

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212722

HAROLD KNIGHT,
EMPLOYEE

CLAIMANT

J. B. HUNT TRANSPORT,
EMPLOYER

RESPONDENT

AIG CLAIM SERVICE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 2, 2006

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE R. THEODOR
STRICKER, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE JOSEPH H.
PURVIS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed April 28, 2005. In
said order, the Administrative Law Judge made the
following findings of fact and 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.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the April 28, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law

Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant was not made whole by the proceeds of the third party settlement therefore, the respondents were not entitled to exercise their

right of subrogation. Based upon my de novo review of the record, I find that the claimant was made whole by the third party settlement. Therefore, the respondents are entitled to their subrogation interest. The claimant has also failed to prove that the respondent is liable for a controverted attorney's fee. Accordingly, the decision of the Administrative Law Judge should also be reversed on this issue.

In my opinion, it appears that the claimant attempted to outwit the Arkansas made whole doctrine by structuring his settlement in such a way that on its face appears that the claimant is not whole. However, when the wife's and children's monies are considered in the total, the claimant has been made whole. I am not aware that West Virginia has a made whole doctrine that applies to workers' compensation settlements. However, Arkansas law should be applied to all aspects of this case.

The claimant is a resident of Camden, West Virginia, and was employed as a truck driver by the respondent employer on October 26, 2002, when he was involved in a motor vehicle accident. A drunk driver crossed the median of the road in the Pittsburgh, Pennsylvania, area and struck the claimant's truck head on. The claimant suffered severe injuries. Immediately

following the accident, the claimant had surgery, and stayed in a rehabilitation hospital for approximately six weeks. The claimant returned home in early December, 2002, and is wheelchair bound. At the time of the accident the claimant was 42 years old. The respondents accepted the injuries as compensable and have paid all appropriate benefits, including indemnity in the amount of \$45,734.00 and medical benefits in the amount of \$119,207.00.

Within two months of returning home, the claimant and his wife, Holly, separated. The claimant's wife subsequently filed for divorce in May of 2003. Holly testified that since their separation she and the claimant have not resumed living together as man and wife.

The claimant hired attorneys in West Virginia to represent him in a third party action against the other driver who was responsible for the accident. The respondents promptly gave notice of their intent to preserve their subrogation interest. As part of the process of trying to settle the tort action, the claimant's West Virginia attorneys prepared an analysis of the economic loss suffered by the claimant. This report was prepared by Thomas Kline, MBA, PhD, as well as Mr. Antony Davis also a PhD in economics. This report

reflected that as a result of this accident, the claimant had a total loss of \$1,848,408.00, which included future medical care.

On July 20, 2004, the claimant and his attorney in West Virginia settled their case with the third party without ever filing suit. No prior notice was given to the respondents in this matter. The third party action was settled for the total sum of 3.35 million dollars. The Release and Settlement Agreement was executed by "Harold Knight and Holly Hannah Knight, individually and as husband and wife, and as parents and natural guardians of Ashley Nichole Knight and Adam Michael Knight, both minors." The settlement agreement demonstrates that the claimant was going to receive the sum of 1.73 million dollars up front and would subsequently receive \$4,500.00 a month for 240 months. He would also receive seven (7) lump sum payments in the amount of \$50,000.00 in May of 2007; 2010; 2013; 2016; 2019; 2022; and 2025. The claimant's wife was to receive \$236,938.35. The two minor children were to receive \$470,000.00. After the cost of recovery, the claimant received \$1,479,068.98. It is of note that the claimant received advanced payments of approximately \$100,000.00. His wife and children received approximately \$50,000.00 each in advance payments. I also note that the

settlement document in the record indicates one-third was held out for subrogation which is required under Arkansas law. This document indicates that the respondent carrier paid \$137,071.68, for medical bills incurred as a result of the October 26, 2002, accident, but agreed to accept \$88,174.49 as payment in full for the satisfaction of a lien.

The respondents are now seeking to assert their statutory subrogation rights against the claimant's settlement. The claimant argued that the respondents were not entitled to their statutory subrogation rights because the claimant has not been made whole. The Administrative Law Judge found that the claimant had not been made whole and the respondents were not entitled to their subrogation interests. The Administrative Law Judge also awarded the claimant a statutory attorney fee based on the entire amount of indemnity and medical benefits already paid. The respondents filed an appeal to the Full Commission. After conducting a de novo review of the record, I find that respondents are entitled to their subrogation interests as claimant has been made whole by his settlement. I also find that the award of attorneys' fees on the entire amount of uncontroverted and already paid medical and indemnity benefits should be reversed.

Arkansas law requires that the made whole doctrine be applied in workers' compensation cases. The seminal case is General Accident Insurance v. James, wherein the Arkansas Supreme Court found that the claimant must be made whole before any subrogation rights of the third party would attach to a settlement with respect to workers' compensation cases. Specifically, the Court determined that Ark. Code Ann. §11-9-410 (Repl. 2002) which 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, does not apply if the claimant is not made whole as a result of the recovery from the third party. The Court further held that the insurer's lien was not an absolute lien because any settlement with a third party was subject to court approval. Subsequently, in the case of Phillip Morris USA v. James, cited supra, the Court found that the "made whole" doctrine was not abrogated by Act 796 of 1993. In James, the Court stated that when an insurer receives the notice and hearing it is entitled to, its lien rights are not abrogated.

The few cases in Arkansas which have applied, the made whole doctrine to workers' compensation cases do not provide guidance as to how to determine whether

an injured party has been made whole when the case is settled without a lawsuit even having been filed. Moreover, these cases are distinguishable on their facts from the present case. First, the seminal case on this issue, which first applied the made whole doctrine to workers' compensation case was General Accident v. Jaynes 343 Ark. 43, 33 S.W3d 161 (2000), In Jaynes unlike here, the claimant had filed a lawsuit and the insurer had intervened. When the case settled for policy limits which were well below the benefits already paid by the workers' compensation carrier, the circuit judge made a determination that the claimant had not been made whole. Thus Jaynes gives no guidance as to how to determine whether a compromise settlement in an amount well in excess of the benefits paid, as here, makes a claimant whole. One thing is for sure, the amount received by the claimant here, whether the Commission considered the total to be \$2,595,735.65 or 2,388,273.00 is well in excess of the \$164,941.00 paid by the respondents thus far. It is also well in excess of the \$1,848,408.00, that the claimant's own experts held was the amount needed to make the claimant whole.

Travelers Ins. Co. v. O'Hara, 350 Ark. 6, 84S.W.3d 4 (2002), also dealt with the made whole doctrine in a case where the claimant settled his claim

against the third party tortfeasor. There, the injured party filed a medical malpractice lawsuit in which the insurance carrier intervened to protect its subrogation interests. After a jury verdict in favor of the claimant was rendered in the amount of \$77,302.03, the trial court granted a motion for a new trial on the basis of that the jury's award of damages was inadequate. The case was then appealed and affirmed. Following remand, the claimant and the tortfeasor entered into a settlement agreement whereby the claimant agreed to accept \$225,000.00. The agreement specifically included all claims the claimant could assert against the third party, and also provided that it was intended to include settlement of any claims that the insurer sought to enforce as a workers' compensation subrogation lien. Further, the agreement provided that it was not intended to "settle around" the insurer, and stated that both the claimant and tortfeasor would contend that the insurer was not entitled to any lien on the proceeds of the settlement because the claimant had not been made whole by the amount of the settlement. After a hearing, the trial court found that the \$225,000.00 would not make the claimant whole, and denied subrogation. No information is provided in the case from which it can be ascertained on what basis the circuit court based its

finding that \$225,000.00 would not make the claimant whole. Nor does the Settlement Agreement here purport to include settlement of claims of the insurer, and it proclaims no intention not to settle around the insurer. In fact, the insurer is not even mentioned in the Settlement Agreement.

In Phillip Morris v. James, the court added the claimant's wife's \$300,000.00 she received in the settlement back into the calculation of whether or not the claimant was made whole. Although the Court found the claimant was not made whole, the case is instructive as the interpretation of the law and what should be considered in the total for determining whether or not a claimant is made whole

In Jerrell Yancy v. B&B Supply, Court of Appeals (Sept. 21, 2005), the court found that the claimant was not made whole. The claimant made the statement that: "even if we added the amount awarded to his wife, \$10,500.00, to the total amount, it would not exceed the total amount the jury had determined as Yancy's damages." This case demonstrates to me that the claimant's wife's settlement proceeds unequivocally needs to be included in the total. This case also utilizes a formula for determining whether or not a person is made whole:

Under Ark. Code Ann. § 11-9-410, employers or workers' compensation insurance carriers have a statutory lien against proceeds recovered from a third party for the injury sustained by the employee. However, that right is not absolute; rather, the insurer's lien right against an insured's settlement with a third party is subject to a court's approval after the carrier has been afforded an opportunity to be heard. S. Cent. Ark. Elec. Coop. v. Buck, 354 Ark. 11, 117 S.W.3d 591 (2003); see also Gen. Accident Ins. Co. v. Jaynes, 343 Ark. 143, 33 S.W.3d 161 (2000); Phillip Morris USA v. James, 79 Ark. App. 72, 83 S.W.3d 441 (2002). An insured's right to be made whole takes precedence over an insurer's right to subrogation, and an insured must be fully compensated before the insurer's right to subrogation arises. Buck, 354 Ark. at 18, 117 S.W.3d at 595. 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. Id., 117 S.W.3d at 595.

Our supreme court has 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." Franklin v. Heathsource of Ark., 328 Ark. 163, 168, 942 S.W.2d 837, 839-40 (1997); see also Buck, 354 Ark. at 20, 117 S.W.3d at 597.

The court's analysis in Buck is illustrative of how to apply the formula. In Buck, the claimant was removing a limb from a power line for his employer when he was hit by

a car driven by a third party. He received workers' compensation benefits in the amount of \$21,979.33 (medical expenses and lost wages). The claimant subsequently filed a lawsuit against the third party for lost wages, medical expenses, and pain and suffering. The compensation carrier intervened asserting its right of subrogation. The jury found the claimant had sustained damages of \$80,000, but the jury reduced the award by forty percent because of the claimant's contributory negligence and awarded the claimant \$48,000. The court found that the claimant had not been made whole and applied the formula in the following way:

Here, the jury determined that [the claimant] incurred damages of \$80,000. He actually received a judgment of \$48,000. From that judgment amount, costs and attorneys' fees totaling \$21,973.22 must be deducted, leaving \$26,026.78 in settlement proceeds. This amount combined with the \$21,979.33 that [the claimant] received in compensation benefits totals \$48,006.11. Clearly this amount does not exceed the damages incurred by [the claimant]. Assuming arguendo that the jury did take into account the \$21,979.33 paid by [the compensation carrier], [the claimant] still incurred \$58,020.67 in non-reimbursed losses; thus, the judgment of \$48,000 is still less than the damages incurred by [the claimant].

Buck, 354 Ark. at 20, 117 S.W.3d at 597.

In all the published Arkansas cases to date, a lawsuit was filed and the carrier was afforded an

opportunity to be heard or the carrier intervened in the action. In this case, however, there was no proceeding in which the carrier could intervene. I would note in this case presently before us, there was also no court approval of the settlement. No lawsuit was ever filed against the third party tortfeasor on behalf of the claimant, his wife, or children. Rather, the claim was settled prior to any legal action being filed.

Therefore, there was no legal action existing into which the respondents could intervene to protect their subrogation interests as set forth by Arkansas law.

Further, the respondents were not involved in any negotiation of the settlement ultimately consummated, and had no knowledge of the settlement between the claimant and the tortfeasor until well after the fact.

It is my opinion that there was an abrogation of the carrier's lien right because the carrier was not afforded notice and an opportunity to be heard until this case was brought before the Commission on the made-whole issue. Furthermore, there appears to have been an attempt by the claimant, the claimant's wife, and their attorneys to insure that the claimant received the structured settlement in such a way that would not allow him to be made whole.

The claimant acknowledged, in his testimony before the Commission, that the third party settlement entered into was in the total amount of \$3.35 million. Since no actual suit had been filed, no separate claims were advanced on the part of the claimant, his wife or children, and no findings were made by a judge or jury as to amount owed, either to the claimant, his wife or children. Therefore, the division of the proceeds among and between the claimant, his wife and his children are arbitrary divisions and are based solely on decisions made by the claimant. No evidence was introduced to support any of the amounts attributed and disbursed to the claimant's wife or his children. The Claimant's wife in her deposition admitted that the amount she received was strictly based upon her agreement with the claimant.

Based solely upon the claimant's decision, he elected to share some of the settlement with his wife and children. The claimant was not obligated to do this, nor are the amounts he chose to give based upon any objective criteria or basis. The claimant could have chosen to keep for himself an amount equal to the amount the economist says he was entitled to or some other amount, but the claimant chose not to do so. In my opinion, the respondents' subrogation rights should not be quashed by the claimant's unilateral decisions. For

the claimant to manipulate the settlement disbursements so as to leave himself a portion that falls below his alleged "made whole" amount should not be accepted.

The only court approval of the settlement is that portion which affects the claimant's minor children. It appears West Virginia law requires that an attorney ad litem be appointed to represent the interest of the claimant's two minor children. Therefore, the court was required to grant permission to settle the claim for the loss of parental consortium. The Court approved that portion of the settlement. However, this settlement was based upon the children's loss of parental consortium. In Arkansas, no such cause of action exists.

According to my research, all of the monies given to the claimant and wife should be included in calculation of whether the claimant was made whole. The claimant and his wife are divorcing. In Arkansas, all property acquired by either spouse subsequent to marriage becomes marital property, unless it is specifically excepted by statute. Ark. Code Ann. §9-12-315(b) (61) provides:

For the purposes of this section,
"marital property" means all
property acquired by either spouse
subsequent to the marriage except:

* * *

(6) benefits received or to be received from a workers' compensation claim, personal injury claim, or social security claim, when those benefits are for any degree of permanent disability or future medical expenses;

Therefore, a settlement from personal injury claim, as in this case, would be included in the marital property. In the case of Liles v. Liles, 289 Ark. 159, 711 S.W.2d 447 (1986), the husband's personal injury settlement did not fit within any of the exceptions to marital property enumerated by the statute. The husband in the Liles case received a settlement under the Jones Act prior to the divorce. He subsequently managed to keep his wife from receiving any of money with the help of his attorney. The Court affirmed a lower Court's finding that the original property settlement should be set aside because it was based on fraud. The wife was given additional property. However, in this case the wife's divorce settlement should be included in the whole amount when making a determination to whether or not the claimant was made whole.

Arkansas does recognize loss of consortium claims for spouses. However, the claimant and his wife are divorcing. Therefore, her claim dies with the filing

of the divorce action which she filed in May of 2003. In the case of Lewis v. Rowland, 287 Ark. 474, 701 S.W.2d 122 (1985), the Supreme Court defined consortium as, "a word derived from Latin meaning fellowship, society, and cooperation; in law it is the right to each other's company, affection, and aid of the other in a conjugal relation." The Court went on to state that husbands and wives have a right to damages for loss of consortium but Arkansas does not recognize that a minor child has a claim for loss of consortium when a parent is injured.

The law is well settled that a wife's loss of consortium claim for injuries sustained by her husband is a derivative claim. See, e.g. Smith vs. State Farm Mut. Auto. Ins. Co., 252 Ark. 57, 477 S.W.2d 186 (1972); see also, Hisaw vs. State Farm Mut. Auto. Ins. Co., 353 Ark. 668, 122 S.W.3d 1 (2003). Consortium may be generally defined as the comfort, society, affection, services, and other indefinable elements reasonably expected from the injured person; damages for loss of consortium do not include the personal inconvenience of the claimant, nor do they include matters such as pain and suffering, loss of wages, medical expenses and other damages personal to the injured party. Loss of consortium is difficult to measure in dollars and cents, but the recovery for loss of consortium should be

dictated by reason and justice. Missouri Pacific Transportation Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957). See Johnson Timber Corp. v. Sturdivent, 295 Ark. 622, 752 S.W.2d 241 (1988). In Johnson, the court found that the wife was entitled to loss of consortium in the amount of \$500,000.00. Specifically in that case, the jury awarded \$750,000.00. The Supreme Court found, on appeal, that the amount of the damages was influenced by passion. The claimant's wife testified at the trial that she sat by her husband's bed at night and cried until she could not cry anymore. Most of her testimony also concerned the care and services that she rendered to the claimant. The court found that the award for loss of consortium was based partly upon matters included in the husband's recovery and not properly embraced within the consortium. The claimant in that case was confined to a wheelchair, wore diapers, was fed through a funnel in the opening in his stomach, was incapable of a conjugal relationship, would probably never regain bowel and bladder control, had severe speech impairment, and considerable brain damage.

In Johnson, the Supreme Court found that the amount of the award of \$750,000.00 by the jury was influenced by passion and if the wife would enter a remittitur of \$500,000.00, that judgement would be

affirmed. Otherwise, the case would be remanded for a new trial on the question of damages for her loss of consortium. The Court went on to explain that damages for loss of consortium do not include the personal inconvenience of the claimant. Nor do they include matters such as pain and suffering, loss of wages, medical expenses and other damages personal to the injured part. Specifically, this case went to the Court on this issue of the excessiveness of the verdict. The Court stated, "the excessiveness of a verdict must be considered on a case by case basis and each must be examined on its own facts. Breitenberg v. Parker, 237 Ark. 261, 372 S.W.2d 828 (1963).

