
In the Matter of the Compensation of
RALPH A. HERNANDEZ, Claimant
WCB Case No. 13-00006TP
THIRD PARTY DISTRIBUTION ORDER
William L Ghiorso, Claimant Attorneys
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Reviewing Panel: Members Johnson and Lanning.

Claimant has petitioned the Board for resolution of a conflict concerning the “just and proper” distribution of proceeds from a third party settlement. *See* ORS 656.593(3). Specifically, the dispute pertains to the amount of the insurer’s “just and proper” share of a \$100,000 settlement. We conclude that a distribution in accordance with ORS 656.593(1) is “just and proper,” and that the insurer is entitled to recover its actual claim costs for the accepted cervical and thoracic conditions (\$37,987.19) as its “just and proper” share of the third party settlement.

FINDINGS OF FACT

On January 25, 2011, claimant was compensably injured when his work vehicle was rear-ended by the vehicle of a third party. (Ex. 1). The insurer accepted the claim for cervical and thoracic strains and paid benefits.

On August 8, 2011, the insurer amended its acceptance to include cervical and thoracic strains combined with preexisting cervical spondylosis, lumbar spondylosis, occipital headaches and mid-back pain. (Ex. 2). On August 9, 2011, the insurer denied the combined condition, asserting that the compensable injury was no longer the major contributing cause of claimant’s disability and need for treatment. (Ex. 3).

On August 22, 2011, pursuant to a recommendation from Dr. Kellogg, neurosurgeon, claimant sought authorization for artificial disc replacement at C5-6 and a Dexa bone scan. (Ex. 4). The insurer declined to authorize the procedures on August 25, 2011. (Ex. 5). .

On August 31, 2011, claimant initiated new/omitted medical condition claims for injury to his cervical and thoracic spine and tissue and requested complete diagnostic exams to determine the need for surgery. (Ex. 6).

On November 15, 2011, the insurer denied a T8-9 disc protrusion and C5-6 disc protrusion.

On April 6, 2012, the insurer and claimant entered into a Disputed Claim Settlement (DCS) for \$5,000, to resolve the denied claim. (Ex. 7). The parties also entered into a Claim Disposition Agreement (CDA) for \$5,000. (Ex. 8). Pursuant to the CDA, claimant released his “non-medical services-related” benefits related to his January 2011 compensable injury.

On July 23, 2013, Dr. Kellogg provided an estimate of the proposed surgery. He projected that the cervical disc replacement and attendant procedures would cost from \$34,615 to \$43,817.50. (Ex. 9). Claimant desires to undergo the recommended surgery. (Ex. 10).

Claimant’s counsel, on his client’s behalf, then pursued a third party cause of action against the third party.¹ Thereafter, claimant and the third party insurer engaged in settlement negotiations, in which the third party insurer offered its policy limits of \$100,000 to settle the claim.

On July 31, 2013, the insurer approved the settlement, “contingent upon distribution being based on the formula.” (Ex. 12). The insurer’s total lien was \$37,987.19, consisting of \$32,987 in medical costs and \$5,000 for recoverable indemnity (*i.e.*, costs associated with the CDA). Pursuant to ORS 656.593, the insurer proposes the following distribution of the proceeds, which claimant rejects:

“Settlement	\$100,000.00
“Attorney Fees	- \$33,333.33
“Balance Forward	\$66,666.67
“Costs	- \$545.00
“Balance Forward	\$66,121.67
“Claimant’s Statutory Share	- \$22,040.56
“Balance Forward	\$44,081.11
“[Insurer’s] Lien	- \$37,987.19
“Balance to [Claimant]	\$6,093.92”

¹ In his complaint, claimant claimed \$20,374.22 in economic damages, and \$45,000 in noneconomic damages. (Ex. 11-2).

CONCLUSIONS OF LAW AND OPINION

If a worker is compensably injured due to the negligence or wrong of a third party not in the same employ, the worker shall elect whether to recover damages from the third party. ORS 656.578. The proceeds of any damages recovered from the third party by the worker shall be subject to a lien of the paying agency for its share of the proceeds. ORS 656.593(1). "Paying agency" means the self-insured employer or insurer paying benefits to the worker or beneficiaries. ORS 656.576.

Here, claimant was compensably injured due to the negligence of a third party. The claim was accepted by the insurer, who has provided compensation. Because the insurer has paid benefits to claimant as a result of a compensable injury, it is a paying agency. ORS 656.576. Moreover, when claimant chose to seek recovery from the third party, the provisions of ORS 656.580(2) and 656.593(1) became applicable. By virtue of the aforementioned statutory provisions, the insurer's lien for its claim costs attaches to claimant's recovery and that lien is preferred to all other claims. ORS 656.580(2).

