EFiled: Oct 28 2019 05:11PM EDT
Filing ID 64360771
Case Number 302,2019

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 the Superior Court C.A. No. N18C-02-004 CLS
v.	)	
CHRISTOPHER ROBERT MAXWELL, and DONEGAL MUTUAL INS. CO. (a.k.a., DONEGAL INS. GROUP),	)	
Defendants Below / Appellees.	)	

APPELLANT'S REPLY BRIEF

ELZUFON AUSTIN & MONDELL

/s/ Scott R. Mondell
SCOTT R. MONDELL, ESQ. #2533

/s/ Andrew J. Carmine
ANDREW J. CARMINE, ESQ. #4991
300 Delaware Ave., Suite 1700
Wilmington, DE 19801
Attorneys for the Plaintiffs Below, Appellants, ACW Corporation and Eastern Alliance Insurance Company

Dated: October 28, 2019

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes & Rules **Page(s)**

ARGUMENT

I. THIS COURT'S HOLDING THAT 19 DEL. C. §2363 ENTITLES THE WORKERS' COMPENSATION CARRIER TO REIMBURSEMENT "FOR ANY BENEFITS PAID OR PAYABLE UNDER THE WORKERS' COMPENSATION ACT" IS UNREBUTTED.

Defendant does not challenge this Court's previous ruling in Harris v. New Castle County "that the decisive language of [19 Del C. §2363](e) with respect to the breadth of an employer's right of subrogation is found within the second, rather than the first, sentence of subsection (e)."[1] This Court made clear that the first sentence of §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. That seems to us to be the plain purpose of the introductory language of subsection (e)."[2] As such, contrary to Defendant's argument, the words "in an action in tort" cannot be said to define the scope of an employer's right of subrogation."[3] Rather, the second sentence of §2363(e) confirms the employer's right of subrogation, which is reimbursement "for any amounts paid or payable under the Workers' Compensation Act."[4]

---

[1] Harris v. New Castle County, 513 A.2d 1307, 1309 (Del., 1985).
[2] Id.
[3] Id.
[4] Id., citing 19 Del. C. §2363(e)

Defendant focuses on the outcome of the Harris decision, which allowed an employer to apply its workers' compensation lien against an injured worker's recovery from the uninsured motorist. While the ultimate determination by this Court in Harris is not relevant to the present issue, this Court's interpretation of §2363 confirms Plaintiff's position that a workers' compensation carrier is entitled to reimbursement from the third party tortfeasor for "any benefits paid or payable under the Workers' Compensation Act" and is not limited to a recovery of tort benefits only. Accordingly, the Harris decision leaves no uncertainty as to the Subrogor Water's rights *in tort* and Plaintiff-Subrogee Eastern Alliance's right to recover any amounts paid or payable under the Workers' Compensation Act.

This Court's interpretation of the workers' compensation carrier's entitlement to reimbursement under §2363 is not specifically challenged by Defendant's Answering Brief and Plaintiff requests that this Court confirm this interpretation applies to the case at hand.

II. THE SUPERIOR COURT'S HOLDING THAT A WORKERS' COMPENSATION CARRIER IS ENTITLED TO REIMBURSEMENT FOR BENEFITS PAID BY WAY OF COMMUTATION IS NOT CHALLENGED BY DEFENDANT.

Defendant appears to accept the rationale set forth in Fireman's Fund Insurance Cos. v. Delmarva Power & Light Co. ("Fireman's Fund"),[5] though it is unclear as to what the "inevitable next step"[6] is. The Fireman's Fund court specifically addressed the argument being advanced by Defendant and rejected same:

> [Third party tortfeasor] appears to argue that inasmuch as the third party plaintiff's recovery is limited to that which would be recoverable in a tort action brought by the injured workman, [the worker's compensation carrier] is not entitled to recoup amounts which were paid out pursuant to its obligations under 19 Del. C. Section 2326. This statute establishes dollar amounts and mandates compensation for actual loss, severance, or impairment of various bodily parts and for disfigurement of the body caused by industrial accidents.
>
> **The Court does not read Section 2363(e) as narrowly as the third party defendant. The injuries which predicated the Section 2326 award in this case are injuries for which Cook or his representative could have recovered damages in a tort action against DP & L and which, correspondingly, [the worker's compensation carrier] may pursue in its subrogation action.**[7]

---

[5] Fireman's Fund Ins. Cos. v. Delmarva Power & Light Co., 1987 Del. Super. LEXIS 1216 (Del. Super. Ct. July 27, 1987).

