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In the Matter of the Compensation of  
**DAVID J. HANSON, Claimant**  
WCB Case No. 14-00008TP  
THIRD PARTY DISTRIBUTION ORDER  
Doblie & Associates, Claimant Attorneys  
MacMillan Scholz & Marks, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

The paying agency has filed a petition for resolution of a dispute regarding a “just and proper” distribution of proceeds from a third party settlement. *See* ORS 656.593(3). Specifically, the dispute concerns what portion of a \$600,000 settlement is attributable to claimant’s third party cause of action (rather than his wife’s loss of consortium action) and, as such, is subject to the paying agency’s third party lien. *See* ORS 656.593(1). The paying agency contends that the value of the loss of consortium claim is in the range of \$50,000 to \$80,000. Claimant asserts, however, that this amount is \$250,000.

On December 30, 2014, we referred this matter to the Hearings Division for a fact finding hearing and a recommendation from an Administrative Law Judge (ALJ). *David J. Hanson*, 66 Van Natta 2131 (2014). Following that hearing, the ALJ recommended that claimant’s wife’s loss of consortium claim be valued at \$80,000. For the following reasons, we agree with the ALJ’s recommendation and conclude that it is “just and proper” for the paying agency to recover its third party lien as determined at the time of the settlement; *i.e.*, \$220,943.38.

### FINDINGS OF FACT

We adopt our previous “Findings of Fact,” as supplemented by the ALJ’s “Findings of Fact,” which we summarize as follows.

Claimant was compensably injured in a motor vehicle accident (MVA) in March 2007. The paying agency accepted the claim and paid benefits to claimant.

Claimant subsequently filed a cause of action against the allegedly negligent third parties. His wife joined the cause of action, claiming loss of consortium.

Those causes of action were settled before trial. One third party insurer tendered its full \$500,000 policy limits and another insurer tendered its \$100,000 policy limits. Neither settlement differentiated between the causes of action from claimant and his wife.

The paying agency approved both settlements, while maintaining its right to full reimbursement of its lien. When the matter was settled, the paying agency had paid \$118,596.07 in medical expenses and \$60,536.31 in indemnity. Additionally, the paying agency projected future payment of \$38,687 in medical expenses and \$3,124 in indemnity. Thus, the paying agency asserted a total lien of \$220,943.38.

Claimant and the paying agency could not agree on the amount of the settlement proceeds to be allocated between his cause of action and his wife's loss of consortium claim. They chose to submit their dispute to the Board. Claimant asserted that \$250,000 of the total settlement proceeds (approximately 42 percent of the total settlements) should be allocated to the loss of consortium claim. The paying agency argued that \$60,000 (10 percent of the settlement proceeds) should be allocated to the loss of consortium claim.

We found it premature to address a "just and proper" distribution of settlement proceeds because the paying agency had not approved a specific settlement between claimant and the third parties. *David J. Hanson*, 63 Van Natta 1108, 1110 (2011). In doing so, we reasoned that the portion of the \$600,000 total settlement allotted to claimant's cause of action (as agreed to by claimant and the third parties) and the portion allotted (by claimant's wife and the third party) to his spouse's loss of consortium claim had not been specifically identified. *Id.* Accordingly, we dismissed the petition.<sup>1</sup> *Id.* at 1111.

The parties were subsequently unable to agree on the proper allocation of the settlement proceeds. These efforts included an unsuccessful attempt at mediation, as well as the paying agency's motion for declaratory judgment, which was dismissed by a circuit court judge.

The paying agency then filed another petition to the Board, requesting that we determine a "just and proper" distribution of the third party settlement proceeds. In support of its petition, the paying agency submitted an affidavit from Mr. Sweek, the attorney who defended the third party in claimant's and his spouse's lawsuit. Mr. Sweek explained that, based on his review of depositions, medical reports, medical summaries, his mediation statement and some pleadings, and considering the marital relationship and changes in that relationship following the MVA, the value of claimant's wife's loss of consortium claim was in the range of \$50,000 to \$80,000. (Ex. 5).

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<sup>1</sup> Our order did not state that the petition was dismissed with prejudice.

Claimant moved to dismiss the paying agency's petition, asserting that it was untimely because the paying agency should have appealed our prior order and the circuit court's dismissal of its petition for declaratory judgment. Claimant also moved to strike the affidavit from Mr. Sweek, asserting that it was previously obtainable and that his constitutional "due process/right to confrontation" rights had been violated by the absence of an opportunity to cross-examine the attorney.

