

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400365

JOE MILLER,
EMPLOYEE

CLAIMANT

BOROCO,
EMPLOYER

RESPONDENT

BITUMINOUS INS. CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 28, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE MICHAEL KNOLLMEYER, Attorney at Law, Jacksonville, Arkansas.

The respondent was represented by HONORABLE BRETT D. WATSON, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on January 10, 2006 in Little Rock, Arkansas. Mr. Miller appeared at the hearing with his attorney, Michael Knollmeyer. Boroco, Incorporated and Bituminous Casualty Corporation appeared through their attorney, Brett Watson. I provided notice of the January 10, 2006 hearing to Ms. Paula Heathscott of SMC, Incorporated by letter dated December 6, 2005. SMC is Mrs. Miller's health insurance carrier. SMC paid for medical treatment associated with Mr. Miller's work related injury. SMC received my letter on December 8, 2005. SMC did not at

any point thereafter contact my office or appear at the hearing.

The parties submitted evidence at the January 10, 2006 hearing on three issues: (1) Whether the made whole doctrine applies to any subrogation rights that SMC may have under Ark. Code Ann. § 11-9-411; (2) If so, whether Mr. Miller would be made whole under the circumstances of the present case where Mr. Miller, Boroco and Bituminous are proposing a joint petition settlement; and (3) Whether SMC has waived its subrogation rights by failing to appear at the January 10, 2006 hearing.

The record consists of the January 10, 2006 hearing transcript and the exhibits contained therein.

DISCUSSION

Mr. Miller sustained an admittedly compensable low back injury on January 21, 2003. Mr. Miller was 69 years old at that time. Dr. Patrick Chan ultimately performed kyphoplasty to compression fractures at the L1 and the L4 levels of Mr. Miller's spine in March of 2003.

Mr. Miller's wife testified at a previous hearing that I held on August 24, 2004, that some of Mr. Miller's medical expenses were paid jointly by Mrs. Miller's health insurance

through SMC and by Medicare as a secondary insurer (70% paid by SMC and 30% paid by Medicare).

On February 10, 2004, Paula Heathscott at SMC provided Brett Watson an itemized statement indicating that SMC paid a total of \$43,936.84 on claims for Mr. Miller between January 1, 2003 and May 31, 2003. On February 15, 2005, SMC provided to Mr. Watson a document indicating that SMC has paid \$12,709.98 for Mr. Miller's back injury.¹ To date, Bituminous has also paid \$12,551.61 in medical benefits on Mr. Miller's behalf.

Mr. Miller, Boroco, and Bituminous propose a joint petition settlement of Mr. Miller's workers' compensation case conditional on the Commission's first concluding that the made whole doctrine applies to this case. By the terms of the joint petition, the respondents would pay the

¹ Mr. Miller's prior medical conditions include chronic obstructive pulmonary disease, hip replacement in January of 2001, kidney surgery in October of 2002, and what Dr. Price described on January 30, 2003 as "horrible lumbar disc disease." Mr. Miller also has osteoporosis secondary to steroid use, and Dr. Curtis Williams read a March 2003 x-ray as also indicating old compression fractures at the T12, T5, T4, and T3 levels of the spine. Presumably, a substantial portion of Mr. Miller's claims between January 1, 2003 and May 1, 2003 were for conditions other than the compensable back injury and surgery. At any rate, Boroco and Bituminous have no reason at present to dispute that SMC paid \$12,709.98 towards Mr. Miller's workers' compensation injury. [T. 8].

claimant the sum of \$5,000.00 plus attorney's fees, and pay a Medicare lien in the amount of \$1,611.20. In addition, the respondents would agree to indemnify the claimant against any third-party healthcare subrogation related to the compensable injury.

1. Does the made whole doctrine apply to any subrogation rights that SMC may have under Ark. Code Ann. § 11-9-411?

The Arkansas Supreme Court summarized the history of the law of subrogation in Arkansas as follows in a case involving automobile insurance in Southern Farm Bureau Casualty Insurance Company v. Tallant, ___ Ark. ___, ___ S.W.3d ___ (04-1080 filed 4-21-05);

Subrogation is the substitution of one party for another. Welch Foods, Inc. v. Chicago Title Ins. Co., 341 Ark. 515, 17 S.W.3d 467 (2000). The party asserting subrogation is making a demand under the right of another. Cooper v. Home Owner's Loan Corp., 197 Ark. 839, 126 S.W.2d 112 (1939); Chaffe & Bros. v. Oliver, 39 Ark. 531 (1882). Subrogation is a normal incident of indemnity insurance. Sentry Ins. Co. v. Stuart, 246 Ark. 680, 439 S.W.2d 797 (1969). That is to say that because insurers pay the obligations of their insureds, a right in equity to subrogation in the insurer arises. Id. This assures against unjust enrichment by way of double recovery. Shelter Mut. Ins. Co. v. Bough, 310 Ark. 21, 834 S.W.2d 637 (1992).

A right in equity to subrogation may arise by convention, or in other words, by way of a subrogation provision in a contract; however, it may also arise as legal or equitable subrogation,

or in other words by operation of law based on facts giving rise to a right of subrogation. Welch, supra; Courtney v. Birdsong, 246 Ark. 162, 437 S.W.2d 238 (1969). A right of subrogation may also arise from statute. See, e.g., Ark. Code Ann. § 23-89-101 (Repl. 2004).

In the context of automobile insurance, an insurer is entitled to subrogation because, while not primarily responsible for paying for injuries and damages suffered by the insured at the hands of a third person, it is under an obligation to pay by reason of the policy of insurance. Farm Bureau Mut. Ins. Co. v. Riverside Marine Remanufacturing, Inc., 278 Ark. 585, 647 S.W.2d 462 (1983). Thus, under these facts, the right to subrogation arises by operation of law; however, if there is a subrogation provision in the policy, then it also arises by convention.

This court once distinguished between legal or equitable subrogation and conventional subrogation. In Higginbotham v. Arkansas Blue Cross and Blue Shield, 312 Ark. 199, 849 S.W.2d 464 (1993), we held that conventional subrogation could differ from equitable or legal subrogation because an insurance company is free to fix the terms and conditions upon which it will offer insurance. However, in Franklin, supra, we rejected the distinction made in Higginbotham, noting the equitable principles underlying subrogation. While insurance companies are free to set terms and conditions, they are not free to define the terms and conditions of the equitable remedy of subrogation. This court in Higginbotham was mistaken in characterizing the issue in terms of the freedom to contract. By availing itself of the remedy of subrogation, the insurer takes the remedy as it is defined by law. While it is the subrogation provision in a contract of insurance that establishes an insurer's right to conventional subrogation, the provision does not and cannot define the nature or extent of the remedy subrogation provides. We noted in Franklin, supra that "[t]he same facts give rise to both

legal and conventional subrogation." Franklin, 328 Ark. at 167.

At issue in this case is whether Tallant was made whole. Tallant argues that he was not made whole by the total sum received from the settlement and amount paid to him by Southern Farm Bureau. In Franklin v. Healthsource of Ark., 328 Ark. 163, 942 S.W.2d 837 (1997), this court stated of the question of being made whole:

As stated by Professor Freedman, "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."

Franklin, 328 Ark. at 168 (quoting Warren Freeman, Freeman on Insurance Law, § 12.6 (6th ed. 1990)). The made-whole doctrine is a descriptive term for application of unjust enrichment. An insured should not recover more than that which fully compensates, and an insurer should not recover any payments that should rightfully go to the insured so that he or she is fully compensated. We so stated in Bough:

Thus, while the general rule is that an insurer is not entitled to subrogation unless the insured has been made whole for his loss, the insurer should not be precluded from employing its right of subrogation when the insured has been fully compensated and is in a position where the insured will recover twice for some of his or her damages.