[6] Answering Brief at 15.

[7] Fireman's Fund, 1987 Del. Super. LEXIS 1216, at *5.

Defendant concedes that the Superior Court in Fireman's Fund "concluded that any award would be receivable."[8] Defendant does not appear to dispute that benefits paid by way of commutation are recoverable under §2363 in general. Rather, Defendant argues that in this specific case, the portion of Plaintiff's lien comprised of benefits paid in the form of commutation are "speculative and could not have been proven with reasonable probability."[9]

As the Superior Court's prior holding in Fireman's Fund that benefits paid by way of commutation are recoverable by the workers' compensation carrier (even when the commutation payment is comprised of permanent impairment and disfigurement benefits under §2326) is not being challenged by Defendants, Plaintiff requests that this Court confirm that entitlement to reimbursement for "any amounts paid or payable under the Workers' Compensation Act" set forth in §2363, includes benefits paid by way of commutation.[10]

Defendant argues that Plaintiff is only entitled to the damages Waters would be entitled to in an action in tort.[11] Defendant argues that the benefits paid out to Waters under "the Workers' Compensation Act are unique to workers'

---

[8] Answering Brief at 15.
[9] Id.
[10] See Fireman's Fund.
[11] Answering Brief at 11.

compensation and are not recoverable against the tortfeasor."[12] This position is contrary to this Court's analysis in Harris, which established that the second sentence of §2363(e) defines the measure of damages recoverable by the workers' compensation carrier – "any amounts paid or payable under the Workers' Compensation Act."[13]

Defendant's position is further contrary to §2363(c), which establishes that a settlement between the injured worker and the 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."**[14]

In addition to being inconsistent with the plain language of §2363 and this Court's interpretation of the statute, Defendant's position is illogical. In a direct subrogation action brought by a workers' compensation carrier against a third-party tortfeasor, the amount of damages sought is limited by the amount of benefits paid to the injured worker. Further, §2363(e)'s provision allowing a cause of action to be brought against the tortfeasor's liability carrier for reimbursement of PIP eligible benefits paid is explicitly limited to the maximum amount of liability insurance available. This is the right of "reimbursement" the General Assembly intended by entitling a workers' compensation carrier to pursue this action in subrogation.

---

[12] Answering Brief at 11.
[13] Harris v. New Castle County, 513 A.2d 1307, 1309 (Del., 1985).
[14] 19 Del. C. §2363(c) (emphasis added).

Defendant's argument seems to allege that damages sought are somehow greater than what Plaintiffs are entitled to. This is simply not true and is misleading.

In practice, the nature of a direct subrogation suit, such as this, necessarily effects the case asserted and evidence brought forth by the workers' compensation carrier as described above. While the cause of action remains derivative of the injured worker's rights, the proceedings will not be the same as if the injured worker were prosecuting the action herself. This creates an issue as to the workers' compensation carrier's burden of proof to establish its prima facie case. The analysis set forth in Harris and Fireman's Fund, *supra*, confirms that §2363 entitles a plaintiff-subrogee to reimbursement for any workers' compensation benefits paid, including those paid via commutation. Defendants' rebuttal to Plaintiffs' analysis of these precedents does not seem to be a rejection *in toto* of what these cases stand for; rather, Defendants' Answering Brief begs the question of what burden of proof is imposed by §2363.

This issue has been addressed before by the Superior Court in the PIP context, but it appears as though there is a split in the court as to how to resolve it. Stated simply, how is the carrier's duty of prompt payment under the Act balanced with its burden of proof to recover the benefits which were dutifully paid. Plaintiffs are asking this Court to provide guidance on this issue as it applies to workers' compensation subrogation.

