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In the Matter of the Compensation of  
**ROARK SCHWANENBERG, DCD., Claimant**  
WCB Case No. 10-00012TP  
THIRD PARTY DISTRIBUTION ORDER  
Furniss Shearer & Leineweber, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys  
Jon A Kadoni, Defense Attorneys  
Gregory A Anderson, Defense Attorneys

Reviewing Panel: Members Weddell, Langer and Herman. Member Langer dissents.

The surviving spouse of the deceased worker (hereafter “claimant”) has petitioned the Board for resolution of disputes that have arisen under the “third party recovery” statutes.<sup>1</sup> Specifically, claimant seeks a determination of whether her cause of action against third parties was lawfully assigned to the paying agency. *See* ORS 656.583. In addition, if a proposed settlement with a third party is valid, we are requested to determine a “just and proper” distribution of the settlement proceeds. *See* ORS 656.593(3). For the following reasons, we conclude that claimant’s cause of action has not been validly assigned to the paying agency.<sup>2</sup>

### FINDINGS OF FACT

On August 5, 2008, claimant’s spouse, a helicopter pilot, died in a helicopter crash. The paying agency accepted the claim and provided death benefits to claimant.

On October 7, 2008, the paying agency sent claimant a letter (“written demand”), stating that her husband’s death may have been caused by the negligence of a third party. (Ex. 1). Claimant received the written demand on October 14, 2008.

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<sup>1</sup> Claimant is Christine Schwanenberg, the surviving spouse of the deceased worker, Roark Schwanenberg.

<sup>2</sup> The paying agency has moved to strike portions of claimant’s reply brief, asserting that she has raised new issues. We will address the specific contentions in the paying agency’s motion in the relevant portions of this order.

The written demand explained that claimant may be entitled to bring suit against the third party or that she could alternatively assign that right to the paying agency. The written demand noted that the statute of limitations for injuries occurring in Oregon was two years from the date of injury, which meant that she must either settle the personal injury claim or file a lawsuit before expiration of the statute of limitations. Claimant was then told that she must decide whether to exercise her right to pursue a damage claim or assign that right to the paying agency and to signify that choice by electing either: Choice A, which retained her right to pursue a lawsuit, or Choice B, which assigned the right to the paying agency.

The written demand informed claimant that she had 60 days from receipt of the demand to respond. The written demand further stated that claimant's right to pursue a cause of action against a third party would be assigned to the paying agency after expiration of the 60-day period. The written demand did not inform claimant that the paying agency also insured a potential third-party defendant (Columbia Helicopters, Inc. (Columbia)). (Exs. 1, 18-3, -4).

On December 10, 2008, 56 days after claimant received the written demand, the paying agency filed a federal lawsuit on claimant's behalf against multiple defendants, including Columbia. (Ex. C, claimant's reply brief). Thereafter, the paying agency moved to dismiss Columbia from the lawsuit. (Ex. 6). The motion was "unopposed" by the other party defendants, and was granted on April 1, 2009. (*Id.*)

In March 2009, a Florida law firm notified the paying agency that it represented claimant, and indicated that the paying agency was not authorized to proceed on her behalf.<sup>3</sup>

On July 14, 2009, claimant filed a motion to intervene in the paying agency's federal court action, which was granted in part, but denied to the extent that the claimant/intervenor sought to bring in Columbia, a non-diverse defendant. (Ex. 8). In October 2009, claimant filed a motion to dismiss the paying agency as party plaintiff. (Ex. 9). That motion was denied, with leave to renew. (Ex. 11).

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<sup>3</sup> In her initial affidavit, claimant averred that she did not respond to the paying agency's written demand within the 60-day period. (Ex. A, claimant's petition). However, in a subsequent affidavit, claimant stated that, although impaired, she put a check mark next to choice A because she did not want to give up any rights to the paying agency and gave the written demand to a family friend to mail. According to claimant, she had no further involvement with the written demand. (Ex. A, claimant's reply brief).

In February 2010, claimant filed her own state cause of action against several third-party defendants, including Columbia. (Ex. 13).

Claimant has reached a proposed third party settlement with one of the third parties in the amount of \$112,000. The paying agency has approved the settlement, provided that it was not construed as a release of its claims.

Claimant has filed a petition with the Board for resolution of these “third party” matters, requesting that we take the following actions: (1) void the purported assignment to the paying agency of her right to pursue a third party action; (2) approve the proposed third party settlement; and (3) approve a “just and proper” distribution of the settlement proceeds. In the event we void the purported assignment, claimant notes that payments to non-workers’ compensation beneficiaries pursuant to the settlement of the estate’s wrongful death action are not subject to the paying agency’s lien.

#### CONCLUSIONS OF LAW AND OPINION

If a worker is compensably injured due to the negligence or wrong of a third person not in the same employ, the worker shall elect whether to recover damages from such third person. ORS 656.578. If the worker elects to pursue a third party action, the proceeds of any damages recovered from a third person by the worker shall be subject to a lien of the paying agency for its share of the proceeds. ORS 656.593(1).

The paying agency may require the worker to exercise the right of election provided in ORS 656.578 by serving a written demand upon such worker. ORS 656.583(1). Unless such an election is made within 60 days from the receipt or service of such a demand and unless, after making such election, an action against a third party is instituted within such time as is granted by the paying agency, the worker is deemed to have assigned the cause of action to the paying agency. ORS 656.583(2). The paying agency shall allow the worker at least 90 days from the making of such an election to institute such action. *Id.*

“[I]n the absence of an adequate written demand under ORS 656.583(1), the 60-day time period for [claimant] to ‘elect’ is not triggered.” *Clifford Carver*, 57 Van Natta 1183, 1191 (2005). Therefore, even where a claimant receives a written demand, “there is still a question as to whether that [demand] provided adequate notice of the claimant’s rights.” *Id.* at 1192. Here, we find that the paying agency’s written demand, as reflected by its subsequent conduct, contained misrepresentations and omissions that, individually and collectively, render its written demand inadequate.

First, the paying agency's October 7, 2008 written demand informed claimant that she had 60 days to elect whether to pursue an action against allegedly negligent third parties. (Ex. 1-1). As set forth above, ORS 656.583(2) requires that a claimant be granted 60 days from receipt of a written demand to make an election. However, in violation of the statute and the express representations contained in its letter, the paying agency filed a lawsuit on claimant's behalf before the statutory 60-day period had expired. (Ex. C, claimant's reply brief). In other words, despite the assertion in the October 7, 2008 written demand that claimant had 60 days before her cause of action would be assigned to the paying agency, the paying agency allotted claimant only 56 days before deeming her cause of action to be assigned.

Consequently, we find that the paying agency's misrepresentation in its written demand, as reflected by its subsequent conduct, renders its written demand null and void. As such, the paying agency has not served a valid demand to claimant as required by ORS 656.583. *See Carver*, 57 Van Natta at 1191-92. Necessarily, claimant has not been provided the necessary 60 days before her cause of action may permissibly be assigned to the paying agency. *See* ORS 656.587(2).

Moreover, the election letter never explicitly stated a time period in which claimant was required to institute a cause of action should she elect to pursue a cause of action herself or stated that, if she did not comply with that time period, the cause of action would be assigned to the paying agency. ORS 656.583(1) requires that a beneficiary be given "at least" 90 days in which to institute the cause of action. The only time frame mentioned in the election was a reference to the two-year statute of limitations. One might infer that was the time period granted by the paying agency, but the letter was not sufficiently clear. Finally, even if the "statute of limitations" reference was considered the time period, nothing was mentioned in the letter regarding an assignment to the paying agency if claimant did not file a lawsuit within that period.<sup>4</sup> *See* ORS 656.583(2). Thus, we find that this omission did not provide claimant adequate notice of her rights concerning a third-party action.

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<sup>4</sup> Claimant notes that the paying agency never contacted her after sending her the election form to determine whether she understood the consequences of the choices presented to her or to let her know that they had not received a response. Considering the profound implications of an "election" under ORS 656.583 and the significant effects on a claimant's assignment of a third party cause of action (either voluntarily or by means of statute), it would seem to be a reasonable practice for a paying agency to maintain contact with a claimant, if for no other reason than to determine whether she either had, or would be, responding to the "election" letter and, if not, whether she would be willing to participate in the paying agency's pursuit of her cause of action.

Lastly, the election letter did not inform claimant that the paying agency also insured a third party. (See Exs. 1, 18-3, -4). Given the transparent potential conflict, such information should have been provided to claimant in the written demand. See also ORS 656.583(2).<sup>5</sup> Therefore, we find that this misrepresentation-by-omission also renders the October 7, 2008 written demand inadequate and invalid.

For the aforementioned reasons, we find that the paying agency never provided claimant with a sufficient and valid written demand as required by ORS 656.583. Consequently, we invalidate the alleged assignment to the paying agency based on claimant's purported failure to respond to a properly-issued written demand.<sup>6</sup>

Alternatively, even were we to find the initial written demand to be adequate, claimant would be entitled to rescind an election where the information provided by the paying agency was "misleading." *EBI Companies v. Cooper*, 100 Or App 246, 250-51 (1990). A claimant need only show that information provided by the paying agency was misleading and that a decision to assign rights to the paying agency could reasonably have been affected if the true facts had been known; a claimant need not prove that she or he was, in fact, misled into assigning a third party action to the paying agency. *James A. Cooper*, 40 Van Natta 1201, 1205-06 (1988); see also *Cooper*, 100 Or App at 250-51.

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<sup>5</sup> ORS 656.583(2) provides, in part: "In any case where an insurer of a third person is also the insurer of the employer, notice of this fact must be given in writing by the insurer to the injured worker and to the Director of the Department of Consumer and Business Services within 10 days after the occurrence of any accident which may result in the assertion of the claim against the third person by the injured worker."

We have not been provided with evidence that the paying agency complied with this statutory notification requirement. In any event, even in the absence of that statutory requirement, we find that, to adequately notify claimant of her rights under ORS 656.583, the paying agency was required in its written demand to inform her that it insured a potential (and, in this case, an *actual*) third-party defendant. Thus, the dissent's parsing of the paying agency's various obligations under ORS 656.583 is misplaced.

<sup>6</sup> We disagree with claimant's alternative argument concerning a "good cause" or "lack of mental competency" exception to the time limitations set forth in ORS 656.583. Unlike ORS 656.319, which pertains to the period in which to file a hearing request, ORS 656.583 does not contain an exception to its time limitations for "good cause" or lack of mental competency. In any event, the record does not establish that claimant lacked the mental competency to attend to legal matters, such as a decision as to whether to assign a cause of action to the paying agency.

Here, we find that each of the aforementioned misrepresentations and omissions that invalidated the paying agency's written demand also could reasonably have affected claimant's failure to respond to that demand in 60 days, "if the true facts had been known." *See Cooper*, 40 Van Natta at 1205. That is, claimant's election decision *could* reasonably have been influenced had she known: (1) that the paying agency would initiate a third-party action on her behalf irrespective of her rights to have 60 days to make her decision; (2) that after electing to seek a remedy against a third party, she had at least 90 more days to institute an action; (3) the time period granted by the paying agency (beyond the required 90 days) to institute an action; and (4) that the paying agency also insured a third party against which a claim may have resulted. Moreover, we also find that claimant's election decision could reasonably have been influenced had she known that the paying agency would subsequently move to dismiss Columbia, a third party that the paying agency also insured, thereby absolving Columbia of any liability.<sup>7</sup> Consequently, for each of these reasons (individually and collectively), we find that claimant was entitled to rescind any election to the paying agency.

We now consider the issue of a "just and proper" distribution of the \$112,000 settlement between claimant and one of the third party defendants.<sup>8</sup>

Claimant argues that payments to persons who are not workers' compensation beneficiaries are not subject to the paying agency's lien. Claimant requests that any distribution of the settlement proceeds takes this into account. The paying agency responds that, until claimant discloses the manner in which the proceeds of the settlement are distributed to beneficiaries, we cannot determine how proceeds should be distributed under the third party statutes. Based on the following reasoning, we conclude that it is premature for us to consider this settlement-distribution issue.

In *Worthen v. Lumberman's Underwriting*, 137 Or App 368, 374 (1995), the court held that where the wrongful death beneficiaries include both workers' compensation claimants and non-claimants, the recovery must first be allocated among the wrongful death beneficiaries pursuant to ORS 30.030. The *Worthen* court explained that, once the workers' compensation beneficiary receives his or

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<sup>7</sup> In that regard, we note that, after the paying agency dismissed Columbia from its federal lawsuit, claimant sought to intervene in that proceeding and bring Columbia in as a defendant, and initiated a state court action against Columbia. (*See Exs. 8, 13*).

<sup>8</sup> The paying agency does not challenge the reasonableness of the settlement. *See ORS 656.587*.

her portion of the recovery, ORS 656.593 dictates how much of that beneficiary's share will be distributed to the paying agency. *See Scarino v. SAIF*, 91 Or App 350, *rev den*, 306 Or 660 (1988) (adult children's share of third party settlement proceeds was not subject to paying agency's statutory lien because adult children were not "beneficiaries" under the workers' compensation statutes).

Here, the record does not contain a determination of whether the wrongful death beneficiaries include both workers' compensation claimants and non-workers' compensation claimants. Unless and until those matters are resolved, it is premature for us to consider a distribution of the third party settlement proceeds attributable to workers' compensation beneficiaries.<sup>9</sup>

In conclusion, we find that claimant's cause of action was not validly assigned to the paying agency. We further conclude that it is premature to determine the issues regarding a "just and proper" distribution of the proceeds of the proposed settlement.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on April 8, 2011

Member Langer dissenting.

The majority finds that claimant did not validly assign to the paying agency her cause of action against an allegedly negligent third party. Because I disagree with that finding, I respectfully dissent.

I have no doubt that claimant has undergone severe emotional distress in the aftermath of this horrible tragedy, which may have caused her inattention to legal matters following her husband's death. Nevertheless, based on my review of this record and my interpretation of the relevant statute, I cannot conclude that claimant should retain this cause of action. I reason as follows.

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<sup>9</sup> The paying agency objects to a new statement of litigation costs in claimant's reply brief and requests a hearing for cross-examination of claimant's counsel. In light of our conclusion that we cannot proceed with a determination of the "just and proper" distribution issue, we need not address these issues.

ORS 656.583 provides:

“(1) The paying agency may require the worker or other beneficiaries or the legal representative of a deceased worker to exercise the right of election provided in ORS 656.578 by serving a written demand by registered or certified mail or by personal service upon such worker, beneficiaries or legal representative.

“(2) Unless such election is made within 60 days from the receipt or service of such demand and unless, after making such election, an action against such third person is instituted within such time as is granted by the paying agency, the worker, beneficiaries or legal representative is deemed to have assigned the cause of action to the paying agency. The paying agency shall allow the worker, the beneficiaries or legal representative of the worker at least 90 days from the making of such election to institute such action. In any case where an insurer of a third person is also the insurer of the employer, notice of this fact must be given in writing by the insurer to the injured worker and to the Director of the Department of Consumer and Business Services within 10 days after the occurrence of any accident which may result in the assertion of the claim against the third person by the injured worker.”

In accordance with the discretion given by the statute, the paying agency served a written demand on claimant to exercise the right of election to institute a cause of action against the allegedly negligent third party. That demand letter expressly informed claimant that she had a choice to make: either to exercise her right to pursue a damage claim herself or to assign her right to the paying agency. Moreover, the letter told claimant that she must make her election, sign and return the document within 60 days from the receipt of the letter. Claimant was further informed that if she failed to respond, her right to pursue the third party action would be automatically assigned to the paying agency.

The majority does not dispute these provisions are consistent with ORS 656.583. Furthermore, the paying agency’s letter informed claimant that, if she had any questions, she could contact it via a phone number provided in the letter

and that she could seek advice from an attorney. Despite the clear instructions provided in the demand letter, the paying agency never received any election. Instead, claimant has provided conflicting information as to whether she signed and attempted to deliver the election letter to the paying agency. Under such circumstances, I am compelled to conclude that claimant did not make any election and that, therefore, by operation of law her cause of action was validly assigned to the paying agency.<sup>10</sup>

The majority reaches the opposite conclusion for essentially three reasons. First, it concludes that the paying agency's demand letter contained a "misrepresentation" because it filed its lawsuit before the 60-day period referenced in its letter had expired. However, the alleged premature filing of the lawsuit was most likely a result of a miscalculation of the 60-day period, because the paying agency's lawsuit was filed on December 10, 2008, more than 60 days from the date the demand letter was *mailed* (October 7, 2008), but a few days less than 60 days from the date that claimant *received* the letter (October 14, 2008). In any event, I see no evidence in this record of a material misrepresentation.

At the time claimant received the demand letter, all information it contained was correct. There is no evidence that the paying agency did not intend to comply with it. Moreover, the paying agency's allegedly premature filing of a lawsuit does not detract from the fact that claimant did not make an election pursuant to the clear instructions of the demand letter. Although the majority finds the premature filing of the lawsuit was "misrepresentation," claimant does not argue that she was misled by this action. Had she provided evidence that, as a result of the paying agency's "premature" action, she believed that she could no longer act on her own behalf, I might reach a different conclusion. However, she did not. Instead, some of the information claimant provided indicated that she completed her election letter. Although some of claimant's submission conflicts with other information she has provided, this "election" assertion supports a conclusion that she understood the significance of a timely election. Such a conclusion contradicts any conclusion that claimant was misled by the paying agency's actions or that the demand letter contained a "misrepresentation."