Thereafter, we denied claimant's motions and referred the matter to hearing for further development of the record. *Hanson*, 66 Van Natta at 2131. In doing so, we concluded that our prior order was procedural and had no preclusive effect on the current dispute.<sup>2</sup> Moreover, we explained that the paying agency's current petition was based on additional facts and circumstances, such as Mr. Sweek's affidavit evaluating the value of the loss of consortium claim. Therefore, we considered it appropriate to address the parties' dispute concerning a "just and proper" distribution of the paying agency's portion of the \$600,000 settlement proceeds.<sup>3</sup> *Id.* at 2133. We concluded, however, that the matter be referred to a hearing for further development of the record, which would include a cross-examination of Mr. Sweek. We directed the ALJ to issue a recommendation regarding the parties' "just and proper" dispute. *Id.* at 2134.

At the subsequent hearing, Mr. Sweek testified regarding his affidavit. He reiterated that in preparation for his affidavit, he reviewed medical reports, his medical summary, and the pleadings in the civil case. (Tr. 27; *see* Ex. 20). He noted that he did not review the Jury Verdicts Northwest summaries, as he had found in his experience that they were not relevant beyond the specific cases. (Tr. 27). He further explained that, in his trial experience, awards for loss of consortium were generally in the range of \$5,000 to \$25,000. (*Id.*) However, he valued claimant's wife's loss of consortium claim between \$50,000 to \$80,000, because claimant and his wife were "likable people" and a jury could award higher than the ordinary range. (Tr. 35-36). He also acknowledged that he had not reviewed several reports in the record in preparing his affidavit, and that he disagreed with some of the accepted conditions. (Tr. 64).

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<sup>2</sup> We further noted, because our previous order had not dismissed the petition "with prejudice," it was considered to have been dismissed "without prejudice." *Id.* at 2134 (citing *Michael R. Dunham*, 63 Van Natta 1627 (2011)).

<sup>3</sup> In reaching this conclusion, we noted that there was no contention that the \$600,000 settlement (which did not expressly differentiate between claimant's and his wife's shares of the proceeds) was invalid or otherwise unapprovable. *See* ORS 656.587; *cf.* *Karl A. McDade, Jr.*, 48 Van Natta 2564 (1996) (because third party settlement was made without the approval of the paying agency or the Board, the settlement was void).

On July 8, 2015, ALJ Pardington issued a recommendation, relying on Mr. Sweek's testimony and recommending that \$80,000 from the \$600,000 settlement be allocated to the loss of consortium claim.

Following ALJ Pardington's recommendation, a supplemental briefing schedule was implemented. Having received the parties' supplemental briefs, we proceed with our review.

### 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.

Because claimant settled his third party claim and the paying agency has approved that settlement, the paying agency 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 one-third share of the settlement. Thereafter, the Board shall resolve any conflict as to what may be a "just and proper distribution." ORS 656.593(3); *SAIF v. Wright*, 312 Or 132, 137 (1991) (the court held that the term "any conflict" in ORS 656.593(3) encompassed the gamut of disputes about distribution of the proceeds).

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. Although ORS 656.593(1)(c) does not apply when we are determining a "just and proper" distribution, we have previously reasoned that the 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. *Jens W. Sherman*, 60 Van Natta 365, 367 (2008).

Finally, we lack the statutory authority to approve or disapprove a proposed settlement of a claimant's spouse's loss of consortium claim. *Weems v. American Int'l Adjustment Co.*, 123 Or App 83, 86 (1993), *aff'd Weems v. American Int'l Adjustment Co.*, 319 Or 140 (1994). Furthermore, proceeds from the settlement of a loss of consortium claim are not subject to a third party lien. *See Hayes*, 48 Van Natta at 1638. However, we can consider the value of such a claim as evidence of the reasonableness of a proposed settlement of claimant's underlying negligence claim. *Weems*, 123 Or App at 86; *Kim J. Hayes*, 48 Van Natta 1635, 1638 (1996).

Here, we find, and the parties do not dispute, that a distribution that mirrors the statutory third party judgment scheme is, in fact, "just and proper."<sup>4</sup> However, before we address that issue, we provide the following responses to claimant's procedural and evidentiary objections.

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<sup>4</sup> Claimant contends that we do not have jurisdiction to rule on the loss of consortium distribution, noting that the paying agency approved the settlement and therefore waived its right to object to the apportionment. However, the paying agency approved the settlement in full, which included the loss of consortium claim; there was no itemization between the two claims. Therefore, because the parties have never reached an agreement regarding the portion of the settlement attributable to claimant's claim or to his wife's loss of consortium claim, it is necessary for us to engage in an allocation of settlement proceeds to identify claimant's share of the settlement. *See Weems*, 123 Or App at 86; *Hayes*, 48 Van Natta at 1638.

Moreover, there is no indication that the paying agency expressly waived the "just and proper" issue. As we explained in our prior order, it would be preferable if future litigants would endeavor to apportion third party settlements between a worker's and a spouse's loss of consortium claims. *Hanson*, 66 Van Natta at 2134 n 5. However, if they are unable to do so, the paying agency should consider disapproving such a settlement, and insist on an apportionment between "lienable" and "nonlienable" portions of the settlement proceeds. In the absence of such an apportionment, the matter could then be submitted to the Board under ORS 656.587. Thereafter, consistent with our earlier *Hanson* rationale, we would likely not approve the settlement until apportionment of the settlement proceeds is specifically quantified.

Claimant further contends that reducing his wife's "\$250,000 allocation" of the settlement is an unlawful and unconstitutional taking of her recovery for the benefit of the paying agency. We disagree. The record does not establish an agreement that \$250,000 was to be considered claimant's wife's consortium share of the settlement. To the contrary, this dispute has always concerned what portion of the \$600,000 "global" settlement pertains to claimant's cause of action. Thus, this record does not establish that there has been any "taking" of claimant's wife's recovery.

Finally, the paying agency is not judicially estopped from filing its petition. In response to our first order, the paying agency argued before the circuit court that the Board did not have jurisdiction. It did not make an "admission." Rather, the paying agency's motion to the court was a response to our order to identify claimant's share of the settlement. Reacting to comments from the judge in that proceeding, the paying agency obtained the third party attorney's opinion regarding allocation of the proceeds and presented that information to the Board. Given such circumstances, the record establishes that the paying agency has been attempting to comply with our first order, responding to the court's dismissal, and further developing the record for our consideration in this new proceeding concerning this new petition.

First, claimant's contentions that our first order and the circuit court's order preclude further consideration of this matter and that the paying agency is prohibited from further developing the record (with the third party attorney's declaration) were previously rejected in our December 2014 "hearing referral" order. *See Hanson*, 66 Van Natta at 2133-34. In addition to that reasoning, we note that the case precedent on which claimant relies (*Bobbie J. Blakely*, 51 Van Natta 1762 (1999)), is distinguishable.

In *Blakely*, there was a proceeding involving an Own Motion "willingness to seek work" case, which resulted in a remand to the Board from the court. On remand, we refused to consider additional evidence offered by the claimant. *Id.* at 1763.

Here, unlike the procedural posture in *Blakely* (and its progeny)<sup>5</sup> that only involved one proceeding, the paying agency introduced new evidence (Mr. Sweek's declaration and eventual testimony) in an entirely separate petition to the Board. The paying agency did not seek to introduce additional evidence upon reconsideration of the first proceeding, which had resulted in our earlier dismissal order that was based on the hope that the parties would be able to reach agreement regarding the allocation of settlement proceeds between claimant's and his wife's claims. Rather, that prior petition had been dismissed as premature because the record was insufficiently developed for a decision on the merits. The paying agency then had an opportunity to submit a new petition, based on new evidence, in this separate proceeding. *See Blackman v. SAIF*, 60 Or App 446, 448 (1992) (there is no limitation on the evidence that may be presented as long as the record is sufficient to sustain judicial review under ORS 656.298). Thus, for these reasons, as well as those articulated in our earlier decision, we continue to permit introduction and consideration of Mr. Sweek's declaration and testimony, which was subject to claimant's counsel's rigorous cross-examination at the hearing.

Claimant also contends that we should disregard Mr. Sweek's conclusions because he did not review his entire defense file.<sup>6</sup> However, our review of the record establishes to our satisfaction that Mr. Sweek was sufficiently familiar with

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<sup>5</sup> *See, e.g., Richard L. Elsea*, 66 Van Natta 727 (2014); *Rex A. Olson*, 55 Van Natta 3379 (2003).

<sup>6</sup> Claimant raises several other evidentiary objections pertaining to admission of ledger payments, the paying agency's attorney's declaration, and jury verdict summaries. We find no abuse of discretion in the ALJ's decision to admit these items. However, even if this evidence were not considered, it is of little probative value and would not change the outcome of our "just and proper" distribution decision. *See, e.g., Edgar M. Woodbury, II*, 61 Van Natta 1008 (2009) (the time of the third party recovery, rather than the time of the employer's petition, is the date on which the reasonable estimate of future expenses under ORS 656.593(1)(c) should be based).

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the circumstances regarding claimant's and his wife's claims and their settlements to offer a probative opinion regarding the parties' dispute. *See Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003) (a history is "complete" if it includes sufficient information on which to base the opinion and does not exclude information that would make the opinion less credible).

Moreover, claimant's counsel fully availed himself of the opportunity at hearing to question Mr. Sweek about what he did or did not consider in reaching his opinion. In fact, he questioned Mr. Sweek on his failure to consult his own defense file and his reliance on the paying agency's file instead. On redirect, Mr. Sweek stated that his opinion would not change based on new information regarding the amount of the settlement. (Tr. 65-66).

Because Mr. Sweek reconfirmed his "consortium" opinion even after reviewing the allegedly omitted evidence, we decline to disregard his opinion for not reviewing the entire defense file. In any event, we note that the primary basis for Mr. Sweek's opinion was the likability of claimant and his wife, not medical opinions in claimant's claim file. As previously noted, he explained that because claimant and his wife were likable, he valued the "consortium" claim at \$50,000-\$80,000, well beyond the range (\$5,000-\$25,000) generally awarded in his experience. Thus, the expert evidence presented on this "valuation" question supports a "loss of consortium" range some two to three times higher than usually granted.

Finally, we do not consider Mr. Sweek's testimony less probative for not considering the testimony of claimant or his wife. As earlier explained, "post-settlement" information is of limited probative value given that a "just and proper" determination (actual and projected expenses/claim costs) is determined as of the "settlement date." *See Edgar M. Woodbury, II*, 61 Van Natta 1008 (2009).

In conclusion, we acknowledge that Mr. Sweek's opinion is not beyond reproach. Nonetheless, the challenges raised by claimant do not render his opinion devoid of probative value. Thus, based on our review of this particular record and in the absence of a countervailing "valuation" opinion, we consider Mr. Sweek's opinion sufficient to meet the paying agency's burden of proof regarding a "just and proper" distribution.

Consequently, in addition to the reasoning expressed in the ALJ's recommendation, we conclude that \$80,000 of the \$600,000 settlement<sup>7</sup> amount (*i.e.*, 13.3 percent) is a reasonable allocation of proceeds to the loss of consortium claim. Therefore, claimant's share of the settlement equals \$520,000.

We now address the paying agency's "just and proper" share regarding claimant's \$520,000 settlement. As stated above, we conclude that a distribution of the third party settlement proceeds mirroring the statutory third party judgment scheme of ORS 656.593(1) is, in fact, "just and proper."

Pursuant to ORS 656.593(1), costs and attorney fees incurred shall be initially disbursed from the \$520,000 settlement.<sup>8</sup> The balance remaining after such disbursement (\$173,333.33) is \$346,666.67. Under ORS 656.593(1)(b), the worker shall then receive 33 1/3 percent of the balance of the recovery (\$346,666.67), which is \$115,555.56. This leaves a balance of \$231,111.11. Pursuant to ORS 656.593(1)(c), the paying agency is entitled to receive \$220,943.38 out of the third party settlement as full reimbursement for its actual and projected claim costs at the time of the settlement. *See Woodbury, II*, 61 Van Natta at 1008.<sup>9</sup> The remaining balance (\$10,167.73) is payable to claimant.

Accordingly, based on the aforementioned reasoning, it is "just and proper" for the paying agency to receive \$220,943.38 from the third party settlement in full reimbursement of its lien. *See* ORS 656.593(3). Claimant's counsel is directed to forward this payment to the paying agency.

### **IT IS SO ORDERED.**

Entered at Salem, Oregon on January 14, 2016

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<sup>7</sup> Claimant also pursued a claim for underinsured motorist (UIM) benefits, which was settled for a substantial amount. However, a paying agency may not benefit directly or indirectly from UIM coverage. ORS 742.504(4)(c) (UIM coverage does not "inure directly or indirectly to the benefit of any workers' compensation carrier \* \* \*"). Therefore, claimant's UIM recovery is not lienable, and only the approved third party settlement of \$600,000, is considered when determining a "just and proper" distribution. *See Longstreet v. Liberty Northwest Ins. Corp.*, 238 Or App 396 (2010); *Lorraine I. McKinnon*, 62 Van Natta 274, *recons*, 62 Van Natta 459 (2010).

<sup>8</sup> Absent extraordinary circumstances, an attorney fee may not exceed 33 1/3 percent of the gross recovery obtained by a plaintiff in an action maintained pursuant to ORS 656.576 through ORS 656.596. OAR 438-015-0095.

<sup>9</sup> The paying agency contends that the ALJ properly considered payments of benefits after the third party settlement in making his recommendation. However, the lien amount is established as of the settlement date, which included actual and future claim costs as determined as of that time. *See id.*