Bough, 310 Ark. at 28. In Franklin, *supra*, we also stated that "equity will require that the insured be made whole before the insurer's right to subrogation will arise." Franklin, 328 Ark. at

168 (quoting Lee R. Ross, Couch on Insurance § 61:20 (Supp. 1996)). The fact that Southern Farm Bureau's right to subrogation arises from contract does not give it a higher priority than Tallant's claim, and Tallant is entitled to be made whole before Southern Farm Bureau is entitled to recover anything against Key.

The statute at issue in the present case is Ark. Code Ann. § 11-9-411 (Repl. 2002) which was enacted as part of Act 796 of 1993. See Acts 1993, No. 796, § 32. The provisions of this law are to be strictly construed. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2002). Ark. Code Ann. § 11-9-411 (Repl. 2002) states:

(a) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

(b) The claimant shall be required to disclose in a manner to be determined by the Workers' Compensation Commission the identity, address, or phone number of any person or entity which has paid benefits described in this section in connection with any claim under this chapter.

(c)(1) Prior to any final award or approval of a joint petition, the claimant shall be required to furnish the respondent with releases of all subrogation claims for the benefits described in this section.

(2)(A) In the event that the claimant is unable to produce releases required by this section, then

the commission shall determine the amount of such potential subrogation claims and shall direct the carrier or self-insured employer to hold in reserve only said sums for a period of five (5) years.

(B) If, after the expiration of five (5) years, no release or final court order is presented otherwise directing the payment of said sums, then the carrier or self-insured employer shall tender said sums to the Death and Permanent Total Disability Trust Fund. [Emphasis added]

The Commission has previously described the operation and perceived purposes of Ark. Code Ann. § 11-9-411 as follows when considering the dollar-for-dollar offset for prior payments of medical expenses by a group carrier:

As we understand operation of the statute . . . a workers' compensation carrier will hold in reserve and ultimately reimburse a group carrier for those medical benefits paid for by the group carrier. The workers' compensation carrier will also take a dollar-for-dollar offset (i.e., not pay the claimant or the medical provider) for benefits described in Section 411(a), and the group carrier will provide a release of any potential subrogation claims once it has been reimbursed by the workers' compensation carrier for those medical benefits already paid for by the group carrier. Consequently, we see no merit in the claimant's argument on appeal that the requirements of Ark. Code Ann. § 11-9-411(c)(1) render impossible the dollar-for-dollar offset provided to the workers' compensation carrier under Ark. Code Ann. § 11-9-411(a).

. . .

[W]e understand the provisions of Section 411 to protect third-party payers of medical benefits, and to provide a means for those third-party payers to recover their payments from the workers'

compensation carrier who is ultimately liable for payment of those medical benefits under the statutory provisions cited by the claimant's brief. We find that Ark. Code Ann. § 11-9-411 is rationally related to a legitimate governmental interest in providing a means for third-party payers of medical benefits to recover their payments from the workers' compensation carrier who is obligated under the workers' compensation law to pay for those medical benefits, as well as a legitimate governmental interest in controlling insurance costs by eliminating the double recovery of medical costs that the claimant apparently seeks in the present case. We point out that, by explicitly providing a means for reimbursement to group carriers from workers' compensation carriers for injuries ultimately determined to be work related, Section 411 also appears to, at least in part, remove a disincentive group carriers might otherwise have had under prior law to avoid making any medical payments until after an injury has been adjudicated either work related or nonwork related.

Dooley v. Automated Conveyor Systems, Inc., 84 Ark. App. 412, 143 S.W.3d 585 (2004) [quoting Dooley v. Automated Conveyor Systems, Inc., Full Workers' Compensation Commission, Opinion Delivered January 8, 2003 (F100282)].

I have the following observations regarding the parties' argument that, under the Supreme Court's reasoning in Franklin v. Healthsource, 328 Ark. 163, 942 S.W.2d 837 (1997) and South Central Ark. Elec. Coop. v. Buck, 345 Ark. 11, 17 S.W.3d 591 (2003), the claimant in a workers' compensation settlement must be made whole before a group

carrier has any potential subrogation rights under Ark. Code Ann. § 11-9-411.

First, I agree with the respondents' observation that the Arkansas Courts have held that the made whole doctrine applies even when the insurer's subrogation right is statutorily created. In General Accident Ins. v. Jaynes, 343 Ark. 143, 33, S.W.3d 161 (2000), the Arkansas Supreme Court clarified that the subrogation interest at issue in Franklin and in Bough was actually a statutory subrogation right contained in Ark. Code Ann.

§ 23-89-207. In Jaynes, the Arkansas Supreme Court further concluded that the made whole doctrine also applies to the statutory subrogation rights provided to workers' compensation insurers in Ark. Code Ann. § 11-9-410.

Second, I note that in Arkansas Dept. Human Servs. v. Estate, Ferrel, 336 Ark. 297, 984 S.W.2d 807 (1999), the Arkansas Supreme Court held that the General Assembly did not intend to subject the Arkansas Department of Human Services to traditional subrogation principles, including the made whole doctrine, in enacting our Medicaid recoupment statute. The insurance carrier in Jaynes asserted that the Court's reasoning in Ferrel should likewise be applied to the statutory lien provided to workers' compensation

insurance carriers under Ark. Code Ann. § 11-9-410. However, the Arkansas Supreme Court in Jaynes rejected this argument, noting that Ferrel involved the Arkansas Department of Human Services (DHS), and that DHS was not a private insurer. The Supreme Court in Ferrel concluded that Ark. Code Ann. § 20-70-301 et seq provided DHS an absolute right to the proceeds from an award or third party settlement equal to the amount of the Medicaid payments received. The Supreme Court in Jaynes concluded that the General Assembly provided no such absolute lien for workers' compensation insurance carriers in Ark. Code Ann. § 11-9-410.

In comparing the governing statutory language at issue in the present case (Ark. Code Ann. § 11-9-411 and possibly Ark. Code Ann. § 23-79-146) to the language in Ark. Code Ann. § 20-70-301 et seq. (Ferrel), to the language in Ark. Code Ann. § 11-9-410 (Jaynes), and to the language in § 23-89-207 (Jaynes, discussing Franklin and Bough), I can find no language in Arkansas Code Ann. § 11-9-411 indicating to me that the General Assembly intended that a group carrier's subrogation rights under either Ark. Code Ann. § 11-9-411 or under Ark. Code Ann. § 23-79-146 would not be subject to the made whole doctrine. In light of the Arkansas Supreme

Court's reasoning in Jaynes, I am certainly inclined to agree with the respondents' conclusion that the Arkansas Courts will someday likely find that the made whole doctrine also applies to a group carrier's subrogation interest in an insured's workers' compensation benefits under Section 411, similar to the Court's conclusion regarding Section 410 in Jaynes.

Third, however, I also note that, prior to the adoption of Ark. Code Ann. § 11-9-411 in Act 796 of 1993, the Arkansas Court of Appeals in Owen Drilling v. Allison, 33 Ark. App. 60, 800 S.W.2d 728 (1990), concluded that a workers' compensation carrier was generally not entitled to an offset for medical expenses paid by the injured employee's private insurance. Therefore, if the Commission and/or the Courts ultimately conclude that the made whole doctrine applies to a group carrier's potential subrogation rights in Ark. Code Ann. § 11-9-411, then a corollary question will be whether the workers' compensation carrier must reimburse the claimant the amount of medical expenses paid by the group carrier, as the Court required in Allison, or whether instead the workers' compensation carrier will now be entitled to a credit and therefore a windfall on medical expenses previously paid by a group carrier even

where the injured worker was not made whole. I note that the parties have not briefed the issue of the potential resurrection of Allison if the made whole doctrine defeats the potential subrogation claim of a group carrier under Ark. Code Ann. § 11-9-411, and resolution of the possible continuing application of Allison could have a bearing on the joint petition currently being reserved by the parties.²

Finally, I note that the parties are requesting that I apply an equitable doctrine to a situation where: (1) the doctrine is not contained in the Arkansas Workers' Compensation Law; (2) the provisions of the Arkansas Workers' Compensation Law are to be strictly construed; (3) the real party in interest, SMC, who might object to applying the made whole doctrine to Ark. Code Ann. § 11-9-411 subrogation interests, would not normally be a party to these proceedings before me and has chosen not to intervene

²For example, in the present case Boroco and Bituminous have no reason at present to dispute that SMC paid \$12,709.98 towards Mr. Miller's workers' compensation claim, and that Mr. Miller has also not been paid for his period of temporary disability. If the made whole doctrine defeats SMC's potential subrogation claim, if Allison remains good law and if Mr. Miller has not been made whole, then I note that a joint petition settlement for \$5,000.00 might not be in Mr. Miller's best interest, since the combination of his unpaid TTD and his medical previously paid by SMC far exceed \$5,000.00.

in the present case; and (4) the doctrine has never before been adopted in this situation by the Full Commission or the Arkansas Courts.

Absent any express statutory language incorporating the made whole doctrine into the procedures of Ark. Code Ann. § 11-9-411, and absent further guidance from the Full Commission or the Arkansas Courts incorporating the made whole doctrine into a determination of potential subrogation claims under Section 411, I find that I currently lack the authority to apply the made whole doctrine to Ark. Code Ann. § 11-9-411 potential subrogation claims.

2. Would The Claimant Be Made Whole By The Benefits Previously Received Combined With The Settlement Amounts Proposed By The Claimant And The Respondents?

Because the parties have failed to persuade me that I have the authority to apply the made whole doctrine to SMC's potential subrogation claim, I do not reach the second question as to whether or not the claimant would be made whole if the doctrine applies to SMC's potential subrogation claim.

3. Has SMC Waived Its Subrogation Rights By Not Appearing At The January 10, 2006 Evidentiary Hearing?

Arkansas Code Annotated § 11-9-411 is silent as to what action, if any, that a group carrier must take before the Commission in order to protect the group carrier's subrogation interests. On the one hand, Ark. Code Ann. § 11-9-411 (c) (2) (A) assigns the Commission the duty of determining the amount of the group carrier's potential subrogation claim, which might suggest that a group carrier has an affirmative duty to appear and present evidence to establish the existence and amount of any potential subrogation lien. However, the Commission has also previously observed that Section 411 is intended, at least in part, to protect the interests of a third party payer who is not normally a party to the hearing. Tadlock v. St. Joseph's Regional Health Center, Full Workers' Compensation Commission, Opinion filed December 9, 1999 (E802168).

In the present case, the parties have failed to present evidence indicating what action, if any, the claimant has taken to obtain a release from SMC. At neither of the two evidentiary hearings held to date have the parties requested that I determine the amount of SMC's potential subrogation lien. Had they done so, I note that the respondents' attorney requested and SMC provided prior to each hearing a copy of SMC's payment history. The parties have failed to

advise me what additional information SMC might need to provide the parties on SMC's behalf in order for me to determine SMC's potential subrogation lien, or why SMC might otherwise be required to appear at a hearing to determine SMC's potential subrogation claim. In fact, the parties have indicated that Boroco and Bituminous have no reason at present to dispute SMC's determination that SMC paid \$12,709.98 towards Mr. Miller's workers' compensation injury. Under these circumstances, the parties have failed to persuade me that SMC has waived any potential subrogation claim under Ark. Code Ann. § 11-9-411 by not appearing at the hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The parties have failed to persuade me that I have the authority to apply the made whole doctrine to SMC's potential subrogation claim identified in § 11-9-411.

2. The parties have failed to persuade me that SMC has waived SMC's potential subrogation claim by SMC not appearing at the January 10, 2006 hearing.

ORDER

For the reasons discussed herein, I find that I am without authority to consider and approve the parties' joint petition settlement agreement without either (1) a release

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of SMC's potential subrogation claim or (2) a hearing to determine the amount of SMC's potential subrogation claim.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge