

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F212722

HAROLD KNIGHT, Employee	CLAIMANT
J.B. HUNT TRANSPORT, Employer	RESPONDENT
AIG CLAIM SERVICE, Carrier	RESPONDENT

OPINION FILED APRIL 28, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by R. THEODOR STRICKER, Attorney, Jonesboro, Arkansas.

Respondents represented by JOSEPH H. PURVIS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 23, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on December 8, 2004, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer existed between the parties at all relevant times.
3. The claimant suffered a compensable injury on October 26, 2002.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant has been "made whole."
2. Whether respondent is entitled to subrogation in the third-party settlement.

The parties' respective contentions are set forth in their briefs which were admitted into evidence at the time of the hearing and are contained in the hearing transcript.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on December 8, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has not been "made whole"; therefore, respondent is not entitled to subrogation from the third-party settlement.

3. Respondent is liable for a controverted attorney fee on the amount it sought to recover - \$164,941.00.

FACTUAL BACKGROUND

The basic facts in this case are not in dispute. Working for the respondent as an over-the-road truck driver on October 26, 2002, the claimant was struck by a drunk driver and suffered multiple injuries. Claimant was hospitalized and went through a period of rehabilitation. While claimant is not paralyzed, he is primarily confined to a wheelchair with the exception of using a walker for short distances. Claimant has not worked for the respondent or any other employer since the date of his accident.

Claimant was released from rehabilitation in December 2002 and returned to his home. At the time of his injury claimant was married to Holly Knight and they had two minor children, Ashley Knight and Adam Knight. Sometime in January 2003 claimant and Holly Knight separated with Holly Knight filing for divorce in May 2003.

The claimant, who lives in West Virginia, hired an attorney in West Virginia, Michael

John Aloj, to represent him in a claim against the third-party drunk driver. In addition, Holly Knight hired an attorney to represent her interest in the third-party claim. Furthermore, Holly Knight was also appointed by a circuit court in West Virginia as the legal guardian of the claimant's two minor children.

The claim against the third party was settled out of court with no lawsuit having been filed for the amount of \$3,350,000.00. Two-thirds of this amount, or \$2,233,333.00 was paid to the claimant. One-third was divided between Holly Knight and the two minor children.

The respondent accepted claimant's injury as compensable and paid compensation benefits. The parties agree that these benefits have totaled in excess of \$150,000.00.

The respondent contends that pursuant to A.C.A. §11-9-410 it is entitled to a subrogation lien and reimbursement from the third-party settlement. Claimant contends that he has not been "made whole"; therefore, respondent is not entitled to subrogation.

ADJUDICATION

Initially, respondent contends that the decision in *General Accident v. Jaynes*, 343 Ark. 143, 33 S.W. 3d 161 (2000) applying the "made whole" doctrine to workers' compensation was wrongly decided. I have no authority to address this issue and will not do so.

The "made whole" doctrine and a workers' compensation carrier's entitlement to subrogation pursuant to A.C.A. §11-9-410 was most recently discussed in *Logan County v. McDonald*, ___ Ark. App. ___, ___ S.W. 3d ___ (April 6, 2005). In that particular case, the Court summarized the relevant law as follows:

The "made-whole" doctrine, under Ark. Code Ann. §11-9-410 (Repl. 2002), grants a statutory lien to employers or carriers for compensation benefits paid and to be paid by them against proceeds recovered from a third party on account of an

employee's injury. *South Cent. Ark. Elec. Coop. v. Buck*, 354 Ark. 11, 117 S.W. 3d 591 (2003). However, that right is not absolute; rather, the insurer-carrier's lien right against an insured's settlement with a third-party defendant is subject to a court's approval after the carrier has been afforded adequate opportunity to be heard. *Id.* An insured's right to be made whole takes precedence over an insurer's right to subrogation; the insured must be wholly compensated before an insurer's right to subrogation arises. *See id.* Therefore, the insurer's right to subrogation arises only in situations where the recovery by the insured exceeds his or her total amount of damages incurred; equity requires that an insured be made whole before the insurer's right to subrogation arises. *Id.* The controlling factor in determining whether appellee was made whole by the judgment here was the application of the formula set forth in *Franklin v. Healthsource of Arkansas*, 328 Ark. 163, 942 S.W. 2d 837 (1997). There, the court stated that "the precise measure of reimbursement is the amount by which the sum received by the insured from the [third party], together with the insurance proceeds, exceeds the loss sustained and the expense incurred by the insured in realizing on his claim." *South Cent. Ark. Elec. Coop. v. Buck, supra*. 354 Ark. at 20, 117 S.W. 3d at 597 (citing *Franklin v. Healthsource of Ark.*, 328 Ark. at 168, 942 S.W. 2d at 839-40).

After my review of the evidence presented in this case, I find that claimant has not been made whole and that respondent is not entitled to a subrogation lien or reimbursement.

The first calculation which must be made involves the amount of money claimant received from the third party. In this particular case, the total settlement was \$3,350,000.00. As previously noted, two-thirds of this amount was paid to claimant and one-third was paid to Holly Knight and the two minor children. Respondent contends that these payments were made voluntarily without any approval by a court; therefore, the proper figure to be used in calculating whether claimant has been "made whole" is the total settlement of \$3,350,000.00. On the other hand, claimant contends that the one-third paid to Holly Knight and the two minor children should be deducted from the total settlement

amount.

First, I note that claimant is not required to file a civil action and recover damages from a third party by judgment. In *South Central Ark. Elect. Co-Op v. Buck*, 354 Ark. 11, 117 S.W. 3d 591 (2003), the court stated that: “The lien right does not arise until after an insured has been made whole by a judgment or settlement against a third-party tortfeasor.” (Emphasis Added.) Thus, the fact that the recovery in this claim was obtained by settlement rather than a judgment is insignificant.

In addition, I find that the total settlement amount of \$3,350,000.00 constituted the policy limits of the third party’s insurance coverage. This is supported by correspondence from USAA, the insurance carrier for the third party.

In *McDonald v. Logan County*, Full Commission opinion filed June 17, 2004 (F103875) the Commission found that the claimant had not been “made whole”. In its ruling the Commission stated that it was likely that the third-party settlement was not entirely to compensate claimant, but included damages suffered by claimant’s spouse. In *Logan County v. McDonald, id.*, the Court of Appeals affirmed the Full Commission’s finding that claimant had not been “made whole”, but stated that there was no evidence of record to support a finding that a portion of the third-party settlement was for claimant’s wife. Notably, the Court did not rule that such considerations were improper, only that the evidence was insufficient. This would indicate that such considerations are proper if there is sufficient evidence to support same.

In this particular case, I believe that there is sufficient evidence to support a finding that a portion of the third-party settlement was for losses sustained by Holly Knight and by the two minor children. Therefore, those amounts must be deducted in determining the amount of money claimant received from the third-party settlement. West Virginia law recognizes a consortium claim for spouses and a parent consortium claim for children. Based upon an agreement made by the parties these claims were determined to total

approximately one-third of the total settlement amount. I find insufficient evidence that the amounts paid to Holly Knight and/or the minor children do not reflect actual losses by those respective parties. First, I believe it is important to note that both sides were represented by counsel. Furthermore, the fact that the attorney for the claimant did not receive a fee based upon the total settlement, but instead received a fee based only upon the amount paid to the claimant is also an indication that this was an "arms length" agreement, not an agreement to avoid respondent's entitlement to subrogation. I also note that an order was entered approving settlement of \$470,000.00 to the two minor children. By order filed July 20, 2004, a circuit judge in Lewis County, West Virginia approved payment of \$470,000.00 to the two minor children for loss of parental consortium. Thus, this portion of the settlement was approved by a court and is further evidence that the payments made to Holly Knight and to the two minor children were not voluntary payments for the purpose of denying respondent its subrogation rights, but instead were legitimate payments for losses recognized under West Virginia law.

Based upon the foregoing, I find that the settlement negotiations were legitimate and that the monies paid to Holly Knight and for the benefit of the two minor children were for actual sustained losses of consortium under West Virginia law, not voluntary payments. Therefore, I find that the sum received by claimant from the third party settlement equals \$2,233,333.00.

The next figure to be calculated is the insurance proceeds received from the workers' compensation carrier. The parties both agree that this amount is in excess of \$150,000.00. The respondent introduced as an exhibit documents showing the medical benefits and indemnity benefits paid to the claimant. My calculations indicate that as of March 14, 2005, the respondent had paid claimant \$45,734.00 in indemnity benefits and through March 17, 2005 had paid \$119,207.00 in medical benefits for a total payment of \$164,941.00.

The next calculation involves the loss sustained by the claimant. Claimant has introduced into evidence a loss analysis prepared by a business analyst and an economist indicating that his loss totals \$1,848,408.00. I find this report to be credible and entitled to great weight. Therefore, I find that claimant's loss totals at least \$1,848,408.00.

The final figure to be calculated involves the expenses claimant incurred in realizing his claim. Claimant paid an attorney fee in the amount of \$744,444.00 and paid costs in the amount of \$9,820.00. This results in total costs in the amount of \$754,264.00.

Having made all the necessary calculations, one can now determine whether claimant has been "made whole". Here, the sum claimant received from the third party totals \$2,233,333.00. Added to that amount are the proceeds claimant received from the workers' compensation carrier in the amount of \$164,940.00 for a total of \$2,398,273.00. Claimant's loss and expenses total \$2,602,672.00. Because claimant's loss and expense is greater than the sums recovered claimant has not been "made whole" and respondent is not entitled to subrogation.

In *McDonald v. Logan County, id.*, the Full Commission after finding that claimant had not been "made whole" found that "respondent is liable for a controverted attorney's fee based on the amount it seeks for reimbursement out of the proceeds of the third-party settlement." The Commission reasoned that the respondent was trying to take those benefits from the claimant. The Commission's decision regarding the attorney fee was affirmed by the Court of Appeals in *Logan County v. McDonald, id.*

Likewise, respondent in this case is requesting payback of benefits totaling \$164,941.00; therefore, respondent has controverted benefits and is liable for an attorney fee pursuant to A.C.A. §11-9-715.

ORDER

Based upon the sums claimant received from the third-party settlement and from

the workers' compensation carrier, claimant has not been "made whole". Therefore, respondent is not entitled to subrogation.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE