



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACW CORPORATION (a.k.a. ARBY'S))
and EASTERN ALLIANCE INS. CO.,)
as Subrogee of)
SHANARA DEVON WATERS,) No.: 302, 2019
)
Plaintiffs Below / Appellants,) On Appeal from the
) July 10, 2019 Decision of
v.) the Superior Court
) C.A. No. N18C-02-004 CLS
CHRISTOPHER ROBERT MAXWELL,)
and DONEGAL MUTUAL INS. CO.)
(a.k.a., DONEGAL INS. GROUP),)
)
Defendants Below / Appellees.)

APPELLANT'S OPENING BRIEF

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NATURE & STAGE OF PROCEEDINGS

Shanara Waters (Waters) was injured and sustained damages in a work-related motor vehicle collision with Christopher Maxwell (Maxwell) on February 2, 2016. Waters was employed at the time by ACW/Arbys (Arbys), whose workers' compensation carrier at the time was Eastern Alliance Insurance Company (EAI).¹

On February 1, 2018, Arbys and EAI filed suit against Maxwell and his auto liability carrier, Donegal Mutual Insurance Company (Donegal) to recover the \$13,133.25 of workers' compensation payments that were paid to or on behalf of Waters as a result of the February 2, 2016 motor vehicle accident.² Maxwell and Donegal³ answered on March 22, 2018.⁴

On June 22, 2018, Plaintiffs identified Drs. Eric Schwartz and Demetrios Zerofos as expert witnesses.⁵

On January 9, 2019, Defendants moved for Summary Judgment,⁶ supported by an Affidavit, with exhibits, from Waters' counsel, Joel Fredericks, Esquire (Fredericks).⁷ Concurrent with that Motion, Defendants also filed a Motion in

¹ Arbys and EAI as subrogees of Waters shall henceforth be referred to collectively as Plaintiffs.

² A001.

³ Maxwell and Donegal shall henceforth be referred to as Defendants.

⁴ A006.

⁵ A009.

⁶ A023.

⁷ A032.

Limine, with exhibits, to bar testimony from a representative from EAI as to how the commuted workers' compensation payment was calculated.⁸

On February 11, 2019, Plaintiffs filed a Response in Opposition to Defendants' Motion for Summary Judgment and a Cross-Motion for Summary Judgment, with exhibits.⁹ Concurrent with that Response and Cross-Motion, Plaintiffs also filed a letter seeking leave to file a response to the Motion in Limine until after the Court had decided the cross-Motions for Summary Judgment.¹⁰

On February 25, 2019, Defendants filed a Response to Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment, by leave of the Court.¹¹

A Pretrial Conference took place on May 13, 2019, at which the Court granted Defendants' Motion in Limine, entered the Pretrial Stipulation as an Order, scheduled oral argument on the cross-Motions for Summary Judgment, requested that the parties submit a Stipulation of Facts, and set a date for a one-half day bench trial if the parties agreed.

On May 16, 2019, Plaintiffs submitted correspondence between the workers' compensation counsel, Elissa Greenberg (Greenberg) and Waters' counsel,

⁸ A054.

⁹ A089.

¹⁰ A070.

¹¹ A062.

Fredericks and also requested permission to amend the Pretrial Stipulation to add Greenberg as a witness to lay a foundation for admission of those emails at trial, and add Fredericks, who was already identified as a witness for the defense, as a witness for Plaintiffs.¹²

On May 22, 2019, Plaintiffs notified the Court that they did not want to waive the right to trial by jury,¹³ and submitted the requested Stipulation of Facts.¹⁴

On May 29, 2019, counsel conferred with the Court by telephone regarding the scheduling of a jury trial sometime after oral argument on the cross-dispositive motions on June 10, 2019.

At the June 10, 2019 oral argument hearing, the Court requested that the parties submit proposed jury instructions.¹⁵ Plaintiffs provided a full-set of proposed Jury Instructions on June 20, 2019,¹⁶ and Defendants responded with argument as to what Plaintiffs provided and a single instruction entitled “Workers’ Compensation.”¹⁷ By email with counsel, Chambers clarified the Court’s request on June 24, 2019, and Plaintiffs submitted a single instruction entitled “Subrogation” on June 24, 2019.¹⁸

¹² A090.

¹³ A091.

¹⁴ A091.

¹⁵ A146.

¹⁶ A149.

¹⁷ A163.

¹⁸ A167.

On July 10, 2019, the Superior Court issued an Order granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment, but awarding \$633.25 in damages to the Plaintiffs.¹⁹

This is Plaintiffs' Opening Brief on Appeal.

¹⁹ *ACW Corp. v. Maxwell*, 2019 Del. Super. LEXIS 326 (Del. Super. July 10, 2019). The Superior Court's decision is attached to the end of this Brief.

SUMMARY OF THE ARGUMENT

1. The Superior Court erred in limiting Plaintiffs' recovery to lost wage benefits and medical expenses paid under 19 *Del. C.* § 2363, because that section entitles reimbursement for any benefits paid or payable under the Workers' Compensation Act.
2. Commutations constitute an amount paid or payable under the Workers' Compensation Act and are therefore recoverable under 19 *Del. C.* § 2363 against the third party tortfeasor.

STATEMENT OF FACTS

Waters was operating a motor vehicle on February 2, 2016, within the course and scope of her employment, when a motor vehicle operated by Christopher Maxwell struck her vehicle, resulting in injuries to her neck, back, head, and upper extremities.²⁰ Maxwell admitted fault for the accident.²¹ Waters' employer, Arby's, through its workers' compensation carrier, Eastern Alliance Insurance Company, acknowledged a compensable workers' compensation claim.²²

Because Waters established a compensable work accident, she was entitled to make a claim for certain workers' compensation benefits under Chapter 23 of Title 19.²³ These benefits included total disability, partial disability, permanent impairment, disfigurement, death benefits, and medical treatment expenses.²⁴ Waters petitioned for workers' compensation benefits before the Industrial Accident Board on February 18, 2016, seeking, at that time, payment for ongoing medical treatment expenses and ongoing total disability benefits, on the basis that

²⁰ A031; A024-25.

²¹ A104.

²² A031; A028.

²³ 19 *Del. C.* 2301 *et seq.*

²⁴ 19 *Del. C.* §§ 2322, 2324, 2325, 2326, and 2330.

she had not recovered from her injuries to the “neck, shoulders, low back, and head.”²⁵

Waters was involved in a subsequent non-work related motor vehicle accident on March 13, 2016.²⁶ Waters’ was treated for her injuries by Christiana Hospital and St. Francis Hospital following the February 2, 2016 work accident. She then treated with Demetrios Zerefos, D.O. and Kishor Patil, M.D. for her injuries sustained as a result of both the February 2, 2016 and March 13, 2016 motor vehicle accidents²⁷ Waters was temporarily placed out of work by Dr. Zerefos as a result of her injuries.

In addition to pursuing workers’ compensation benefits, Waters also pursued payment for her medical treatment expenses and lost wage benefits through PIP.²⁸ In the months following the work accident, the PIP carrier paid medical expenses and lost wages to Waters, nearly exhausting the \$15,000.00 policy limits.²⁹

After the applicable PIP coverage was exhausted, Waters returned her focus to the workers’ compensation carrier. Plaintiffs paid medical bills regarding Waters’ treatment for the injuries she sustained in the February 2, 2016 work

²⁵ A012-A014.

²⁶ A017.

²⁷ A015-A016.

²⁸ Claimant may collect both No-Fault and workers’ compensation benefits “to receive[] the maximum benefits available under both.” *Cicchini v. State*, 640 A.2d 650, 653 (Del. Super., 1993).

²⁹ A021.

accident in the amount of \$633.25.³⁰ Plaintiffs then arranged for Waters to be evaluated by a defense medical expert, Dr. Eric Schwartz, on May 11, 2016, in an effort to challenge Waters' entitlement to future workers' compensation benefits.³¹ Dr. Schwartz opined that the costs of Waters' current treatment be provided in a 50-50 fashion between the February 2, 2016 work-related motor vehicle accident and the subsequent March 13, 2016 non-work-related motor vehicle accident.³² Dr. Schwartz' recommended "continued therapeutic modalities for up to 12 weeks" and advised that Waters was only "capable of returning to work in a light-duty capacity in regard to the automobile accident of February 2, 2016."³³ Based on Dr. Schwartz' expert opinion, "[a]dditional medical bills that were submitted to the workers' compensation carrier were denied."³⁴

On August 7, 2017, Waters' attorney, Joel Fredericks, Esq., contacted counsel for Plaintiffs, Elissa Greenberg, and discussed, in a series of emails, Waters' potential future benefit entitlement under the statute, which included, but was not limited to permanent impairment, future total and/or partial disability, and

³⁰ A045.

³¹ A015.

³² A019.

³³ A020.

³⁴ A045.

future medical treatment expenses.³⁵ Frederick's informed Greenberg that he "intended to send [Waters] for [a] perm[anent] [impairment] eval[uation]."³⁶

Rather than have Waters incur the costs associated with a permanent impairment expert evaluation³⁷ and litigating the issue of future benefit entitlement and so Waters could "move on with [her] life and put [the accident] behind [her],"³⁸ Waters and the Plaintiffs entered into negotiations to pay Waters' future workers' compensation benefit entitlement in the form of a lump sum commutation under 19 *Del. C.* § 2358.³⁹

In Delaware, a workers' compensation claimant can elect to have his/her workers' compensation benefits (total disability, partial disability, permanent impairment, disfigurement, medical treatment, and death benefits) commuted and paid in a lump sum.⁴⁰ "The parties involved in a workers' compensation claim frequently prefer one large lump sum payment instead of many small monthly payments that may extend for years."⁴¹ As such, the injured worker and the workers' compensation insurance carrier can stipulate to have a claimant's future benefit entitlement commuted in the form of a lump sum, rather than paid out over

³⁵ A126; 19 *Del. C.* §§ 2322, 2324, 2325, 2326, and 2330.

³⁶ A122.

³⁷ A121-A-122.

³⁸ A025.

³⁹ A028-A030.

⁴⁰ 19 *Del. C.* § 2358.

⁴¹ *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 157 (Del., 1998).

several years. All commutations must be evaluated and approved by the Industrial Accident Board.⁴² The Board will only approve a commutation of benefits, if the agreement “serves the employee's best interest.”⁴³

After meaningful negotiations between Fredericks and Greenberg, Waters agreed to accept a lump sum payment of \$12,500.00, in exchange for her waiving her entitlement to future “total disability benefits, partial disability benefits, permanent impairment benefits, disfigurement benefits, death benefits, and past, present, and future medical benefits, to which [she] may now or in the future become entitled,”⁴⁴ with the understanding that this “lump sum may be a discounted or lesser amount than the total amount of payments [she] may receive in the future.”⁴⁵ The Industrial Accident Board evaluated the parties’ proposed commutation of benefits, approved same on January 5, 2018, and ordered Plaintiff to issue payment to Waters in the amount of \$12,500.00 in accordance with 19 *Del. C.* § 2358.⁴⁶

Per the terms of the global commutation, Plaintiffs preserved their statutory right, under 19 *Del. C.* § 2363, to pursue subrogation against the Defendants, to recover “any amounts paid or payable under the Workers’ Compensation Act to

⁴² Del. I.A.B. R.22.

⁴³ *Id.*

⁴⁴ A028.

⁴⁵ A025.

⁴⁶ A030.

date of recovery.”⁴⁷ Plaintiffs filed a subrogation suit against Defendants in Superior Court on February 1, 2018 demanding judgement in the total amount of \$13,133.25,⁴⁸ which was comprised of the medical bills paid (\$633.25) as well as the benefits paid by way of commutation (\$12,500.00).

Defendants admit “that that [Plaintiffs] paid certain workers’ compensation benefits”⁴⁹ to Waters and concede that Defendants are responsible for reimbursing Plaintiff for the \$633.25 paid in medical benefits under 19 Del. C. § 2363.⁵⁰ However, Defendants refuse to reimburse Plaintiffs for the benefits paid in the form of a commutation under 19 Del. C. § 2358.⁵¹ Defendants contend that (1) 19 *Del. C.* § 2363 only permits a workers’ compensation insurance carrier to recover from the third party tortfeasor “those [benefits] the injured employee would be entitled to recover in an action for tort” and therefore “commutation, permanent partial disability payments, and other benefits exclusively created by the Delaware Workers’ Compensation Act are not recoverable from the third party tortfeasor” in subrogation⁵² and (2) the commutation benefits paid by Plaintiffs to Waters, in the amount of \$12,500.00, “were speculative” and “based upon nothing.”⁵³

⁴⁷ A028-A029; 19 *Del. C.* § 2363.

⁴⁸ A031-A036.

⁴⁹ A037.

⁵⁰ A046-A049.

⁵¹ A049.

⁵² A048.

⁵³ A063.

Defendants moved for summary judgement and the Superior Court granted same, on the basis that “any damages related to the commutation would be speculative and not proved with reasonable probability.”⁵⁴

It is Plaintiffs’ position that (1) Plaintiffs are entitled to recover “any workers’ compensation benefits paid or payable under the Workers’ Compensation Act pursuant to 19 Del. C. §2363, including benefits paid by way of commutation under 19 Del. C. §2358 and (2) evidence exists to establish the basis for the commutation amount of \$12,500.00 paid to Waters. The Superior Court’s decision below incorrectly prevented Plaintiffs from presenting this evidence.

This is Plaintiffs’ Opening Brief on appeal.

⁵⁴ *ACW Corp. v. Maxwell*, 2019 Del. Super. LEXIS 326, at *6 (Del. Super. July 10, 2019).

ARGUMENT I

THE SUPERIOR COURT ERRED IN LIMITING PLAINTIFFS' RECOVERY TO LOST WAGE BENEFITS AND MEDICAL EXPENSES PAID UNDER 19 DEL. C. § 2363, BECAUSE THAT SECTION ENTITLES REIMBURSEMENT FOR ANY BENEFITS PAID OR PAYABLE UNDER THE WORKERS' COMPENSATION ACT.

A. QUESTION PRESENTED

Whether the court below erred in limiting a workers' compensation insurance carrier's recovery to only lost wage benefits and medical expenses paid when the plain language of section 2363 orders reimbursement for "any amounts paid or payable under the Workers' Compensation Act."⁵⁵ (This issue was preserved in Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment A065-A068).

B. SCOPE OF REVIEW

"As to questions of law, the Court's review is plenary."⁵⁶ When a "statute as a whole is unambiguous, there is no reasonable doubt as to the meaning of the words

⁵⁵ 19 Del. C. § 2363(e).

⁵⁶ *Lee v. UE&C Catalytic, Inc.*, 1999 Del. Super. LEXIS 211, at * 3 (Del. Super. Mar. 31, 1999).

used and the Court's role is then limited to an application of the literal meaning of the words."⁵⁷

C. MERITS

1. The unambiguous language of 19 Del. C. § 2363 grants the workers' compensation carrier reimbursement for any benefit paid or payable under the Workers' Compensation Act.

When a work accident is caused by the fault of a third party, the Workers' Compensation Act, specifically 19 Del. C. § 2363(a), expressly grants an injured worker the right to pursue an action directly against the third party tortfeasor⁵⁸ and

⁵⁷ *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).

⁵⁸ 19 Del. C. §2363(a) provides as follows:

Where the injury for which compensation is payable under this chapter was caused under circumstances creating a legal liability in some person... an injured employee or the employee's dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with this section. If the injured employee or the employee's dependents or personal representative does not commence such action within 260 days after the occurrence of the personal injury, then the employer or its compensation insurance carrier may... enforce the liability of such other person in the name of that person.

“also provides a right of subrogation in the employer or its carrier for workers’ compensation payments made for a third party’s tort.”⁵⁹

The Act further specifies the damages available to the parties pursuing a claim against the tortfeasor under section 2363(e). The injured employee can “recover any amount which the employee or the employee’s dependents or personal representative would be entitled to recover in an action in tort,” while the workers’ compensation carrier can recover “any amounts paid *or payable* under the Workers’ Compensation Act to date of recovery”⁶⁰

In construing a statute, the court first looks to the “language of the statute itself.”⁶¹ The statutory language of section 2363(e) has been held to be “specific and unambiguous.”⁶² “If a statute is unambiguous, the plain meaning of the statute controls.”⁶³

Despite this clear and unambiguous language dictating a recovery to the employer for “any benefits paid or payable under the Workers’ Compensation Act,”⁶⁴ Defendants contend that the first sentence of section 2363(e) limits the

⁵⁹ *Miller v. Purcell*, 2001 Del. Super. LEXIS 428, at *4 (Del. Super. Nov. 15, 2001).

⁶⁰ 19 *Del. C.* § 2363(e) (emphasis added).

⁶¹ *Evans v. State*, 516 A.2d 477, 478 (Del. 1986).

⁶² *Esterling v. Bd. of Trustees*, 1988 Del. Super. LEXIS 256, at *11 (Del. Super. July 8, 1988), *aff’d* 1989 Del. LEXIS 106 (Del. Mar. 27, 1989).

⁶³ *Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Corp.*, 772 A.2d 172, 176 (Del. 2001).

⁶⁴ 19 *Del. C.* § 2363(e).

workers' compensation carrier's subrogation recovery to "those claims in tort," which excludes commutation, permanent impairment, and "other benefits exclusively created by the Act."⁶⁵ **This Court has previously dismissed that contention.**

In *Harris v. New Castle County*, this Court held that "the first sentence [of section 2363(e)] exists to define the measure of damages recoverable by a *recipient* of workmen's compensation benefits in a suit at law against a third-party tortfeasor."⁶⁶ This first sentence addresses the injured worker's ability to recover damages in tort against the third party tortfeasor, not the recovery available to the workers' compensation insurance carrier. The language "*in an action in tort* cannot be said to define the scope of an employer's right of subrogation."⁶⁷

As the *Harris* Court held, "the decisive language of subsection (c) with respect to the breadth of an employer's right of subrogation is found within the second, rather than the first, sentence."⁶⁸ The second sentence of section 2363(e) reads in part: "Any recovery against the third party for damages resulting from

⁶⁵ A042, ¶¶ 12, 13.

⁶⁶ *Harris v. New Castle Cty.*, 513 A.2d 1307, 1309 (Del. 1986) at 1309 (emphasis added) (interpreting 19 *Del. C.* § 2363(e), which provides as follows: "In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort.").

⁶⁷ *Id.*

⁶⁸ *Id.*

personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery... ."⁶⁹ This Court confirmed that the "words '*any recovery*' must be taken to intend subrogation to be all-inclusive" and that the "[l]egislature has placed no limitation upon an employer's subrogation right of reimbursement for an injured claimant's recovery at law."⁷⁰

A plain reading of the preceding sub-section leaves no alternative interpretation, consistent with the Supreme Court's holding in *Harris*, as 19 *Del. C.* §2363(c) provides that a settlement between the injured worker and the third party tortfeasor "shall not be a bar to action by the employer or its compensation insurance carrier to proceed against said third party for *any interest or claim it might have*..."⁷¹

As such, the plain language of section 2363 establishes the workers' compensation carrier's right to pursue an action against the third party tortfeasor directly and that they are entitled to recover "any amount paid or payable under the

⁶⁹ 19 *Del. C.* §2363(e).

⁷⁰ *Harris*, 513 A.2d at 1309 (citing *Travelers Ins. Co. v. E. I. Du Pont De Nemours & Co.*, 9 A.2d 88 (Del. Super. 1939)).

⁷¹ 19 *Del. C.* §2363(c) (emphasis added).

Workers' Compensation Act.”⁷² The reference to “those claims in tort” does not limit the damages or payments recoverable by the workers' compensation carrier.

2. The Superior Court has previously established that workers' compensation benefits paid for permanent partial disability, disfigurement, and by way of commutation are recoverable from a third party tortfeasor.

Consistent with the statutory language set forth in section 2363, the Superior Court has previously ruled that a workers' compensation carrier “shall be entitled to recover all benefits paid” to the injured worker from the third party tortfeasor, “if the [workers' compensation carrier] can establish that the [tortfeasor] was liable for the accident and injuries to the worker.”⁷³

In *Fireman's Fund*, the workers' compensation carrier commuted a compensable claim with the injured worker. This commutation consisted of future benefit entitlement, to include permanent impairment and disfigurement benefits. The workers' compensation carrier subsequently pursued a subrogation action against the third party tortfeasor pursuant to section 2363. The third party tortfeasor argued that the workers' compensation carrier was “not entitled to recover any sums paid out for permanent injury or disfigurement under 19 *Del. C.* § 2326” on the basis that the workers' compensation carrier's right of recovery was

⁷² 19 *Del. C.* §2363(e).

⁷³ *Fireman's Fund Ins. Co. v. Delmarva Power & Light Co.*, 1987 Del. Super. LEXIS 1251, at *2 (Del. Super. Aug. 12, 1987) (hereinafter *Fireman's Fund II*). (Defendant's liability for the Feb, 2, 2016 motor vehicle accident and Waters' injuries is not disputed). A104.

“limited to that which would be recoverable in a tort action brought by the injured workman...”⁷⁴ The court rejected the tortfeasor’s attempt “to limit the class of payments which [the workers’ compensation carrier] could recover in such an action” and **held that the workers’ compensation carrier was “entitled to recover all workmen’s compensation benefits paid to the injured worker[.]”**⁷⁵

The court reasoned that “[t]he injuries which predicated the Section 2326 [permanent impairment benefits] award in this case are injuries for which [the injured worker] or his representatives could have recovered damages in a tort action against [the tortfeasor].”⁷⁶ Therefore, the Court did not reduce the workers’ compensation carrier’s award by the benefits paid under §2326 and ruled that the workers’ compensation carrier “shall be entitled to recover all benefits paid.”⁷⁷

In the present case, the commutation benefits paid to Waters were partly comprised of the permanent impairment benefits she would be entitled to under 19 *Del. C. § 2326*.⁷⁸ As such, the Superior Court’s decision in the present case is inconsistent with the Superior Court’s holding in *Fireman’s Fund* and, if allowed to stand, will effectively limit the class of payments workers’ compensation

⁷⁴ *Fireman’s Fund Ins. Co. v. Delmarva Power & Light Co.*, 1987 Del. Super. LEXIS 1216, at * 5 (Del. Super. July 27, 1987) (hereinafter *Fireman’s Fund I*).

⁷⁵ *Fireman’s Fund II*, at *1.

⁷⁶ *Fireman’s Fund I*, at *5.

⁷⁷ *Fireman’s Fund II*, at *2.

⁷⁸ A022.

insurance carriers are able to recover in subrogation. The Court below held that Plaintiffs are allowed to recover *some* amounts, i.e. \$633.25 for medical expense payments. In denying a recovery for the balance Plaintiffs paid under 19 *Del. C.* § 2358, the Superior Court violated section 2363(e)'s prescribed recovery of *any* amount. All other decisions addressing this issue make clear that "if the injury is compensable and proximately caused, at least in part, by a third-party tortfeasor, the compensation insurer may recover *any* benefits it has paid to the employee pursuant to § 2363."⁷⁹

3. Permanent impairment and disfigurement benefits available under the Workers' Compensation Act are equivalent to general damages available in tort law.

As the Superior Court in *Fireman's Fund* established, workers' compensation benefits paid for permanent impairment and disfigurement benefits, even when paid in the form of a commutation, are equivalent to the damages the injured worker would be entitled to recover in a tort action brought against the tortfeasor. Even assuming *arguendo* Defendants' contention that a workers' compensation carrier can only recover those damages available to the injured worker in a tort action, permanent impairment and disfigurement benefits would be recoverable as "general damages" and/or "pain and suffering."

⁷⁹ *Travelers Prop. Cas. Corp. v. Kledaras*, 2001 Del. Super. LEXIS 351, at *9 (Del. Super. Sept. 18, 2001).

Under section 2326 of the Workers' Compensation Act, a claimant is entitled to "equitable compensation for serious and permanent disfigurement to any part of the human body up to 150 weeks, provided that such disfigurement is visible and offensive when the body is clothed normally."⁸⁰ This section of the statute entitles an injured employee to compensation for the humiliation or embarrassment they feel because of the scarring or deformation. This section of the statute also specifically entitles an injured employee to benefits for permanent impairment in the form of scheduled losses.⁸¹ "Section 2326 of the Delaware Code guarantees compensation to an employee who is permanently impaired as a result of a work injury."⁸² Further, "Section 2336 allows a claimant to be compensated for permanent injuries sustained as the result of a work-related accident resulting in the loss of or loss of use of any member or part of the body."⁸³

While workers' compensation law addresses these benefits in specific statutory sections of the Act, tort law provides compensation to an injured employee for the same loss in the form of general damages. In Delaware, "whenever a party's negligence is directly responsible for physical injury to another, the injured party may recover for actual physical injury and for

⁸⁰ 19 Del. C. § 2326(f).

⁸¹ 19 Del. C. § 2326(a)

⁸² *Davis v. Christiana Care Health Servs.*, 2015 Del. Super. LEXIS 102, at *10 (Del. Super. Feb. 27, 2015), *rev'd on other grounds* 127 A.3d 391 (Del. 2015).

⁸³ *Id.* at *10-11.

concomitant mental and emotional pain and suffering that flows as a natural consequence of the wrongful act.”⁸⁴ “Any amount, even pain and suffering damages” is subject to recovery to satisfy a workers’ compensation lien.⁸⁵ The recoverable damages under pain and suffering includes “humiliation from a scar”⁸⁶ and “permanent impairment.”⁸⁷

The Restatement (Second) of Torts sets forth that “damages can be recovered for the feeling of mortification resulting from a scar or deformity produced by the defendant’s act.”⁸⁸ Delaware law has long recognized damages for bodily harm in tort. In tort, a plaintiff is entitled to a “sum as will reasonably compensate [him/her] for the injuries to [his/her] person” to include “pain and suffering, [] loss of earning power, ... expenses for medicine and medical attendance, and if such injuries are of a permanent character, such fact should be considered.”⁸⁹ The Restatement Second defines “bodily harm” as “any impairment of the physical condition of the body.”⁹⁰

⁸⁴ *Bangs v. Follin*, 2016 Del. Super. LEXIS 581, at *4 (Del. Super. Nov. 21, 2016).

⁸⁵ *Moore v. McBride*, 2001 Del. Super. LEXIS 254, at *8 (Del. Super. May 1, 2001).

⁸⁶ *Id.* at *3 n.6 (quoting Restatement (Second) of Torts § 912, cmt. *b* (1979)).

⁸⁷ Del. P.J.I. Civ. § 22.1.

⁸⁸ Restatement (Second) of Torts § 905, cmt. *i* (1979).

⁸⁹ *Garrett v. People’s Ry. Co.*, 64 A. 254, 257 (Del. Super. 1906).

⁹⁰ Restatement (Second) of Torts § 905, cmt. *b* (1979).

Again, while the Workers' Compensation Act is more specific with respect to the calculation and entitlement of these benefits, the purpose behind the benefits is the same in both tort law and workers' compensation law—to compensate the injured employee for permanent injury and humiliating scarring. As such, when a workers' compensation insurance carrier pays disfigurement benefits and/or permanent impairment benefits to an injured employee, they are permitted to recover these payments from the third party tortfeasor in the same way the injured worker can, as general damages in an action in tort. Defendants' contention that tort law only entitles an injured party to recover lost wages and medical expenses is unfounded.

4. Limiting a workers' compensation carrier's recovery against a third party tortfeasor is contrary to the purpose of subrogation inherent in 19 Del. C. §2363.

“Subrogation is ‘the substitution of one person in the place of another with reference to a lawful claim or right.’”⁹¹ “Subrogation actions exist [in the context of section 2363] to prevent double recovery by an injured employee and to permit the employer or its carrier to recoup its compensation payments.”⁹² “[T]he subrogation action presents an opportunity to shift burdens placed by law on the employer or carrier, regardless of the fault or cause of injury, to the true

⁹¹ *Jeffries v. Kent Cty. Vocational Tech. Sch. Dist. Bd. of Educ.*, 743 A.2d 675, 678 (Del. Super. 1999) (quoting 73 Am. Jur. 2d *Subrogation* § 1 (1974)).

⁹² *Fireman's Fund I*, at *3.

wrongdoer.”⁹³ This Court has previously stated that “it is quite obvious that the subrogation clause is solely for the benefit of the employer who has paid or become liable for compensation.”⁹⁴ Equally as obvious is the well-recognized corollary of an employer’s right to stand in the shoes of an injured employee “to prevent a windfall to culpable tortfeasors.”⁹⁵

Limiting the Plaintiffs’ recovery, in the present case, to the medical expenses paid to Waters, creates a windfall for the Defendants and is in direct conflict with this Court’s stated purpose of the subrogation clause in § 2363. Medical expenses are just one of the six statutory benefits an injured worker is entitled to under the Act. To exclude benefits paid for permanent impairment, disfigurement, death, and future benefits paid by way of a commutation would significantly reduce or even eliminate a worker’s compensation carrier’s recovery and fail to accomplish the shift in liability from the workers’ compensation carrier to the responsible tortfeasor that is the core intention of subrogation.

⁹³ *Id.* See also *Baio v. Commercial Union Ins. Co.*, 410 A.2d 502, 506 (Del. 1979) (“Clearly, the objective of subrogation is to reimburse the person who met the obligation of another or paid the money or the compensation owed by another.”)

⁹⁴ *Travelers Ins. Co. v. E.I. DuPont De Nemours & Co.*, 9 A.2d 88, 90 (Del. 1939).

⁹⁵ *Showell v. Mountaire Farms*, 2002 Del. Super. LEXIS 507, at *9 (Del. Super. Dec. 9, 2002) (citing *Ianire v. Univ. of Del.*, 255 A.2d 687, 695 (Del. Super. 1969), *aff’d sub nom. Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52 (Del. 1970)), *aff’d* 2003 Del. LEXIS 539 (Del. Oct. 28, 2003).

Defendants have cited no authority for their contention that “commutation, permanent partial disability payments, and other benefits exclusively created by the Delaware Workers’ Compensation Act are not recoverable from a third party tortfeasor.”⁹⁶ The Superior Court’s Order below relies only on Defendants’ unsupported contentions regarding section 2363.⁹⁷ Defendants’ position and the Superior Court’s decision below are inconsistent with the plain language of section 2363, contrary to prior decisions of the Superior Court and this Honorable Court, and are discordant with the purpose of subrogation.

⁹⁶ A042, ¶ 12.

⁹⁷ See *ACW Corp. v. Maxwell*, 2019 Del. Super. LEXIS 326, at *5-6 (Del. Super. July 10, 2019).

ARGUMENT II

COMMUTATIONS CONSTITUTE AN “AMOUNT PAID OR PAYABLE UNDER THE WORKERS’ COMPENSATION ACT” AND ARE THEREFORE RECOVERABLE UNDER 19 *DEL. C. § 2363* AGAINST THE THIRD PARTY TORTFEASOR.

A. QUESTION PRESENTED

Does 19 *Del. C. § 2363* entitle Plaintiff to recover, from Defendants, workers’ compensation benefits paid to Waters by way of commutation? (This issue was preserved in Plaintiffs’ Response in Opposition to Defendants’ Motion for Summary Judgement A062-A065).

B. SCOPE OF REVIEW

See Scope and Standard of Review for Argument I.

C. MERITS

Section 2363(e) entitles the workers’ compensation carrier to recover “any amounts paid or payable under the Workers’ Compensation Act”⁹⁸ and a commutation, under section 2358, constitutes an amount paid under the Act.

1. Commutation is a statutory mechanism for paying benefits payable under the Workers’ Compensation Act in a present day lump sum.

A workers’ compensation carrier’s acknowledgment of a claim creates liability for certain benefits set forth in the Delaware Workers’ Compensation Act.

⁹⁸19 *Del. C. § 2363*(e)

These benefits include, medical treatment expenses (§ 2322), total disability benefits (§ 2324), partial disability benefits (§ 2325), permanent impairment benefits and disfigurement benefits (§ 2326), and death benefits (§ 2330). The Act also establishes that “upon application of either party, and on due notice to the other, the compensation contemplated by this chapter may be commuted by the Board.”⁹⁹ Commutation of benefits must be consented to by the parties and approved by the Board. A “commutation agreement between the parties is unenforceable without Board approval.”¹⁰⁰

However, if both parties agree, the claimant’s benefit entitlement, under the aforementioned statutory sections, can be paid in a lump sum so long as the Board determines that the agreement “will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or hardship to either party.”¹⁰¹ If the Board approves the commutation, it will issue an Order that is final and binding and obligates the carrier to pay that awarded amount to the claimant under section 2358 of the statute.

A commutation of benefits under section 2358 accomplishes the two primary purposes of the Workers’ Compensation Act: “providing prompt payment

⁹⁹ 19 *Del. C.* § 2358

¹⁰⁰ *Kandravi v. J&J Corp.*, 1996 Del. Super. LEXIS 8, at *17 (Del. Super. Jan. 3, 1996) (citing 19 *Del. C.* §2358: (“commutation of benefits is within the sole discretion of the IAB”)).

¹⁰¹ *Id.*

of benefits without regard to fault, and relieving employers and employees of the burdens of civil litigation.”¹⁰²

Defendants contend that Plaintiffs’ payment to Waters in the form of a commutation is not recoverable from the third party tortfeasor under section 2363 of the Act as it is not “damages,” but rather a settlement “to buy peace or close a file.”¹⁰³ However, as established by the Act and confirmed by the court in *Fireman’s Fund*, benefits paid by way of a commutation are “benefits paid under the Act” and therefore are specifically recoverable by the plain language of section 2363(e).

“Commutation” is defined as “[t]he substitution of one form of payment for another.”¹⁰⁴ “Commutation of payments,” specifically in the workers’ compensation context, is defined as “[a] substitution of lump-sum compensation for periodic payments. The lump sum is equal to the present value of the future periodic payments.”¹⁰⁵ As such, by definition, a commutation payment is comprised of specific benefits the claimant is or may be entitled to under the Act.

In the present case, Plaintiffs paid Waters a fixed payment of \$12,500.00 comprised of its assessment of future benefits payable under the Act as ultimately

¹⁰² *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 158 (Del. 1998) (citing *Champlain Cable Corp. v. Empl’rs Mut. Liab. Ins. Co.*, 479 A.2d 835 (Del. 1984).

¹⁰³ A049 ¶ 13.

¹⁰⁴ *Commutation*, Black’s Law Dictionary (11th ed. 2019).

¹⁰⁵ *Commutation of payments*, Black’s Law Dictionary (11th ed. 2019).

approved by the Boards' Order. As such, that payment is recoverable per the language and intent of section 2363. Defendants cite no authority that states otherwise.

2. Plaintiffs' commutation payment to Waters was comprised of future workers' compensation benefits Waters intended to pursue.

Defendants argue that Plaintiffs' commutation payment to Waters "was speculative and based upon nothing."¹⁰⁶ To support this argument, Defendants rely on the Affidavit from Fredericks and argue that at the exact time Waters and Plaintiffs entered into their agreement to globally commute her future workers' compensation benefit entitlement, she "had no outstanding medical expenses nor did she have any present claims for lost wages."¹⁰⁷ The fact that there existed no outstanding medical bills or that Waters was not being placed out of work by her doctors at the exact time the parties were negotiating for commutation is not the relevant factor in assessing future exposure or valuing a claim.

What is relevant is that at the time Waters and Plaintiffs were negotiating for a commutation, Waters' workers' compensation claim remained open and therefore she had a statutory right to file a Petition before the Industrial Accident Board seeking any and all benefits available under the Workers' Compensation Act. In Delaware, the statute of limitations for an acknowledged claim is five

¹⁰⁶ A063.

¹⁰⁷ *Id.* at ¶ 7.

years from the date the last indemnity benefit or medical expense was paid.¹⁰⁸ As such, prior to entering into a commutation, Plaintiffs faced potential future exposure for workers' compensation benefits and corresponding fees and costs through the year 2022.¹⁰⁹

Defendants contend that there was “no sense to the figure at all”¹¹⁰ and that Plaintiffs paid Waters “\$12,500.00 for matters that didn’t exist.”¹¹¹ However, prior to commutation, **Waters had already indicated she was pursuing permanent impairment benefits under section 2326, as evidenced by the correspondence between Fredericks and Greenberg that Waters intended to be rated for permanent impairment by a medical expert.**¹¹² As such, Plaintiffs faced exposure for permanent impairment benefits regarding the cervical spine, thoracic spine, and lumbar spine injuries causally related to the February 2, 2016 work accident. Had Waters been conservatively rated for 7% permanent impairment to each injured portion of her spine, Plaintiffs could easily have faced exposure in the amount of \$17,333.82 for permanent impairment benefits alone. Waters also had

¹⁰⁸ 19 *Del. C.* §2361(b).

¹⁰⁹ Five years from the date the medical bills in the amount of \$633.25 was paid by Plaintiffs.

¹¹⁰ A106.

¹¹¹ A049.

¹¹² A022.

the right to bring claims for additional medical treatment or recurrence of disability benefits (total or partial) over the next five years.

While this calculation of permanent impairment benefits is based on hypothetical ratings,¹¹³ Waters' entitlement to permanent impairment benefits was certain per section 2326. Plaintiffs' payment of benefits to Waters by way of commutation was not simply to "buy peace" as Defendants contend, but rather was comprised of Plaintiffs' assessment of Waters' future benefit entitlement under the Act and is therefore recoverable per the plain language of section 2363(e).

3. The Superior Court's decision denied Plaintiff the opportunity to present evidence establishing the workers' compensation benefits comprising the commutation paid to Waters under section 2358.

In granting summary judgement in Defendants' favor, the Superior Court below decided that "any damages related to the commutation [Plaintiffs paid to Waters] would be speculative and not proved with reasonable probability."¹¹⁴ However, Plaintiffs were prepared to prove the valuation of the commutation amount through the testimony of Fredericks, Greenberg, Dr. Eric Schwartz, and

¹¹³ Based on the fact that Waters and Plaintiffs commuted all benefits prior to Waters being formally rated for permanent impairment.

¹¹⁴ *ACW Corp. v. Maxwell*, 2019 Del. Super. LEXIS 326, at *5-6 (Del. Super. July 10, 2019).

Dr. Demetrios Zerefos.¹¹⁵ The court's decision to grant summary judgment in favor of Defendants prohibited Plaintiffs from presenting this evidence.

“Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.”¹¹⁶ “If, however, there are material factual disputes, that is, if the parties are in disagreement concerning the factual predicate for the legal principles they advance, summary judgment is not warranted.”¹¹⁷ Where “it seems desirable to inquire more thoroughly into the facts . . . to clarify the application of law to the circumstances,” summary judgment should also be denied.¹¹⁸

In the present case, Plaintiffs named Dr. Eric Schwartz, who evaluated Waters upon Plaintiffs' request as a medical expert.¹¹⁹ Dr. Schwartz was expected to testify that as a result of the February 2, 2016 work accident Waters sustained injuries to her cervical, thoracic, and lumbar spines, that Waters would continue to have difficulties with certain activities of daily living, would require work restrictions, and would require additional medical treatment.¹²⁰

¹¹⁵ A040.

¹¹⁶ *E.I. du Pont de Nemours & Co. v. Stonewall Ins. Co.*, 2009 Del. Super. LEXIS 235, at *9 (Del. Super. June 30, 2009), *aff'd sub nom. Travelers Cas. & Sur. Co. v. E.I. DuPont de Nemours & Co.*, 2007 Del. LEXIS 392 (Del. Sept. 6, 2007).

¹¹⁷ *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992).

¹¹⁸ *See Gunzel v. Chadwick*, 2010 Del. LEXIS 353, at *4 (Del. 2010) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962)).

¹¹⁹ A040.

¹²⁰ A040-A057.

Plaintiffs also named Waters' treating physician, Dr. Demetrios Zerefos, as a witness, who was expected to testify that Waters sustained a permanent injury to her cervical, thoracic, and lumbar spines as a result of the work accident.¹²¹

In addition to medical expert testimony, Plaintiffs named Fredericks and Greenberg as witnesses to testify as to the negotiations between Waters and Plaintiffs that resulted in the \$12,500.00 commutation payment.¹²² This testimony would include Waters anticipated permanent impairment rating already conveyed by Fredericks.¹²³

The Superior Court's finding that Plaintiffs "cannot offer evidence that any of the \$12,500.00 commutation are damages resulting from the personal injuries Ms. Waters suffered from the motor vehicle collision"¹²⁴ was inconsistent with the record as Plaintiffs were prepared to present evidence specifically addressing the commutation payment to Waters. It is the Plaintiffs' position that the Superior Courts' decision to grant summary judgment in favor of the Defendants was premature as it prevented Plaintiffs the opportunity to present the aforementioned

¹²¹ A041.

¹²² A122-126.

¹²³ A022.

¹²⁴ *ACW Corp. v. Maxwell*, 2019 Del. Super. LEXIS 326, at *6 (Del. Super. July 10, 2019).

evidence to establish the basis for the negotiated lump sum payment of Waters' future workers' compensation benefits.

Had Plaintiffs been afforded the opportunity to present their case, the evidence would have shown that the payment made to Waters by way of commutation was not speculative, but rather comprised of a meaningful valuation and negotiation as to Waters' future benefit entitlement under the Workers Compensation Act.

4. Prohibiting the recovery of benefits paid in the form of a commutation will drastically reduce commutations, increasing litigation before the Industrial Accident Board and depriving injured workers of receiving their benefits in the form of a lump sum payment.

“It is axiomatic that Delaware law encourages settlements.”¹²⁵ “Settlement of all claims as early as possible benefits all parties and the Court, and, thus, should be encouraged.”¹²⁶ One of the core principles and purposes of the Workers' Compensation Act is to “relieve employers and employees of the expenses and uncertainties of civil litigation.”¹²⁷ To achieve this purpose, section 2358 of the Act permits the Board to approve commutation of future workers' compensation

¹²⁵ *Wilt v. Kenyon*, 2009 Del. Ch. LEXIS 223, at *2-3 (Del. Ch. Dec. 31, 2009).

¹²⁶ *E. I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1995 Del. Super. LEXIS 59, at *9 (Del. Super. Feb. 15, 1995); *see also Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964) (“The law, of course, favors the voluntary settlement of contested issues.”).

¹²⁷ *New Castle Cty v. Goodman*, 461 A.2d 1012, 1014 (Del. 1983).

benefits "if it appears that it will be for the best interest of the employee . . . or that it will avoid undue expense or hardship to either party."¹²⁸

The Act contemplates the positive effect a lump sum settlement of a workers' compensation claim can have on the injured worker, the employer, and the administrative system. A "commutation of claimant's benefits, in addition to generating additional funds, [has] a rehabilitative effect on claimant... possibly creat[ing] a perception by claimant that he has more control over his life and that his weekly checks are not a hand-out from the government."¹²⁹ A commutation of all benefits can "fulfill the purpose of the Workers' Compensation Act while allowing Claimant to move forward with his life."¹³⁰

Commutations also decrease the Board's docket by eliminating the need to litigate multiple petitions to determine a claimant's entitlement to benefits. Industrial Accident Board Rule 7 and 19 *Del. C.* § 2348 allow any party "to engage in good faith settlement negotiations through mediation with a designated Hearing Officer of the Department of Labor."¹³¹ A settlement of some or all benefits by

¹²⁸ 19 *Del. C.* § 2358.

¹²⁹ *O'Day v. Healy-Disabatino*, 1988 Del. Super. LEXIS 326, at *2 (Del. Super. Sept. 20, 1988) (reciting the underlying reasoning of the I.A.B. as to why a commutation was in the employee-below, appellant's best interest), *aff'd* 1989 Del. LEXIS 959 (Del. July 12, 1989).

¹³⁰ *Carranza v. Rodriguez Constr.*, Hearing No. 1265839, at *5 (Del. I.A.B. Nov. 9, 2007).

¹³¹ *Allen v. Kirkwood Auto Ctr., LLC*, Hearing No. 1362532, at *1 (Del. I.A.B. Feb. 8, 2012).

way of commutation “avoid[s] the unnecessary expenditure of the Board's time and resources on a hearing.”¹³²

During 2018, a total of 7,708 petitions were filed before the Industrial Accident Board and the Board conducted 4,561 hearings.¹³³ Allowing the parties to reach a settlement to commute benefits and avoid litigating petitions allows the Board to effectively operate its busy docket. Counsel for Plaintiffs represents that commutations are a frequently used mechanism for settlement of workers’ compensation claims in Delaware. The Superior Court’s ruling that insurance carriers are not permitted to recover benefits paid by way of commutation in subrogation would significantly reduce the number of commutations and dramatically increase the Board’s docket.

Further, shifting of financial liability back to the responsible party, i.e. the ultimate tortfeasor, is likely a factor considered by the Delaware Compensation Rating Bureau, the agency that sets allowable workers’ compensation premiums, with approval of the Insurance Commissioner, when setting its rates. Impeding the carrier’s ability to recover benefits paid by way of commutation in subrogation would increase the costs of workers compensation claims, thereby increasing the cost of workers’ compensation insurance premiums, which will have a detrimental

¹³² *Id.* at *2.

¹³³ State of Delaware, Department of Labor, 21st Annual Report on the Status of Workers’ Compensation Case Management. 9-10.

· effect on the businesses operating in Delaware. This result was certainly not intended by the legislature; rather the clear language of section 2363 was intended to allow recovery by way of subrogation of amounts commuted.

CONCLUSION

The plain and unambiguous language of 19 *Del. C.* § 2363 is contrary to Defendants' contention that Plaintiffs are prohibited from recovering "commutation, permanent partial disability payments, and other benefits exclusively created by the Act."¹³⁴ Plaintiffs ask that this Court confirm its prior holding that the language "*in an action in tort* cannot be said to define the scope of an employer's right of subrogation"¹³⁵ and that an employer is entitled to recover from a third party tortfeasor "any amounts paid or payable under the Workers' Compensation Act."¹³⁶

As benefits paid by way of commutation constitute an "amount paid or payable under [section 2358 of] "the Workers' Compensation Act,"¹³⁷ the Plaintiffs also respectfully request that this Court reverse the Superior Court's decision below and award Plaintiffs the full lien recovery of \$13,133.25 in accordance with the statute and consistent with the purpose of subrogation law.

In the alternative, Plaintiffs request that this honorable Court reverse the Superior Court's decision below and grant Plaintiffs the opportunity to present evidence to establish the basis for the benefits paid to Waters via commutation.

¹³⁴ *ACW Corp. v. Maxwell*, 2019 Del. Super. LEXIS 326, at *6 (Del. Super. July 10, 2019).

¹³⁵ *Id.*

¹³⁶ 19 *Del. C.* § 2363(e).

¹³⁷ *Id.*