Jones v. City of Olympia, __ Wn. App. __, __ P.3d ___ (10/30/12) (Division II)

In a case argued by Wallace, Klor & Mann, P.C., the Washington Court of Appeals recently held that the full amount of a third party settlement--undifferentiated between general and special damages--is subject to the self-insured employer's/Department's industrial insurance lien under RCW 51.24.060.

In October 2004, Dennis Jones, a City of Olympia firefighter, sustained an industrial injury. His injury was partly caused by the negligence of third parties. Jones filed a worker's compensation claim which was allowed. He also sued the third parties for negligence. In July 2009, Jones settled this negligence claim for a $250,000 lump sum, fully releasing the third parties from all liability for his current and future injuries stemming from the accident. This lump-sum settlement agreement did not differentiate between general (pain and suffering) and special (wage loss; loss of future earnings; medical expenses) damages; nor did it separately allocate any portion of the settlement award for Jones' pain and suffering.

By the time Jones settled his third-party claim, the City had paid him $82,188.86 in worker's compensation benefits. To obtain reimbursement for these benefits, the City, under RCW 51.24.030 and RCW 51.24.060, asserted a statutory lien against Jones' full settlement proceeds of $250,000. The Department issued a distribution order, calculating the statutorily defined "recovery" and "distribution" of Jones' settlement by using his full $250,000 settlement award and distributing it according to the formula in RCW 51.24.060. The "recovery" from a third-party tortfeasor subject to "distribution" under RCW 51.24.060 is statutorily defined as including "all damages except loss of consortium." RCW 51.24.030(5). Also excluded from this statutory definition of "recovery," and not subject to distribution under RCW 51.24.060, are pain and suffering damages. *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 404, 239 P.3d 544 (2010).

Jones objected to having the City's lien apply to more than the $82,188.86 it had paid Jones. So he appealed the Department's order first to the Board of Industrial Insurance Appeals, and then to Superior Court, losing at each stage. He then appealed the Superior Court's decision to the Court of Appeals (Division II).

There he argued that (1) under *Tobin*, the Department and/or the City "cannot recover from the portion of a settlement that represents general damages of pain and suffering"; (2) although his settlement agreement did not allocate any portion of the lump-sum award for pain and suffering damages like the settlement agreement in *Tobin*, the general and special damages components of his settlement could be "readily ascertained" because he had received only $82,188.86 in worker's compensation benefits, thus by logical necessity making the remainder of the settlement award his general pain and suffering damages; and (3) because the general and special damages components of his settlement were ascertainable, the Department erred in calculating the recovery and distribution amounts using the full $250,000 third-party settlement rather than only the $82,188.86 worker's compensation benefits paid.

The Court of Appeals disagreed that *Tobin* applied to Jones' facts. Tobin's settlement agreement expressly allocated an amount for his pain and suffering damages. *Tobin*, 169 Wn.2d at 398. Jones' settlement agreement, in contrast, did not; nor did it separately designate any portion of his settlement award for pain and suffering. So the Court of Appeals held that *Tobin* did not support Jones' argument that the Department miscalculated the recovery and distribution of his settlement. (It should be noted Jones' "logical necessity" argument failed because the settlement could have included amounts for special damages in addition to what he had been paid by the City in industrial insurance benefits, such as future loss of earning potential or future loss of income and/or future medical expenses.)

The Court of Appeals then noted that on three separate occasions, two before and one after *Tobin*, it had rejected similar injured workers' arguments that a portion of an unallocated third-party settlement should be excluded from statutory distribution under RCW 51.24.060. *Mills v. Dep't of Labor & Indus*., 72 Wn. App. 575, 865 P.2d 41*, review denied*, 124 Wn.2d 1008 (1994) (Division II); *Gersema v. Allstate Ins. Co*., 127 Wn. App. 687, 112 P.3d 552 (2005) (Division II); *Davis v. Dep't of Labor & Indus*., 166 Wn. App. 494, 268 P.3d 1033 (2012) (Division I). The Court of Appeals held that these three decisions controlled here.

The Court of Appeals added that Jones had settled with his third-party tortfeasor in 2009, years after the *Mills* and *Gersma* decisions put him on notice that he needed to segregate pain and suffering damages to insulate them from distribution under RCW 51.24.060.

In summary, agreeing with the *Davis* analysis of Division I post-*Tobin*, the Court of Appeals held that (1) *Tobin* did not apply to unallocated third-party settlement agreements; (2) instead, *Mills* and *Gersema* applied where the parties have an unallocated third-party settlement agreement; and (3) because Jones' lump-sum third-party settlement agreement did not differentiate between general and special damages, the Department did not err in subjecting his entire $250,000 settlement to RCW 51.24.060's distribution formula.

The Court of Appeals added that because it did not hold that RCW 51.24.060 permitted a taking of damages for pain and suffering (that is, Jones had failed to prove that the $250,000 included pain and suffering damages), it did not need to address Jones' alternative argument that the Department's distribution order involved an unconstitutional taking of private property under state and federal constitutions.