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In the Matter of the Compensation of  
**JOEL B. RAMIREZ, Claimant**  
WCB Case No.

THIRD PARTY DISTRIBUTION ORDER  
Daniel Snyder, Claimant Attorneys  
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Johnson and Ousey.

Claimant 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 the SAIF Corporation’s contention, that, as a paying agency, it is entitled to a portion of claimant’s \$25,000 settlement as its “just and proper” share under ORS 656.593(3). For the following reasons, we disagree with SAIF’s contention.

#### FINDINGS OF FACT

Claimant was compensably injured in a dog-bite incident at work in August 2013. SAIF, as the paying agency, accepted the claim and paid benefits. (Exs. E, F).

On August 24, 2015, claimant filed a complaint in civil court stemming from the work-related dog bite incident, asserting causes of action for injured worker discrimination, failure to reinstate, whistleblowing, assault, battery, negligence and intentional infliction of emotional distress.

Claimant’s counsel sent SAIF a letter of representation, and SAIF responded with a letter dated December 31, 2015. (Ex. I). In that letter, SAIF provided claimant with a third party Notice of Election form. SAIF represented that, to date, it had paid claim costs totaling \$10,138.29, including medical bills, temporary disability benefits, and settlements. SAIF notified claimant that any settlement of his action must have its prior written approval, and the failure to receive such approval rendered any settlement void under ORS 656.587. SAIF stated that any agreed-upon settlement would be disbursed in accordance with ORS 656.593.

In a January 27, 2016 letter to claimant’s counsel, SAIF reported a revised lien amount of \$8,084.72, and included copies of payment ledgers. (Ex. J).

On March 2 and May 20, 2016, SAIF’s third party adjuster contacted claimant’s counsel, inquiring about the status of the litigation, and requesting any mediation or trial dates. (Exs. K-1, L).

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SAIF again inquired into the status of the litigation on March 2, 2017. (Ex. K-3-4).

On March 17, 2017, claimant's counsel sent an email to SAIF's third party adjuster stating that the case had been settled in mediation, and providing a copy of the settlement agreement. The email also stated: "The defendant expressly agreed that the settlement did not cover injuries that were covered by work comp as they regarded those as fully compensated already. Please advise as to SAIF's position on this matter." (Ex. K-3).

Pertinent to the matter at hand, the settlement agreement contained the following provision under "Factual Recitals:"

"C. The Parties intend this Agreement to resolve all disputes and potential disputes between and among them related in any way to the [claimant's] Lawsuit subject to the terms and conditions set forth in the Agreement. The Parties agree that this settlement does not cover or compensate for any claim for which Plaintiff already received payment arising from a workers' compensation claim since Defendants have declined to pay for any such potential claim as having been previously fully resolved by acceptance of such other payment, and further which other recovery Defendants contend was Plaintiff's sole remedy and means for recovery. Thus the sole inducement and basis for settlement arises from Plaintiff's employment law claims as well as his claims for emotional distress and property damage. Nevertheless, this Agreement is intended to resolve all disputes and potential disputes related in any way to the [claimant's] Lawsuit." (Ex. C-1).

Under "Terms," a provision titled "Prior Approval of Workers Compensation Paying Agency Required," provided that the parties' agreement was "not conditioned upon [claimant] obtaining written approval of the Agreement from SAIF, or the applicable paying agency \* \* \*." (*Id.* at 2). The provision further provided:

"The Payment shall be \$25,000 and discharges Defendants from any liability or potential liability arising from or connected to the [claimant's] Lawsuit. If the paying agency or Workers Compensation Board decides

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the Payment or any part of it is applicable to a Workers Compensation injury, this Agreement will remain in force and [claimant] shall pay that portion of the Payment to the paying agency. It is agreed and understood that Defendants shall not be responsible for or required to issue any payments beyond the sum(s) agreed to on December 20, 2016.” (*Id.*)