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<sup>10</sup> I recognize claimant's assertions that, because she was under severe emotional distress in the period following her husband's death, this explains her failure to return the election form to the paying agency. However, in the absence of evidence, medical or otherwise, that she was unable to attend to pressing legal matters, this record is insufficient to support claimant's assertions. In any event, the statute does not include a "good cause" provision that allows us to overlook an untimely election. *Compare* ORS 656.319(1)(b), (2), (3).

Second, the majority faults the demand letter for neglecting to provide a period of “at least” 90 days in which to file a cause of action should she decide to elect to pursue a third party cause of action and to inform her of the consequences of failing to do so. I am also not persuaded by this reasoning.

As I interpret ORS 656.583(1), setting a period of at least 90 days in a demand letter is not a statutory requirement. In other words, the statute allows the paying agency to “grant” a time period within which a beneficiary must institute a cause of action should he or she elect to institute such an action. If the paying agency does, in fact, set a time period, all the statute requires is that it be “at least 90 days” from the making of the election.

Therefore, I would find that the paying agency’s omission of a specific time period in which to file a cause of action in the event of an election is not fatal to the validity of the demand letter.<sup>11</sup> *Cf. William Coultas*, 63 Van Natta \_\_\_\_ (issued this date) (ORS 656.583(2) does not require the claimant to institute a third party action within 90 days; rather it requires the paying agency to allow the claimant “at least” 90 days to institute a cause of action). In addition, I would note that the omission of any time limit that the paying agency had a right to set, but chose not to, had no consequence to claimant’s rights, where she neglected to exercise her right of election within the 60 day period provided in the demand letter.

Third, the majority attaches great significance to the fact that the election letter did not inform claimant that the paying agency also insured a third party. It cites the 10 day notice requirement in ORS 656.583(2) that a worker be informed of a potential conflict of interest.

I would first observe that the third party defendant referred to by the majority (Columbia Helicopters) is not even the one that is the subject of this settlement (the United States Forest Service). Perhaps this explains why claimant does not assert that the election letter was invalid due to alleged noncompliance with the notice requirements of the statute. Despite claimant not having raised this issue in any fashion, compare *Coultas* (rejecting the paying agency’s challenges as “nonspecific”), the majority terms the paying agency’s alleged failure to give notice of a potential conflict as “misrepresentation by omission.” I disagree with that reasoning.

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<sup>11</sup> If the paying agency does not provide any time period in which to initiate a cause of action, the claimant’s action is only limited by the applicable statute of limitations. The paying agency’s demand letter correctly informed claimant of the two-year statute of limitations for filing of a lawsuit.

Apart from the fact that claimant does not make this argument, the majority's apparent assumption that the statute requires that the election letter contain this information finds no support in the statute. Although the notice provision appears in the same subsection, it is clear from the language of the statute that this is a separate obligation from the requirements of the election demand. The notice that the insurer of the employer also insures the third person must be filed within 10 days of the accident. In contrast, the election demand is not mandatory and is not restricted by any deadline. The omission of the notice of insuring a third person is simply not relevant to the issue of whether the demand letter triggered the 60-day period or whether claimant was adequately notified of her rights to pursue a cause of action against the third party. Because claimant does not argue that the election letter was void for lack of this notice, and does not even assert that the paying agency did not file the required notice within 10 days after the accident, it is more reasonable to assume that she in fact did receive the proper notice.<sup>12</sup>

The majority reasons that, even if initial assignment to the paying agency was valid, claimant subsequently rescinded that election. It argues that, under *James A. Cooper*, 40 Van Natta 1201 (1988), *aff'd*, *EBI Companies v. Cooper*, 100 Or App 246 (1988), claimant was entitled to a rescission of any election because of misleading conduct by the paying agency. I am not persuaded by that reasoning.

To be entitled to a rescission of an election under *Cooper*, claimant must show that the election form was misleading and that the decision to assign her rights to the paying agency could reasonably have been affected if the true facts had been known. 100 Or App at 249. In *Cooper*, there was a clear misstatement of the law that was misleading. By contrast, here, there was no such misstatement. As previously explained, the paying agency's demand letter requiring that claimant make an election within 60 days was consistent with ORS 656.583. Because the election form was not misleading, claimant is not entitled to a rescission of her election. Furthermore, as discussed above, the record does not support the majority's assertion that the paying agency's premature filing of its lawsuit or any other conduct affected claimant's initial decision not to pursue her own cause of action.

In conclusion, for the aforementioned reasons, I would find that claimant validly assigned her cause of action to the paying agency. Because the majority reaches a different conclusion, I must part company and dissent.

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<sup>12</sup> Claimant timely commenced her action against Columbia Helicopters in February 2010.