In State Farm Fire & Casualty Co. a/s/o Sandra Vest v. Dept. of Correction (hereinafter referred to as "Vest"), plaintiff-PIP carrier sought to recover PIP benefits paid on behalf of its insured for medical treatment pursuant to the subrogation section of the PIP statute, 21 Del. C. §2118(g).[15] The PIP carrier did not provide expert testimony to establish that the medical treatment was "reasonable and necessary." The defendant filed a motion *in limine* to preclude the PIP carrier from recovering these costs due to this lack of evidence.

The court noted that the PIP statute "neither defines 'reasonable and necessary' nor does it indicate whether reasonable necessity is to be determined by a medical expert or by a reasonable person in the position of the insurer."[16] However, as the court further noted, the purpose of the PIP statute is to compensate the insured promptly for benefits deemed reasonably and necessary "from the perspective of a reasonable person in the position of the insurer (i.e. objectively)."[17]

> An insurer who has a duty to promptly pay costs that are objectively reasonably necessary has an incentive to disburse payment quickly rather than quibble over the details of a particular treatment. Conversely, an insurer who has a duty to promptly pay medical costs that are deemed by a medical expert to be reasonable and necessary has an incentive to extensively review policy

---

[15] State Farm Fire & Cas. Co. a/s/o Sandra Vest v. Dept. of Correction, C.A. 09C-07-030 WLW (Del. Super. Ct. Mar. 18, 2011) (Order). Attached hereto as "Exhibit "A."

[16] Id. at *3.

[17] Id. at *4.

> claims and second-guess the opinion of its customers' treating physicians in an effort to minimize claims.[18]

This "incentive" to pay claims promptly is "reinforced by the insurer's understanding that it would be unable to recoup its costs through a subrogation claim."[19] The court opined that if insurers anticipating recovery through subrogation were compelled to prove that each treatment it paid for was reasonable and necessary in the mind of a medical professional, insurers would be slower to disburse funds for medical treatment and "that there would be an increase in litigation between customers and insurers over the payment of benefits."[20] "Such a result is antithetical to the policy of promoting the prompt payment of no fault claims without the injured customer being compelled to resort to litigation."[21]

The court found that the corollary of the duty of prompt payment incumbent on a no fault insurer is that "an insurer may pay the claims without submitting them to its independent medical expert."[22] Since the question as to whether the damages sought in subrogation are reasonable and necessary would ultimately be put to a jury, the court noted that "it would be prudent for both the insurer and the defendant in a subrogation action to present expert testimony in close cases." [23] However, this is

---

[18] Id.
[19] Id.
[20] Id. at *5.
[21] Id.
[22] Id.
[23] Id.

not an absolute requirement. Rather, as a consequence of the no-fault insurer's duty of prompt payment, "the insurer should not be compelled to introduce expert medical testimony to authenticate the reasonable necessity of the claims when the insurer is pursuing a subrogation claim under Section 2118(g)," the PIP subrogation statute.[24] Since the PIP statute does not require expert testimony, the court held that imposing this requirement in order for an insurer to pursue its subrogation rights would frustrate the policy of the statute.

This issue is not settled, however, as it was revisited two months later in the case State Farm Mutual Auto Insurance Co. a/s/o Eleanor Koger v. Dep't of Natural Resources (hereinafter referred to as "Koger").[25] In Koger, plaintiff-PIP carrier sought to recover PIP benefits paid to its insured from the defendant-tortfeasor.[26] The defendant filed a motion to dismiss for failure to prosecute based on the plaintiff's lack of response to discovery requests and failure to identify any expert witnesses.[27] Plaintiff relied on the decision set forth Vest, which had just been released one month prior, to rebut the motion. The Koger Court declined to follow the holding in Vest, and granted Summary Judgment to the defendant.[28] The facts

---

[24] Id.
[25] State Farm Mutual Auto Ins. Co. a/s/o Eleanor Koger v. Dep't of Natural Resources, 2011 Del. Super. LEXIS 250 (Del. Super. Ct. May 31, 2011).
[26] Id. at *1-2.
[27] Id. at *3-4.
[28] Id. at *7.

before this Court, however, are distinguishable, as Dr. Eric Schwartz was named by the underlying Plaintiff as its expert witness and was prepared to offer testimony as to Shanara Waters medical condition predicating the Defendant's liability.

Employer contends that interpretation of the duty incumbent on a workers' compensation carrier pursuing its subrogation rights should parallel the analysis set forth in Vest. Here, the Workers' Compensation Act is analogous to the PIP statute in two important ways.

First, the Workers' Compensation Act also does not define "reasonable and necessary." Rather, questions as to the reasonableness and necessity of medical expenses remain within the purview of the Industrial Accident Board.[29] The Stipulation and Order for Commutation explicitly requested "that a Hearing Officer approve the commutation of *all benefit entitlement to include future medical expenses* in exchange for the payment of $12,500.00."[30] The commutation was approved by the Board on January 5, 2018.[31]

Second, the duty of prompt payment is common among both PIP insurers and workers' compensation insurers. "One of the underlying purposes for both the

---

[29] AFL Network Servs. v. Heglund, 2016 Del. Super. LEXIS 141, at *6 (Del. Super. Ct. April 18, 2016) ("Section 2322 does not define 'reasonable' or 'necessary' and, therefore, what is reasonable or necessary is left to be determined by the Board.").
[30] A030.
[31] Id.

Workers' Compensation Act and the Delaware PIP statute is the timely payment of benefits for injuries by either the employer or the no-fault insurer."[32] If a carrier is required to prepare its' entire subrogation case at every stage in the life of a common workers' compensation claim, claimants would suffer from delay after delay, a result the General Assembly sought to eliminate. Viewed from the claimants' perspective, subrogation of a workers' compensation claim is completely separate from benefits awarded by the Board and it would be wholly unfair to demand a workers' compensation carrier, in conjunction with disposition and management of its workers' compensation case, to anticipate and prepare a tort claim to be litigated in the future.

[32] Moore v. McBride, 2001 Del. Super. LEXIS 245, at *8 (Del. Super. Ct. May 31, 2001) (citing International Underwriters, Inc. v. Blue Cross & Blue Shield of Del., Inc., 449 A.2d 197 (Del. 1982) (stating one of primary objectives of no-fault insurance law is prompt payment of medical expense, lost wages and property damage); Kofron v. Amoco Chems. Corp, 441 A.2d 226, 231 (Del. 1982) (explaining purpose of Workers' Compensation Act)).

III. THE LAW IS UNSETTLED AS TO A WORKERS' COMPENSATION CARRIER'S BURDEN OF PROOF TO ESTABLISH REIMBURSEMENT FOR BENEFITS PAID IN AN ACTION UNDER SECTION 2363.

This Court has never addressed the burden of proof a workers' compensation carrier has to meet in order to recover benefits paid by way of commutation from a tortfeasor under §2363. As this Court established in Harris, §2363 provides a workers' compensation insurer the right to enforce the liability of a tortfeasor and to be reimbursed for the workers' compensation benefits paid as a result of that tortfeasor's negligence.

As subrogee, the workers' compensation insurer must establish liability, just as the injured worker, subrogor, would. The workers' compensation carrier has the same obligation, standing in the shoes of the injured worker, to prove the torfeasor is liable in order to establish a right of action for reimbursement under §2363.

However, once liability is established (or conceded as in this case) the statute draws a distinction with respect to the element of damages and what reimbursement the workers' compensation insurance carrier is entitled to recover. While the injured worker is entitled to recover any amounts available "in an action in tort,"[33] the workers' compensation carrier is entitled to "reimburse[ment] for any amounts paid

[33] Id.

or payable under the Workers' Compensation Act."[34] The statute does not specify what proof is required for reimbursement under §2363. The statute does grant the Industrial Accident Board jurisdiction to determine what benefits are owed under the Workers' Compensation Act and therefore Plaintiff contends that benefits paid based on a Board Order should be sufficient evidence of "benefits paid under the Act."

A. THE BOARD APPROVED COMMUTATION ORDER IS SUFFICIENT PROOF TO EMPORT A SUBROGATION AWARD OF THE BENEFITS PAID TO WATERS.

The Workers' Compensation Act sets forth that the Board has exclusive jurisdiction to award workers' compensation benefits pursuant to the Act. Specifically, §2301A(i) states that "the Board shall have jurisdiction over cases arising under Part II of this title and shall hear disputes as to compensation to be paid under Part II of this title."[35]

As the Board has jurisdiction to determine what benefits are payable to an injured worker and to award those benefits in the form of an Order, it is the proper body to establish what benefits are reasonable, necessary, and causally related to the work accident in a workers' compensation case.

---

[34] Id.
[35] 19 Del. C. §2301A(i)

As such, benefits paid by the workers' compensation carrier pursuant to an Order from the Board are "benefits paid under the Workers' Compensation Act."[36] The Order itself is sufficient proof to support reimbursement from the tortfeasor in an action under §2363, assuming liability is established.

By enacting §2363, the legislature did not intend for workers' compensation insurers to litigate or re-litigate the issue of whether workers' compensation benefits paid to an injured worker were reasonable and necessary in order to be reimbursed for those benefits by the tortfeasor. The issue of whether the benefits paid were reasonable was previously adjudicated or scrutinized by the Industrial Accident Board, which is the proper oversight body per the statute.

Defendant's contention that a jury should be responsible, or is even qualified, to render a decision as to whether the workers' compensation benefits paid by a workers' compensation insurer based on an Industrial Accident Board Order were reasonable is not supported by the statute or any case law.

In arguing the distinction between the calculation of permanent impairment in an action in tort and permanent impairment paid under the Workers' Compensation Act, Defendant makes the point that "a Superior Court jury is not offered any guidance as to the percentage of impairment and which is as specific to 19 Del. C.

[36] 19 Del. C. §2363(e)

§2326..."[37] Plaintiff agrees that a Superior Court jury is not educated as to the entitlement or calculation of benefits paid under the Workers' Compensation Act. Therefore, a Superior Court jury is not the proper forum for establishing whether benefits paid under the Workers' Compensation Act were reasonable and necessary.

The Board is the appropriate forum for determining whether workers' compensation benefits paid were reasonable and necessary. As such, in the present case, the Board-approved Commutation Order is sufficient to establish Plaintiff's right to receive reimbursement for the $12,500.00 paid in commutation benefits.

Defendant argues that a commutation, even when scrutinized and approved by the Industrial Accident Board in accordance with 19 Del. C. §2358, is insufficient evidence to establish "benefits paid or payable under the Workers' Compensation Act, because the amount paid was "speculative."[38] If, for example, Plaintiff had litigated Water's entitlement to permanent impairment benefits and future medical treatment expenses and the Board had issued an award, would Defendant be challenging Plaintiff's entitlement to reimbursement for those benefits paid in accordance with a Board decision? Plaintiff asserts that they would not be challenging benefits paid in accordance with a Board award following litigation, nor would they be entitled to do so as the Board has jurisdiction to decide what benefits

[37] Answering Brief at 16.
[38] Answering Brief at 17

are owed to an injured worker under the Act. The Board-approved Commutation Order is no different.

In the present case, Waters and Eastern Alliance evaluated potential future benefit entitlement based on the Workers' Compensation Act, and stipulated to resolving all future benefit entitlement in exchange for a payment of $12,500.00. The Board then reviewed this settlement to ensure "that it [was] for the best interest of the employee" in accordance with §2358 and ultimately approved same, issuing an Order compelling Eastern Alliance to pay this amount to Waters.

Plaintiff contends that this Board Order is sufficient evidence to establish reimbursement in the amount of the commutation benefits paid ($12,500.00) in accordance with §2363.