Although loss of consortium is difficult to measure in dollars and cents, recovery for such loss should be dictated by reason and justice. White v. Mitchell, 263 Ark. 787, 568 S.W.2d 216 (1978). The Court considered the propriety of an award for loss of consortium in Morrison v. Lowe, supra, where the trial court had reduced the jury verdict from \$100,000.00 to \$30,000.00. In affirming the reduction of the award, the Court pointed out that the record is reviewed de novo on appeal to determine whether the amount of the judgment shocks the conscience of the court. Consortium awards have often been reduced because the jury considered

matters included in the spouse recovery. See, e.g. Scheptmann v. Thorn, 272 Ark. 70, 612 S.W.2d 291 (1981).

There was some questioning by the respondent carrier's attorney at Holly's deposition that indicates that she had an ulterior motive. She denied it. However, we can only speculate as to why the claimant allowed her to have 11.10% of the claimant's settlement proceeds. When added to the children's portion, this is a net total 33.3% of the settlement proceeds. The claimant is getting a divorce from his wife. What did he give up or get in return for the money that he gave her? That question remains unanswered.

This is a Arkansas Workers' Compensation case, therefore, it should be analyzed under Arkansas law as opposed to West Virginia law. Although the settlement offer and agreement was entered into in West Virginia, the applicable law with respect to whether or not the workers' compensation carrier has an ability to recover from the settlement depends on Arkansas law. Arkansas law does not recognize loss of consortium for children. Therefore, the \$470,000.00 that the claimant paid to his children should be put back into the bottom line.

In my opinion, the divorce action by the claimant's wife should negate any loss of consortium claim that she would have. When the claimant's wife

filed for divorce, that cause of action died. I would note that she filed for divorce prior to the settlement being finalized. West Virginia law allows loss consortium for children as well as spousal consortium. Arkansas law only provides for spousal consortium. Therefore, the wife's claim for loss of consortium and the amount of agreed upon money that she received should be added back into the settlement to make a determination of whether or not the claimant was made whole. The claimant's wife is not going to be there at all and based upon her own testimony has not even lived with the claimant since January of 2003. When you put those monies back into the net proceeds, it is very clear that the claimant was made whole and the respondents should receive their lien.

When this case is analyzed using the factors in Buck, supra, it is clear the claimant has been made whole. Further, no judicial body or tribunal has made any findings of fact as to what compensation the claimant, his wife or children were entitled to receive for the claimant's injuries. Again, the amount the claimant now claims was needed to make him whole is simply what the claimant would have presented had he been in front of a judge or jury. This never occurred because the claimant, on his own volition, determined to

settle his claim. For him to now come forward and state that the amount he agreed to accept did not "make him whole", in my opinion, is disingenuous. His acceptance of the agreed to amount is his tacit agreement that the amount was sufficient. There is no hint that he accepted the amount he did because of some cap beyond which he could never recover. Rather, the amount accepted is the result of negotiation and compromise made in light of and with due consideration of the risks inherent in a trial and an evaluation of likelihood of success.

None of the cases dealing with the application of the made whole doctrine to workers' compensation cases assist in the analysis of this case. There is absolutely no authority that stands for the proposition that a claimant is not made whole simply because he says he is not, which is essentially the case here. This is not a case where the amount recovered is but a small portion of the amount already received in workers' compensation benefits. Rather, this is a case in which the claimant, unilaterally negotiated a substantial settlement, then unilaterally divided the amount with his estranged wife and children in a fashion so as to permit him to make an argument that he was not made whole.

The claimant has offered insufficient proof to establish that he has not been made whole for his injuries by virtue of his third party settlement. The claimant's acceptance of the \$3.35 million shows that this amount was sufficient, and I can only presume accepted after weighing litigation risks. In my opinion, the claimant's unilateral decisions regarding the divisions and disbursements of the settlement to his family members cannot be sanctioned as a way to defeat the respondents' statutory subrogation rights. No logical basis exists to support the claimant's portion. The claimant's wife has no claim for loss of consortium because she is divorcing him. His children, under Arkansas law, have no claim for loss of consortium. His request to defeat the respondents subrogation claim should have been denied. These portions the claimant unilaterally gave to his estranged wife and children should be included in the calculation of determining whether or not the claimant was made whole.

Although the settlement would be considered a portion of the marital estate during the divorce, we are not privy to any information regarding the divisions of the marital estate. One can only presume the claimant and his wife negotiated the distribution of the third party settlement as part of the divorce. With regard to

the claimant's future medical expenses, these future expenses were without question used by the claimant's own expert economists to arrive at the amount of the claimant's damages. Without the respondents being able to take the statutory credit against two-thirds of that settlement for those same medical bills for which they have responsibility, the claimant in essence will receive payment for those damages twice. This is the very thing that subrogation exists to prevent. Simply put, I find the claimant has been made whole and the respondents are entitled to their subrogation lien. Therefore, I must dissent from the majority's affirmance of the Administrative Law Judge's decision.

I also find that the award of attorney's fees to the claimant's attorney should be reversed. The claimant's medical and indemnity benefits have never been controverted by the respondents. The respondents accepted the claimant's injuries as compensable and paid benefits accordingly. Specifically, the claimant has received \$45,734.00 in indemnity benefits and \$119,207.00 in medical benefits. Even if the claimant's attorney was entitled to receive attorney's fees on these amounts, a finding which I do not make, the amendments to §11-9-715 in 2001 specifically state that the claimant's attorney is only allowed to receive fees

on controverted indemnity benefits. It specifically excludes attorney's fees being calculated based upon medical benefits.

In making the attorney fee award, the Administrative Law Judge based his decision on the Full Commission opinion in McDonald v. Logan County, Full Commission Opinion filed June 17, 2004 (F103875). In that case the Commission determined that a respondent was liable for a controverted attorney's fee based, in part, on the amount it sought to be reimbursed from the proceeds of a third party settlement, stating:

As noted by claimant's attorney in claimant's brief to the Commission, any way you look at it, respondent is trying to take away \$11,111.12 in benefits from claimant. Accordingly, respondent has controverted claimant's entitlement to these monies and, therefore, owes an attorney's fee based thereon. See Cleek v. Great Southern Metals, 335 Ark. 342, 981 S.W.2d 529 (1998).

Apparently, the Administrative Law Judge interpreted this Commission's holding in McDonald as being that when a respondent unsuccessfully asserts its subrogation rights, the amount it sought for reimbursement via subrogation is deemed controverted, regardless of whether those benefits had ever been challenged before.

In my opinion, this result is contrary to the statutes and logic. Ark. Code Ann. §11-9-715 provides in part:

(A) (a) (A) Fees for legal services rendered in respect of a claim shall not be valid unless approved by the Workers' Compensation Commission.

(B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee. Attorney's fees shall not be awarded on medical benefits or services except as provided in subdivision (a) (4) of this section.

Attorney's fees, pursuant to §11-9-715, are not to be calculated based upon medical benefits paid. The injury in McDonald occurred prior to the amendment. Therefore, attorney's fees cannot be awarded on the medical benefits paid to the claimant (\$119,207.00).

More importantly, such an interpretation is not supported by the very case cited by this Commission in McDonald, as support. In Cleek v. Great Southern Metals, the benefits were found to have been controverted from the outset. Therefore, an attorney's fee was proper on those controverted benefits. In my opinion, nothing in the Cleek case indicates that the act of simply seeking statutory subrogation rights deems the amount sought for reimbursement as "controverted" for purposes of awarding attorney's fees. This

rationalization penalizes respondents for seeking its statutory subrogation rights. This is clearly not the intent of the Arkansas Workers' Compensation Act.

The argument that the Commission's decision regarding attorney's fees in McDonald was affirmed by the Court of Appeals in Logan County v. McDonald, ___ S.W.3d ___, 2005 WL768659 (Ark. App., 2005) does not support the reasoning that the amount sought to be reimbursed via subrogation is "deemed" to be controverted. While it is true that the award of attorney's fees was affirmed by the Court of Appeals in McDonald, that decision did not even touch on the issue before the Commission at this juncture. This is shown by the fact that the Court in McDonald, only made reference to the fact that the respondent had argued against wage-loss benefits above the claimant's impairment rating. The Court appropriately recognized that this situation was a true controversion of those benefits. In my opinion the affirmance of the fee award by the Court of Appeals in McDonald, was strictly based upon the actual controversion of wage-loss benefits. In this case, there was never a controversion of any benefits.

The right of an insurer, to assert its subrogation rights and seek reimbursement from the

proceeds of a third party settlement is granted pursuant to Ark. Code Ann. §11-9-410. Nowhere in that statutory scheme is it set forth that a respondent has to pay an attorney's fee of 25% of the amount it seeks through subrogation should such a claim fail, particularly where benefits were never controverted in the first place. Accordingly, I find that the award of an attorney's fee is erroneous. Therefore for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner