

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F203387

ANNE McSWEENEY, EMPLOYEE

CLAIMANT

**ADDUS HEALTHCARE, INC. d/b/a
CARE NETWORK OF LITTLE ROCK,
EMPLOYER**

RESPONDENT

**AMERICAN CASUALTY CO. OF
READING, PA/RSKCO (TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED SEPTEMBER 25, 2003

Submitted on the record before Administrative Law Judge Dail Stiles.

Claimant represented by Mr. Ray Baxter, Attorney at Law, Benton, Arkansas.

Respondents represented by Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas.

The issue to be resolved in this case is whether the claimant has a valid "made whole" defense nullifying the workers' compensation carrier's right to enforce its subrogation interests.

The matter is submitted on briefs by the parties.

It is stipulated that the claimant had a work-related automobile accident on August 15, 2001, which was accepted as compensable. The claimant was earning sufficient wages to entitle her to \$410.00 for temporary total disability and \$308.00 for permanent partial disability benefits.

As a result of the claimant's compensable motor vehicle accident of August 15, 2001, she settled her third-party lawsuit for \$25,000.00.

In his brief, the claimant's attorney states:

The claimant sustained an injury to her thoracic and lumbar spine and has been treated by a variety of physicians including a chronic pain management specialist, Dr. Thomas Hart. He has performed numerous procedures on her in an effort to alleviate her symptoms. As of August 19, 2003, the claimant had

incurred medical expenses for the treatment of her injuries in the amount of \$34,749.36.

The claimant argues that an injured claimant in a workers' compensation claim has no obligation to share any portion of a liability settlement with an employer or workers' compensation insurance carrier unless and until the claimant has made a "full recovery" from her liability settlement and has gained complete and total compensation for each and every element of damage for which he or she made claim in their third-party liability proceeding. The claimant argues:

In other words, there would have to have been complete payment of all medical bills, past and future, complete and total compensation for past and future lost wages, complete and total recovery for past and future pain, suffering, and mental anguish as well as disfigurement, if applicable.

The claimant's attorney in his brief states that as of August 19, 2003, the claimant had incurred medical expenses of \$34,749.36. The claimant's attorney cites several cases in support of his position including General Accident Insurance Co. v. Jaynes, 343 Ark. 143, 33 S.W.3d 131 (2000); Phillip Morse U.S.A. v. James, 79 Ark. App. 72, 83 S.W.3d 441 (2002); Travelers Insurance Company v. O'Hara, 350 Ark. 6, 84 S.W.3d 419 (2002).

The respondents argue that the claimant has lost no time as a result of the August 15, 2001 compensable injury, and that all medical bills presented to respondent have been paid. The respondents urge that since the claimant has continued to work, "there appears to be no wage loss disability." The respondents argue that the "made whole doctrine" does not apply in the case at bar.

FINDINGS OF FACT

The respondent carrier is not entitled to any proceeds from the claimant's \$25,000.00 third-party liability settlement which arises from her compensable claim of August 15, 2001.

DISCUSSION

The respondents' right to subrogation in a compensable claim caused by a third party is set forth at Ark. Code Ann. §11-9-410 and reads in pertinent part:

(a) Liability Unaffected. (1)(A) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make a claim or maintain an action in court against any third party for the injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in the action.

(B) If they, or either of them, join in the action, they shall be entitled to a first lien upon two-thirds (2/3) of the net proceeds recovered in the action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents.

In the case of General Accident Insurance Co. v. Jaynes, supra, the Court stated that a claimant was not obligated to share the proceeds of a third-party liability settlement with the workers' compensation carrier unless that claimant had made a "full recovery."

In a liability lawsuit, the court at law may make determinations relative to the claimant's damages for past and future lost wages, past and future pain, suffering and mental anguish, as well as compensatory damages, which in this case are reflected by the medical expenses. Pain, suffering and mental anguish are not elements to be considered in a workers' compensation claim. To weigh whether a claimant has been properly compensated by a liability settlement for elements of pain, suffering and mental anguish, is not a task which the Workers' Compensation Commission is competent to perform. Since no court of competent jurisdiction has made any determination as to what the claimant's damages are relative to the third-party action, I am in no position to assess or determine what amount of money would make the claimant whole or constitute a "full recovery" for her. Because I

cannot make that assessment, I have no choice but to find that the respondents in this case are not entitled to exercise any subrogation interests in the \$25,000.00 settlement the claimant obtained in her liability suit against the third party.

The respondents claim to assert its subrogation interests under Ark. Code Ann. §11-9-410 is denied.

IT IS SO ORDERED.

DAIL STILES
Administrative Law Judge