On March 21, 2017, the third party adjuster responded that the agreement was reviewed and it was SAIF’s opinion that its lien attached to the gross settlement because the complaint “stems from the dog bite claim that we paid for.” (*Id.*) Claimant’s counsel replied that claimant’s civil claim was for termination from his employment because he reported the dog bite, and the damages sought had nothing to do with his physical injuries from the bite. SAIF responded that the negligence claim included economic and non-economic damages that would encompass its claim. (Ex. K-5). Claimant’s counsel replied that the negligence and battery claims were for emotional distress damages that were denied by SAIF, and that the “overwhelming majority of damages were for employment claims.” (*Id.*)

On April 3, 2017, SAIF’s third party adjuster informed claimant’s counsel that SAIF approved the \$25,000 settlement under the statutory distribution provided for in ORS 656.593, but “not under the terms listed in the settlement agreement previously sent to SAIF.” (Ex. K-2). Claimant then filed a petition for resolution of the dispute.

### CONCLUSIONS OF LAW AND OPINION

Relying on *Roberston v. Davcol*, 99 Or App 542 (1989), claimant contends that SAIF is not entitled to assert a lien against proceeds of the settlement because it was expressly only for the employment law claims and SAIF approved the settlement. Alternatively, he argues that SAIF’s recovery of its asserted lien of \$8,084.72, would not be “just and proper” under ORS 656.593 when the overall settlement amount is \$25,000. For the following reasons, we conclude that SAIF is not entitled to a share of the settlement proceeds.

If a worker receives a compensable injury due to the negligence or wrong of third persons not in the same employ, the worker or the beneficiaries of the worker shall elect whether to recover damages from the third persons. ORS 656.578. The proceeds shall be subject to a lien of the paying agency for its share of the proceeds.<sup>1</sup> ORS 656.593(1).

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<sup>1</sup> There is no dispute that SAIF is a “paying agency.” See ORS 656.576.

Any settlement by the worker is void unless made with the written approval of the paying agency or, in the event of a dispute between the parties, by order of the Board. ORS 656.587; *see Toole v. EBI Cos.*, 314 Or 102 (1992) (the Board has jurisdiction to declare a third party settlement void under ORS 656.587 where the compromise was made without approval of the paying agency or the Board); *Donna Dean*, 63 Van Natta 558 (2011) (because third party settlement was made without the approval of the paying agency or the Board, the settlement was void); *Karl A. McDade, Jr.*, 48 Van Natta 2564 (1996) (same).

If a claimant settles a third party case with the approval of the paying agency, the paying agency is authorized to accept such a share of the proceeds as may be “just and proper” and the worker or the beneficiaries of the worker shall receive the amount to which the worker would be entitled for a recovery under ORS 656.593(1) and (2). ORS 656.593(3); *Estate of Troy Vance v. Williams*, 84 Or App 616, 619-20 (1987). 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. *Robertson*, 99 Or App at 546; *see Gale E. Charlton*, 43 Van Natta 1356, 1358 (1991).

In reaching our conclusion that SAIF is not entitled to a share of the settlement proceeds, we find *Robertson* instructive. In *Robertson*, the claimant filed a third party action against her employer and one of its managers, alleging claims for negligence, wrongful discharge, intentional infliction of emotional distress, defamation and retaliatory discharge, and sought total damages of \$550,000, of which \$200,000 was alleged to be damages resulting from negligence that caused the compensable injury. 99 Or App at 544. The parties settled the entire action for \$100,000. The settlement provided that the policy of insurance covering the wrongful termination and defamation claims “exclude[ed] coverage for claims concerning which benefits are payable or are required to be provided under the workers’ compensation laws.” *Id.* The agreement further recited:

“3. The parties wish by this settlement agreement to resolve all of the issues between them by applying the proceeds of the policy of insurance referenced above to settle the covered claims between the parties, that is, the wrongful termination and defamation claims to

compensate her solely and exclusively for the emotional trauma and distress which was allegedly suffered by her following the end of her period of employment with Defendants.

“4. The parties agree and acknowledge that the claims for which the policy proceeds are available are not compensable under the workers' compensation laws.”  
*Id.* at 545.

The paying agency in *Robertson* approved the settlement “with the understanding that the settlement of the third party claim shall not be effective until such time as [paying agency] receives its share of the settlement proceeds.” *Id.* Thus, the paying agency approved the settlement on the condition that the portion of the proceeds attributable to its alleged third party lien be held in trust pending resolution of the claimant’s contention that the lien did not attach to any part of the settlement. *Id.* The paying agency then petitioned the Board to determine its “just and proper” distribution. The Board held that the paying agency’s lien applied to the proceeds of any and all damages recovered, regardless of the agreed upon composition of the settlement. *Sheri L. Robertson*, 40 Van Natta 1885 (1988).

On appeal, the claimant contended that the settlement proceeds were intended, as the agreement expressly provided, to compensate her only for the emotional trauma and distress that she allegedly suffered as a result of the wrongful termination and defamation claims, and not for the negligence claim that related to the compensable injury. 99 Or App at 545. In response, the paying agency conceded that it only had a right to proceeds attributable to the negligence cause of action. *Id.* at 545-46. It argued, however, that, because the claimant had presented no evidence or argument to the Board “sufficient to enable it to determine what part of the settlement was attributable to the negligence claim” and did not “clearly apportion the recovery between the third party cause of action and the other causes of action,” its lien attached to “proceeds of any damages recovered;” *i.e.*, the entire settlement. *Id.* at 546.

The court ruled in the claimant’s favor, holding that the paying agency was not entitled to any share of the proceeds. *Id.* at 547. In doing so, it reasoned that, contrary to the paying agency’s contention, the settlement agreement clearly apportioned the proceeds between the third party claim and the other claims, and did not allocate any portion to the claim related to the compensable injury. *Id.* at 546. Citing ORS 656.587, the court explained that, if the paying agency had wished to disapprove of the settlement because nothing was paid to settle the

negligence claim, it could have done so. Then, the court reasoned that the claimant would have been required to seek the Board's approval. *Id.* However, when the paying agency approved the settlement, the court determined that it was validated, even though there remained the need to resolve the issue of whether the paying agency was entitled to a share of the proceeds pursuant to ORS 656.593(3). *Id.* The court explained that, because the paying agency had asked the Board to make that determination, it thereby assumed the burden of establishing the portion of the settlement proceeds to which its lien attached. *Id.* The court noted that the paying agency had conceded that it was entitled to a lien only on proceeds paid to settle the negligence claim. Because the settlement agreement stated expressly that no part of the settlement was attributable to that claim, and there was nothing in the record to show otherwise, the court concluded that the paying agency was entitled to no share of the proceeds and remanded with instructions to make a distribution order to the claimant.<sup>2</sup> *Id.* at 546-47.

Here, as in *Robertson*, by not allocating any portion of the settlement to the negligence claim, the settlement agreement clearly apportioned the proceeds between the third party claim (none) and the other claims (\$25,000). (Ex. C-1). Also similar to *Robertson*, we conclude that SAIF's response amounted to approval of the settlement, although it disputed the allocation provisions. (See Ex. K-2). Therefore, because SAIF approved the settlement, and the agreement expressly stated that no part of the settlement was for the workers' compensation claim, SAIF is not entitled to a share of the proceeds.

The paying agency contends that because it approved the *amount* of the settlement, but expressly disapproved of its *terms*, it did precisely what the court said the paying agency failed to do in *Robertson*—it disapproved the terms of the settlement where the parties agreed that nothing was paid to settle the negligence claim. Consequently, because it objected to the terms of the settlement and approved only the amount, SAIF contends that it did not waive its right to assert a lien.

We disagree with SAIF's contention. As explained in *Robertson*, if a paying agency believes that a settlement agreement does not adequately apportion some of its proceeds to the claim related to the compensable injury, its remedy is to reject

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<sup>2</sup> The court noted that it was not saying that a claimant who filed a third party cause of action that included other claims that were not compensable under the Workers' Compensation Act may avoid the paying agency's lien merely by allocating all, or substantially all, of the settlement proceeds to claims against which the paying agency had no lien. Rather, it mentioned that the two claims to which the settlement proceeds were applied, if established, could easily have resulted in a damage award in the amount paid, and there was no insurance covering the negligence claim. *Id.* at 546 n 3.

the settlement and to await Board resolution of the settlement's propriety under ORS 656.587. *See id.* at 546. Here, in contravention to the recommended approach in *Robertson*, by agreeing with the amount but disapproving the terms allocating no portion of the settlement to the negligence claim, SAIF was in effect taking issue with the apportionment of the settlement. Based on the *Robertson* rationale, SAIF's approval of the amount of the settlement validated the agreement, even if there remained the need to resolve the issue of whether it was entitled to a share of the proceeds under ORS 656.593(3). *See id.*

In conclusion, based on the foregoing reasoning, we hold that SAIF is bound by its approval of the settlement, which apportioned nothing to the workers' compensation claim. Under such circumstances, its "just and proper" share of the settlement proceeds totaling zero is likewise zero.<sup>3</sup> *See* ORS 656.593(3).

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

Entered at Salem, Oregon on September 19, 2017

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<sup>3</sup> Because SAIF provides workers' compensation coverage to his employer, claimant's cause of action (insofar as it pertained to damages attributable to a compensable injury) would be subject to an "exclusive remedy" defense under ORS 656.018. Consequently, to the extent that claimant's cause of action concerned such matters involving his employer, no "workers' compensation-related damages" would be lawfully recoverable. Furthermore, the workers' compensation insured employer would not constitute a "third party." *See* ORS 656.578. Nevertheless, because claimant's cause of action extended to entities/individuals beyond his insured employer, and because the parties do not contend otherwise, we assume that claimant's settlement does concern a "statutory" third party. Based on that assumption, had SAIF disapproved of the settlement and claimant sought Board resolution of the matter, the agreement would likely have been disapproved for the following reasons.

First, this case is distinguishable from *Robertson* given that, there, the third party carrier's insurance contract provided for no liability for workers' compensation damages, whereas here, no such provision apparently exists. Second, because it is undisputed that about \$8,000 in claim costs has been incurred for medical services, temporary disability benefits, and settlements, claimant's third party cause of action related to the compensable injury had some value. Essentially, the settlement provision that acknowledges claimant has already been compensated recognizes this result. Yet, such a provision conflicts with the fundamental premise of the statutory third party distribution scheme in which the tortfeasor is ultimately responsible for the costs of the third party claim; *i.e.*, the wrongdoer is to provide reimbursement to the workers' compensation carrier when damages for settlements are obtained. *Allen v. American Hardwoods*, 102 Or App 562, *rev den*, 310 Or 547 (1990); *Schlecht v. SAIF*, 60 Or App 449, 456 (1982); *Scott Turo*, 45 Van Natta 995, 998 (1993).

Considering that statutory policy, along with the record (including the settlement provisions), a settlement in which no proceeds are allocated for the workers' compensation claim would likely be considered grossly unreasonable. *See Weems v. American Int'l Adjustment Co.*, 319 Or 140 (1994); *Michael F. Boyle*, 55 Van Natta 848 (2003); *Alfred Storms*, 48 Van Natta 1470 (1991). Therefore, the settlement would not likely be approvable. However, because SAIF has approved the settlement, the "approval" question is not before us, nor will we effectively rewrite the agreement to reallocate the proceeds in a manner that would provide SAIF with a lienable share.