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**SUBSTITUTE SENATE BILL 5747**

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**State of Washington**

**52nd Legislature**

**1991 Regular Session**

**By** Senate Committee on Commerce & Labor (originally sponsored by Senators McMullen, Anderson and Talmadge).

Read first time March 6, 1991.

1 AN ACT Relating to compromise of industrial insurance liens in  
2 actions against third parties; and amending RCW 51.24.060 and  
3 51.24.090.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 51.24.060 and 1987 c 442 s 1118 are each amended to  
6 read as follows:

7 (1) If the injured worker or beneficiary elects to seek damages  
8 from the third person, any recovery made shall be distributed as  
9 follows:

10 (a) The costs and reasonable attorneys' fees shall be paid  
11 proportionately by the injured worker or beneficiary and the department  
12 and/or self-insurer;

13 (b) The injured worker or beneficiary shall be paid twenty-five  
14 percent of the balance of the award: PROVIDED, That in the event of a

1 compromise and settlement by the parties, the injured worker or  
2 beneficiary may agree to a sum less than twenty-five percent;

3 (c) The department and/or self-insurer shall be paid the balance of  
4 the recovery made, but only to the extent necessary to reimburse the  
5 department and/or self-insurer for compensation and benefits paid;

6 (i) The department and/or self-insurer shall bear its proportionate  
7 share of the costs and reasonable attorneys' fees incurred by the  
8 worker or beneficiary to the extent of the benefits paid or payable  
9 under this title: PROVIDED, That the department or self-insurer may  
10 require court approval of costs and attorneys' fees or may petition a  
11 court for determination of the reasonableness of costs and attorneys'  
12 fees.

13 (ii) The sum representing the department's and/or self-insurer's  
14 proportionate share shall not be subject to subsection (1) (d) and (e)  
15 of this section.

16 (d) Any remaining balance shall be paid to the injured worker or  
17 beneficiary;

18 (e) Thereafter no payment shall be made to or on behalf of a worker  
19 or beneficiary by the department and/or self-insurer for such injury  
20 until the amount of any further compensation and benefits shall equal  
21 any such remaining balance. Thereafter, such benefits shall be paid by  
22 the department and/or self-insurer to or on behalf of the worker or  
23 beneficiary as though no recovery had been made from a third person;

24 (f) If the employer or a co-employee are determined under RCW  
25 4.22.070 to be at fault, (c) and (e) of this subsection do not apply  
26 and benefits shall be paid by the department and/or self-insurer to or  
27 on behalf of the worker or beneficiary as though no recovery had been  
28 made from a third person.

29 (2) The recovery made shall be subject to a lien by the department  
30 and/or self-insurer for its share under this section.

1       (3) (~~The department or self-insurer has sole discretion to~~  
2 ~~compromise the amount of its lien. In deciding whether or to what~~  
3 ~~extent to compromise its lien, the department or self-insurer shall~~  
4 ~~consider at least the following:~~

5       (a) ~~The likelihood of collection of the award or settlement as may~~  
6 ~~be affected by insurance coverage, solvency, or other factors relating~~  
7 ~~to the third person;~~

8       (b) ~~Factual and legal issues of liability as between the injured~~  
9 ~~worker or beneficiary and the third person. Such issues include but~~  
10 ~~are not limited to possible contributory negligence and novel theories~~  
11 ~~of liability; and~~

12       (c) ~~Problems of proof faced in obtaining the award or settlement)~~

13       (a) In the event of a compromise and settlement between the injured  
14 worker or beneficiary and the third party, the lien of the department  
15 or self-insurer shall be equitably compromised.

16       (b) If the injured worker or beneficiary and the department or  
17 self-insurer cannot agree on an equitable compromise of the lien,  
18 either party may petition the board of industrial insurance appeals for  
19 a determination. The board shall consider:

20       (i) The extent to which the injured worker failed to obtain full  
21 recovery for his or her damages;

22       (ii) The likelihood of collection of the full settlement amount, as  
23 may be affected by insurance coverage, solvency, or other factors  
24 relating to the third person;

25       (iii) Factual and legal issues of liability between the parties,  
26 including but not limited to possible contributory negligence and novel  
27 theories of liability;

28       (iv) The risk associated with the investment in the costs of  
29 investigating and prosecuting the claim; and

30       (v) Problems of proof faced in obtaining the settlement.

1       (c) Petitions under this section shall be decided on the record of  
2 the department or self-insurer or, if the compromise and settlement is  
3 entered into following a judicial determination of damages sustained by  
4 the injured worker or beneficiary, on the record of that proceeding.

5       (d) The following briefs may be filed: (i) A brief of petitioner,  
6 which shall be filed and served within ten days following the filing of  
7 the petition; (ii) a brief of respondent which shall be filed and  
8 served within ten days following service of the brief of petitioner;  
9 (iii) a reply brief of petitioner which shall be filed and served  
10 within five days following service of the brief of respondent.

11       (e) The board, on its own motion, or the request of a party, may  
12 set a time for oral argument or may decide the petition on the record  
13 and briefs submitted.

14       (f) Petitions under this subsection shall not be subject to the  
15 authority of the department under RCW 51.52.060 to hold a matter in  
16 abeyance for further investigation or reconsideration, but shall  
17 proceed as directed by this subsection to a decision and order within  
18 forty-five days following the filing of the petition.

19       (g) The provisions of this subsection shall apply to all  
20 settlements entered into on or after July 1, 1991.

21       (4) In the case of an employer not qualifying as a self-insurer,  
22 the department shall make a retroactive adjustment to such employer's  
23 experience rating in which the third party claim has been included to  
24 reflect that portion of the award or settlement which is reimbursed for  
25 compensation and benefits paid and, if the claim is open at the time of  
26 recovery, applied against further compensation and benefits to which  
27 the injured worker or beneficiary may be entitled.

28       (5) In an action under this section, the self-insurer may act on  
29 behalf and for the benefit of the department to the extent of any  
30 compensation and benefits paid or payable from state funds.

1 (6) It shall be the duty of the person to whom any recovery is paid  
2 before distribution under this section to advise the department or  
3 self-insurer of the fact and amount of such recovery, the costs and  
4 reasonable attorneys' fees associated with the recovery, and to  
5 distribute the recovery in compliance with this section.

6 (7) The distribution of any recovery made by award or settlement of  
7 the third party action shall be confirmed by department order, served  
8 by registered or certified mail, and shall be subject to chapter 51.52  
9 RCW. In the event the order of distribution becomes final under  
10 chapter 51.52 RCW, the director or the director's designee may file  
11 with the clerk of any county within the state a warrant in the amount  
12 of the sum representing the unpaid lien plus interest accruing from the  
13 date the order became final. The clerk of the county in which the  
14 warrant is filed shall immediately designate a superior court cause  
15 number for such warrant and the clerk shall cause to be entered in the  
16 judgment docket under the superior court cause number assigned to the  
17 warrant, the name of such worker or beneficiary mentioned in the  
18 warrant, the amount of the unpaid lien plus interest accrued and the  
19 date when the warrant was filed. The amount of such warrant as  
20 docketed shall become a lien upon the title to and interest in all real  
21 and personal property of the injured worker or beneficiary against whom  
22 the warrant is issued, the same as a judgment in a civil case docketed  
23 in the office of such clerk. The sheriff shall then proceed in the  
24 same manner and with like effect as prescribed by law with respect to  
25 execution or other process issued against rights or property upon  
26 judgment in the superior court. Such warrant so docketed shall be  
27 sufficient to support the issuance of writs of garnishment in favor of  
28 the department in the manner provided by law in the case of judgment,  
29 wholly or partially unsatisfied. The clerk of the court shall be  
30 entitled to a filing fee of five dollars, which shall be added to the

1 amount of the warrant. A copy of such warrant shall be mailed to the  
2 injured worker or beneficiary within three days of filing with the  
3 clerk.

4 (8) The director, or the director's designee, may issue to any  
5 person, firm, corporation, municipal corporation, political subdivision  
6 of the state, public corporation, or agency of the state, a notice and  
7 order to withhold and deliver property of any kind if he or she has  
8 reason to believe that there is in the possession of such person, firm,  
9 corporation, municipal corporation, political subdivision of the state,  
10 public corporation, or agency of the state, property which is due,  
11 owing, or belonging to any worker or beneficiary upon whom a warrant  
12 has been served by the department for payments due to the state fund.  
13 The notice and order to withhold and deliver shall be served by the  
14 sheriff of the county or by the sheriff's deputy, or by any authorized  
15 representatives of the director. Any person, firm, corporation,  
16 municipal corporation, political subdivision of the state, public  
17 corporation, or agency of the state upon whom service has been made  
18 shall answer the notice within twenty days exclusive of the day of  
19 service, under oath and in writing, and shall make true answers to the  
20 matters inquired of in the notice and order to withhold and deliver.  
21 In the event there is in the possession of the party named and served  
22 with such notice and order, any property which may be subject to the  
23 claim of the department, such property shall be delivered forthwith to  
24 the director or the director's authorized representative upon demand.  
25 If the party served and named in the notice and order fails to answer  
26 the notice and order within the time prescribed in this section, the  
27 court may, after the time to answer such order has expired, render  
28 judgment by default against the party named in the notice for the full  
29 amount claimed by the director in the notice together with costs. In  
30 the event that a notice to withhold and deliver is served upon an

1 employer and the property found to be subject thereto is wages, the  
2 employer may assert in the answer to all exemptions provided for by  
3 chapter 6.27 RCW to which the wage earner may be entitled.

4 **Sec. 2.** RCW 51.24.090 and 1984 c 218 s 7 are each amended to read  
5 as follows:

6 (1) Any compromise or settlement of the third party cause of action  
7 by the injured worker or beneficiary which results in less than the  
8 entitlement under this title is void unless made with the written  
9 approval of the department or self-insurer: PROVIDED, That for the  
10 purposes of this chapter, "entitlement" means benefits and compensation  
11 paid and payable. If, upon request of the injured worker or  
12 beneficiary, the department refuses to approve such settlement, the  
13 injured worker or beneficiary may petition the board of industrial  
14 insurance appeals for an order requiring approval under the procedure  
15 set forth in RCW 51.24.060.

16 (2) If a compromise or settlement is void because of subsection (1)  
17 of this section, the department or self-insurer may petition the court  
18 in which the action was filed for an order assigning the cause of  
19 action to the department or self-insurer. If an action has not been  
20 filed, the department or self-insurer may proceed as provided in  
21 chapter 7.24 RCW.