Since claimant settled his third party claim and the insurer has approved that settlement, the insurer is authorized to accept as its share of the proceeds "an amount which is just and proper," provided that claimant receives at least the amount to which he 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.

The underlying public policy of the third party distribution statutes and the purpose of the statutory liens is to allocate whatever the claimant recovers between him and the paying agency and to provide reimbursement to those responsible for statutory compensation of injured workers when damages for settlements are obtained against the persons whose act caused the injuries. *Allen v. American Hardwoods*, 102 Or App 562, 567, *rev den*, 310 Or 547 (1990); *Schlecht v. SAIF*, 60 Or App 449, 456 (1982). In other words, the tortfeasor or wrongdoer should bear the burden of claimant's workers' compensation claim costs to the greatest extent possible. *See Scott Turn*, 45 Van Natta 995, 998 (1993).

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, it was improper for the Board to 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).

Here, we find that a distribution that mirrors the statutory third party judgment scheme is, in fact, “just and proper.” For the following reasons, we find that it is “just and proper” for the insurer to receive \$37,987.19 out of the third party settlement as full reimbursement for its actual claim costs.

Claimant argues that negotiations with the third party insurer centered on his need for surgery and an artificial C5-6 disc replacement, which pertained to denied condition(s) for which the insurer would not be responsible. Therefore, he contends that it would not be “just and proper” for the insurer to receive reimbursement for a condition that it denied. Specifically, claimant asserts that the insurer is entitled, at most, to the recoverable indemnity of \$5,000 in accordance with ORS 656.593(1), or to \$4,511.87 for actual medical treatment costs. We are not persuaded by claimant’s argument.

A paying agency is entitled to recover reimbursement for its claim costs from a third party settlement or judgment “to the extent that it is compensated for its expenditures for compensation” resulting from the compensable injuries for which the claimant has received damages from the third party. *See William Bohn*, 54 Van Natta 298 (2002); *Donna L. Johnson*, 45 Van Natta 1586, 1588 (1993). A paying agency is not entitled to a share of settlement proceeds that are expressly not attributable to the compensable injury. *See Robertson v. Davcol, Inc.*, 99 Or App 542 (1989) (paying agency not entitled to a share of settlement proceeds that are expressly not attributable to the compensable injury); *Gale E. Charlton*, 43 Van Natta 1356, 1358 (1991).

Here, the insurer has not asserted a lien for its actual/projected costs attributable to a denied condition. Rather, the record demonstrates that the insurer is seeking reimbursement for actual claim costs for the accepted cervical and thoracic strain conditions. The issue is thus whether the third party settlement only pertained to those denied conditions, as claimant claims. However, the record does not establish that the settlement offer was expressly allocated or limited in the manner presented by claimant. *See John A. Knapp*, 60 Van Natta 77 (2008) (record did not establish that the settlement specifically provided for an apportionment of damages between compensable and noncompensable conditions); *Bohn*, 54 Van Natta at 301 (record did not support a conclusion that the third party settlement was attributable to denied conditions where the settlement recited that it was for all claims of bodily injury resulting from the accident and was not expressly limited to denied conditions). Instead, all we can discern from the record is that claimant filed a cause of action stemming from his compensable injury, claiming economic damages of \$20,374.22,² and subsequently settled the lawsuit.

Where a paying agency has incurred expenditures for compensation attributable to an accepted injury and the claimant has not challenged the payment of those benefits, we have found it is “just and proper” for a paying agency to receive reimbursement for such claim costs. *See Bohn*, 54 Van Natta at 302; *Jack S. Vogel*, 47 Van Natta 406, 410 (1995). Here, based on the record presented, and in the absence of any evidence affirmatively showing that a specific amount of the third party settlement was attributable to conditions not accepted by the insurer, we conclude that it is “just and proper” for the insurer to receive reimbursement of \$37,987.19 from the remaining balance of settlement proceeds (after distribution of claimant’s counsel’s attorney fee, litigation costs, and claimant’s statutory 1/3 share) in recovery of its actual claim costs. *See ORS 656.593(3)*. The remainder of the settlement proceeds are payable to claimant.

IT IS SO ORDERED.

Entered at Salem, Oregon on November 4, 2014

² Pursuant to the insurer’s ledger, medical costs for treatment through December 4, 2011 (the date claimant filed his third party cause of action) totaled \$32,259.42. Claimant’s third party cause of action was filed in December 2011, at which time he sought economic damages of \$20,374.22, as well as noneconomic damages of \$45,000. Claimant also submitted a ledger that shows a total of \$27,300.97 paid by the insurer for medical costs through September 28, 2011.