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In the Matter of the Compensation of  
**MIKE A. PINKERTON, Claimant**  
WCB Case No. 12-00007TP  
THIRD PARTY DISTRIBUTION ORDER  
Parker Waichman LLP, Claimant Attorneys  
Department of Justice, Defense Attorneys

Reviewing Panel: Members Langer and Lanning.

The SAIF Corporation, as a paying agency, has petitioned the Board for resolution of a third party dispute concerning a “just and proper” distribution of proceeds from a third party settlement. *See* ORS 656.593(3). We conclude that a distribution in accordance with ORS 656.593(1) is “just and proper.”

FINDINGS OF FACT

On July 3, 2003, claimant was compensably injured. SAIF accepted a left thigh contusion, nondisplaced fracture left acetabulum, partial detachment of the posterior hip joint labrum, and provided compensation benefits. (Exs. A1 through A4).

On January 11, 2007, claimant underwent left hip implant surgery for his compensable condition. (Ex. A6). The implant was determined to be defective and was subsequently recalled. Claimant underwent revision surgery on January 12, 2009. (*Id.*)

Subsequently, claimant pursued a third party claim against the manufacturer of the defective hip implant. The parties settled the claim (with SAIF’s approval) for \$180,000.

On August 25, 2010, SAIF informed claimant’s attorney that it had a lien on the third party cause of action and that “[d]istribution of any agreed-upon settlement will be disbursed in accordance with ORS 656.593.” (Ex. A7-1). The final lien amount was for \$135,867.48, composed of \$51,123.17 in medical costs, \$24,319.26 in time loss, \$26,958.30 for permanent disability, and \$33,466.75 in future expenditures. (Ex. A9).

In a September 6, 2011 email, SAIF’s third party adjuster noted that claimant and his counsel had prior approval to accept “whatever gross settlement offer [claimant] and his attorneys which [*sic*] to accept under statutory distribution,

which I verbally explained to you.” (Ex. A8). The email stated that a document containing a copy of third party statutes was attached.<sup>1</sup>

In a January 24, 2012 letter to SAIF’s adjuster, claimant’s attorney stated, “You informed our office that according to ORS 656.593, the attorney receives costs and fees first, client gets a third of the net balance with workman’s compensation carrier receiving their lien amount after that.” Claimant then provided the following breakdown (Ex. A10):

“Total Award	\$180,000.00
Less disbursements	\$98.79
Less Attorney Fees (1/3)	\$59,967.07
Less 1/3 to client	\$59,967.07
Remaining funds to SAIF Corporation	\$59,967.07”

Based on that calculation, claimant’s counsel enclosed with the letter a check for \$59,976.07 in “full satisfaction” of SAIF’s lien. (*Id.*)

On February 3, 2012, SAIF’s adjuster notified claimant’s counsel via email that SAIF had received his January 2012 letter and check. The adjuster informed claimant’s counsel that SAIF’s statutory share of the settlement was \$79,934.14, and that it therefore required an additional \$19,967.07. The adjuster noted that a message to this effect had been left with claimant’s attorney’s office on January 27, but there had been no response. The adjuster also explained, “we had a conversation with your office in October wherein your office suggested the distribution be 1/3, 1/3, 1/3. At that time it was, and still is, SAIF’s position statutory distribution would apply. Using the 1/3 each formula creates a disadvantage to SAIF and we did not agree to that.” (Ex. A11).

SAIF has petitioned the Board pursuant to ORS 656.593(3) for resolution of the parties’ dispute.

Relying on the distribution schedule for ORS 656.593(1), SAIF proposes the following distribution of the \$180,000 settlement proceeds:

“Attorney fees:	\$60,000.00
Costs:	\$98.79
Claimant:	\$39,967.07 (33 1/3 % of balance after deduction of costs and fees)
SAIF lien:	\$79,934.14.”

<sup>1</sup> The document does not specifically designate which statutes were provided.

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## CONCLUSIONS OF LAW AND OPINION

If the worker or beneficiaries settle a third party claim with paying agency approval, the agency is authorized to accept as its share of the proceeds “an amount which is just and proper,” provided that the worker receives at least the amount to which he or she is entitled under ORS 656.593(1) and (2). ORS 656.593(3); *Estate of Troy Vance v. Williams*, 84 Or App 616, 619-20 (1987). The amounts referred to in ORS 656.593(1) and (2) pertain to attorney fees, litigation expenses, and claimant’s statutory 1/3 share of the settlement. Thereafter, any conflict as to what may be a “just and proper distribution” shall be resolved by the Board. ORS 656.593(3). Because such a conflict exists in this case, we now proceed with a determination of a “just and proper” distribution.

In *Urness v. Liberty Northwest Insurance Corporation*, 130 Or App 454 (1994), the court held that “ad hoc” distributions are contemplated by ORS 656.593(3) and, therefore, the Board should not automatically apply the distribution scheme for third party judgments under ORS 656.593(1) when resolving disputes. *Id.* at 458. The court held that each case should be judged on its own merits when determining a “just and proper” distribution. *Id.*

In light of *Urness*, we are not limited to applying only the statutory scheme for distribution of a third party recovery. Rather, ORS 656.593(3) specifically contemplates “ad hoc” distributions. Although ORS 656.593(1)(c) does not apply when we are determining a “just and proper” distribution, that provision provides some general guidance in determining what portion of the remaining balance of the third party settlement proceeds the paying agency may receive in satisfaction of its lien. *Norman H. Perkins*, 47 Van Natta 488 (1995).

For the following reasons, we conclude that a distribution of the settlement proceeds in a manner consistent with the statutory formula in ORS 656.593(1)<sup>2</sup> is “just and proper.”

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<sup>2</sup> In so deciding, we are mindful of the court’s admonishment that we must refrain from automatically applying the third party judgment scheme when determining a “just and proper” distribution for third party settlement proceeds. *Urness*, 130 Or App at 458. Thus, in reaching our determination regarding a “just and proper” distribution, we judge this case based on its own merits and not on an inapplicable statutory distribution scheme. In other words, in exercising our statutory authority under ORS 656.593(3), we do not arbitrarily adhere to the specific distribution scheme set forth in ORS 656.593(1). Rather, to assist us in conducting our deliberations, we have examined the components of compensation that are subject to reimbursement from a third party judgment under Section (1)(c). Such an examination provides some general guidance in determining what portion of the remaining balance of claimant’s third party settlement would be “just and proper” for the paying agency to receive in partial satisfaction of its lien.

Pursuant to ORS 656.593(1)(c), after the deductions for costs, attorney fees, and the claimant's 1/3 share, the paying agency shall be paid and retain the balance of the recovery to the extent that it is compensated for its expenditures for compensation and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim under the workers' compensation law. Any remaining balance shall be paid to the worker. ORS 656.593(1)(d); *Liberty Northwest Ins. Corp. v. Golden*, 116 Or App 64, 67-68 (1992). Where a paying agency has incurred expenditures for compensation attributable to an accepted injury claim and the claimant has not challenged the payment of those benefits, we have found it "just and proper" for a paying agency to receive reimbursement for such claim costs. *Perkins*, 47 Van Natta at 490; *Jack S. Vogel*, 47 Van Natta 406 (1995).

Here, claimant does not dispute SAIF's assertion that it incurred \$102,400.73 in actual claim costs. However, claimant asserts that SAIF's share of the settlement should be limited to that which he alleges it agreed to accept before the distribution, *i.e.*, "one-third of the settlement after deduction of costs and disbursements." In support of this position, claimant contends that SAIF's acceptance of the check for \$59,967.07 did not only represent a "just and proper" settlement of the lien, in keeping with what SAIF had advised claimant's attorneys would be acceptable, but was "an accord and satisfaction of the debt." Claimant reasons that SAIF's later letters and emails seeking an additional share are "of no moment," as acceptance of the check in the first instance constituted an acceptance of the lesser amount. Finally, according to claimant, SAIF's claim should be limited to monies paid to date, and its petition for a further share of the third party settlement proceeds denied.

In response, SAIF contends that a distribution under the formula prescribed in ORS 656.593(1)(c) would be "just and proper." SAIF further notes that it would recover only \$79,934.14 of its \$135,867.48 lien. Regarding any prior "agreement," SAIF counters that claimant has offered no evidence to support his claim that it agreed to accept a lesser amount. SAIF asserts that the evidence shows that it approved the settlement on the understanding that distribution would be pursuant to ORS 656.593 and that, once it received claimant's counsel's "partial payment" check, it took actions designed to remind him of its position.<sup>3</sup>

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<sup>3</sup> SAIF's adjuster's assertion that she left a message with claimant's counsel's office on January 27, when SAIF received the check, is undisputed. (*See* Ex. A11). Also, when she did not receive a return call, SAIF's adjuster sent claimant's counsel an email documenting her phone message and SAIF's position. (*Id.*)

After considering the parties' respective positions, as well as the aforementioned policies, we find that it is "just and proper" for SAIF to recover the remaining balance of settlement proceeds after distribution of claimant's counsel's \$98.79 in litigation expenses and claimant's statutory one-third share; *i.e.*, that it is "just and proper" for SAIF to recover the remaining balance of proceeds. We reason as follows.

First, when either a worker or the paying agency, in the course of negotiating a third party settlement, makes a representation to the other that could affect the other's position on the amount of the settlement, the other is entitled to rely on that representation. *Williams*, 84 Or App at 620 ("when either a worker or an agency, in the course of negotiating a third-party settlement, makes a representation to the other that could affect the other's position on the amount of the settlement, the other is entitled to rely on that representation"); *Robert L. Hardt*, 45 Van Natta 1487 (1993) ("To permit either party to challenge or alter any portion of a previously approved lien at a date subsequent to the third party settlement would create further instability in the negotiation process."); *Verne E. Davis*, 43 Van Natta 1726 (1991) (the claimant's request to effectively revise the parties' previously agreed upon "just and proper" distribution of settlement proceeds was declined given that, in approving the settlement, the carrier had expressly relied upon the claimant's representation that he would satisfy a specific lien amount); *Timothy J. Gheen*, 43 Van Natta 1484 (1991) (where the claimant agreed to honor the paying agency's \$18,000 lien in return for the agency's approval of the third party settlement, the claimant could not later object to a portion of the lien related to projected medical treatments).

Here, however, the record does not support claimant's contention that the parties had a mutual agreement concerning the distribution of the settlement proceeds. When it first informed claimant's attorney of its lien in August 2010, SAIF stated that "[d]istribution of any agreed-upon settlement will be disbursed in accordance with ORS 656.593." (Ex. A7-1). In her September 6, 2011 email, SAIF's third party adjuster noted that claimant and his counsel had prior approval to accept "whatever gross settlement offer [claimant] and his attorneys which [*sic*] to accept under statutory distribution, which I verbally explained to you." (Ex. A8).

Following the settlement, in his January 24, 2012 letter to the adjuster, claimant's attorney confirmed his understanding of the statutory distribution schedule, by stating that:

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“You informed our office that according to ORS 656.593, the attorney receives costs and fees first, client gets a third of the net balance with workman’s compensation carrier receiving their lien amount after that.”

Such a description is not consistent with equal 1/3 shares. Yet, claimant’s counsel then proceeded to subtracted his costs from the total award, and divide that balance into thirds between his client, himself, and SAIF. (Ex. A10). Finally, claimant’s counsel enclosed a check for \$59,976.07 in “full satisfaction” of SAIF’s lien.

Following receipt of claimant’s check, SAIF’s adjuster promptly informed claimant’s counsel that SAIF’s statutory share of the settlement (after costs) was \$79,934.14, and that it therefore required an additional \$19,967.07. A few days later, the adjuster reiterated her message in an email to claimant’s counsel, stating that, “we had a conversation with your office in October wherein your office suggested the distribution be 1/3, 1/3, 1/3. At that time it was, and still is, SAIF’s position statutory distribution would apply. Using the 1/3 each formula creates a disadvantage to SAIF and we did not agree to that.” (Ex. A11). Claimant’s counsel does not contest this statement.

This record supports a conclusion that SAIF approved the settlement on the understanding that it would receive the balance of settlement proceeds remaining after claimant’s attorney fee, litigation costs, and claimant’s statutory 1/3 share were distributed. Even the January 2012 letter from claimant’s counsel describes such a distribution (“the attorney receives costs and fees first, client gets a third of the net balance with [] carrier receiving their lien amount after that”).<sup>4</sup> Notwithstanding those expressed intentions and understandings, the check provided to SAIF did not follow that distribution method. Consequently, on this record, it cannot be said that SAIF agreed to claimant’s counsel’s proposed settlement distribution.<sup>5</sup> *See, e.g., Robert Aagesen (Brown)*, 46 Van Natta 1663

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<sup>4</sup> Furthermore, claimant’s counsel does not rebut SAIF’s adjuster’s representation that the earlier proposed “1/3, 1/3, 1/3 split” offered by claimant’s counsel had been rejected by SAIF.

<sup>5</sup> We also do not agree with claimant that SAIF’s acceptance of the check for \$59,967.07 represented an “accord and satisfaction of the debt,” therefore precluding it from petitioning for a different amount. The record does not establish that SAIF *agreed* to accept \$59,967.07 in full satisfaction of its previously claimed share of the settlement proceeds, or that it accepted and processed the check with that in mind. To the contrary, as confirmed by its email issued after receiving the check, it is apparent that SAIF considered the check to represent *partial payment* of its final \$79,934.14 share of the settlement. We acknowledge that claimant’s counsel’s January 2012 letter stated that the check was in

(1994) (no mutual agreement where the carrier's attorney submitted an affidavit indicating that he and the claimant's counsel had agreed to a certain distribution, but the claimant's counsel's affidavit indicated there was no such agreement, and the correspondence at the time of the agreement did not support the carrier's position); *Robert E. Greer, III*, 43 Van Natta 650 (1991) (when parties had different understandings of a third party lien agreement, express language of the settlement document relied on to resolve the dispute).

We now address SAIF's "just and proper" share. The record establishes that SAIF has paid \$102,400.73 in actual claim costs related to claimant's compensable claim.<sup>6</sup> (Ex. A9). Claimant neither challenges these claim expenditures nor contends that such costs were unrelated to his compensable injury. Inasmuch as SAIF's expenditures constitute "compensation" that has previously been provided to claimant, we find it "just and proper" for SAIF to receive reimbursement for these expenses from claimant's third party settlement. See ORS 656.593(3); *Donisha E. Cosby*, 63 Van Natta 235 (2011); *Rosie E. Reeves*, 63 Van Natta 1718 (2011); *Perkins*, 47 Van Natta at 490.

In conclusion, we find that a distribution of third party settlement proceeds mirroring the statutory third party judgment scheme of ORS 656.593(1) is, in fact, "just and proper."<sup>7</sup> SAIF's "just and proper" share is calculated in the following manner.

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"full satisfaction" of SAIF's lien. However, in the same letter, claimant's counsel acknowledged SAIF's position that it was entitled to the remainder of the settlement after deductions for attorney fees, costs, and claimant's 1/3 share. Also, SAIF promptly responded to the check by seeking its remaining share. Under these circumstances, because SAIF never agreed to accept a lesser amount, its acceptance of the check does not establish that it withdrew its claim for the previously asserted share; *i.e.*, there was no "accord" or "satisfaction."

<sup>6</sup> Although SAIF's lien included an amount for future expenditures, because the amount SAIF will recover as a "just and proper" share (based on a distribution under ORS 656.593(1)) does not fully satisfy the amount it paid in actual claim costs, we need not determine whether any future expenditures are viable.

<sup>7</sup> ORS 656.593(1) provides that the total proceeds shall be distributed as follows:

"(a) Costs and attorney fees incurred shall be paid, \* \* \*.

"(b) The worker or the beneficiaries of the worker shall receive at least 33-1/3 percent of the balance of such recovery.

"(c) The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service,

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Pursuant to ORS 656.593(1)(a), costs and attorney fees incurred shall be initially disbursed from the \$180,000 settlement. The balance remaining after such disbursement (\$60,000 attorney fee plus \$98.79 in costs) is \$119,901.21. Under ORS 656.593(1)(b), the worker shall then receive 33 1/3 percent of the balance of the recovery (\$119,901.21), which is \$39,967.07. Pursuant to ORS 656.593(1)(c), SAIF is entitled to the remaining balance of settlement proceeds, \$79,934.14 (\$119,901.21 minus \$39,967.07), as partial reimbursement for its third party lien.

Accordingly, based on the aforementioned reasoning, it is “just and proper” for SAIF to receive \$79,934.14 from the third party settlement. *See* ORS 656.593(3). Because SAIF has already been reimbursed in the amount of \$59,967.07, claimant’s attorney and claimant are directed to forward the remaining \$19,967.07 to SAIF for its “just and proper” share.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on October 15, 2012

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and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim under this chapter. \* \* \*.

“(d) The balance of the recovery shall be paid to the worker or the beneficiaries of the worker forthwith. \* \* \*.”