under the terms of this coverage because of bodily injury sustained in an accident by a person who is an insured under this coverage shall be reduced by:

“*****

“(B) The amount paid and the present value of all amounts payable on account of such bodily injury under any workers’ compensation law, disability benefits law or any similar law.”

In sum, Liberty's arguments do not provide us with a sufficient basis for not applying ORS 742.504(4)(c).⁶ Pursuant to that statute, a workers' compensation carrier such as Liberty is prohibited from benefiting directly or indirectly from claimant's recovery under the UIM policy. Therefore, we decline Liberty's request that it receive a share of claimant's settlement with the UIM insurer.

IT IS SO ORDERED.

Entered at Salem, Oregon on February 2, 2010

⁶ In reaching this conclusion, we note that Liberty approved claimant's settlement with the third-party tortfeasor. Had it believed that such a settlement was not reasonable, and that a recovery beyond the policy limits of the third-party tortfeasor's insurance coverage was more appropriate, Liberty could have withheld its approval of the proposed recovery, thus requiring claimant to seek approval of the settlement from the Board. *See* ORS 656.587. However, by approving the third-party settlement, Liberty in effect conceded that a settlement within policy limits was a reasonable resolution of the third-party action.