B. PLAINTIFF IS ENTITLED TO PRESENT EVIDENCE FOR THE BASIS OF THE BENEFITS PAID BY WAY OF COMMUTATION

Should this Court determine that the Board-approved Commutation Order alone is insufficient evidence to establish Plaintiff's right to reimbursement for benefits paid by way of commutation, Plaintiff should be permitted to present evidence to establish what future benefits the commutation amount was based upon in order to receive reimbursement of those benefits.

Defendant argues that Plaintiff conceded that no evidence exists to prove the basis for the payment of $12,500.00.[39] This is not accurate. The Plaintiff's agree that at the time of oral argument on the Motion for Summary Judgment, there was no permanent impairment report and no present lost wages or medical expenses sought. Further, because Waters had commuted her remaining entitlement to workers' compensation benefits, she would not be making any future claims for benefits. However, at the time Waters and Plaintiff were negotiating for a commutation of her workers' compensation benefits, there **was evidence** of exposure remaining for workers' compensation benefits under the Act.

The correspondences between Waters' attorney, Joel Fredericks, who Defendant named as a witness in this proceeding, and counsel for Eastern Alliance, Elissa Greenberg, establish that **Waters intended to be rated for permanent impairment.**[40] Plaintiff named Dr. Eric Schwartz as a witness because he issued an expert opinion on May 11, 2016 that Waters would require future medical treatment and have continued physical restrictions placed on her ability to return to work.[41] Because this evidence was not present in the form of a payment ledger, but rather required witness testimony, it contributed to Judge Scott's initial confusion and

[39] Answering Brief at 19-20.
[40] A022.
[41] A020.

statement that "there is not going to be any proof offered."[42] However, as Plaintiff explained in Oral Argument, Plaintiff intended to present evidence consisting of the Commutation Order itself awarding the payment of $12,500.00 as well as testimony from witnesses "involved in the process of arriving at that number."[43]

The Superior Court's Order granting summary judgement (and decision to grant Defendant's Motion in Limine) precluded Plaintiff from presenting this evidence to establish the benefits "paid or payable under the Act." Appellate review of Superior Court's grant of summary judgment is plenary.[44] "This Court consider[s] de novo the factual record before the trial court and examine anew the legal conclusions to determine whether error occurred in applying pertinent legal standards."[45] Plaintiff contends that the core question before this Court is whether the underlying decision appropriately applied 19 *Del. C.* § 2363. To the extent the Board approved Commutation Order is not sufficient to prove reimbursement, then there is a disagreement as to the materials facts and it was wrong to grant summary judgment, denying Plaintiff the ability to present proof of benefits paid.

---

[42] A138.
[43] A139
[44] Rizzitiello v. McDonald's Corp., 868 A.2d 825, 829 (Del. 2005).
[45] Arnold v. Society for Savings Bancorp, Inc., 650 A.2d 1270, 1278 (1994).

The Superior Court's decision to grant summary judgement for Defendant incorrectly assumed that Plaintiff could "only recover those claims in tort"[46] under §2363. This is inconsistent with the previous decisions in Harris and Fireman's Fund.

Further, the Superior Court also determined that "[t]here was no dispute" that "Plaintiff [could] not offer evidence that any of the $12,500.00 commutation [was] damages resulting from the personal injuries Ms. Waters suffered from the motor vehicle collision."[47] As the record reflects, Plaintiff disputes Defendant's contention that no evidence exists to establish that the $12,500.00 paid by way of commutation is comprised of "benefits paid or payable under the Act" and is prepared to present evidence establishing same.

[46] ACW Corp. v. Maxwell, 2019 Del. Super. LEXIS 326 (Del. Super. July 10, 2019) at 6*.
[47] Id.

CONCLUSION

Plaintiff respectively requests that this Court confirm the previous rulings in Harris and Fireman's Fund and hold that Plaintiff is entitled to reimbursement, pursuant to §2363, for any benefits paid or payable under the Workers' Compensation Act, to include benefits paid by way of commutation, and is not limited to benefits available in an action in tort as Defendant contends.

Having established Plaintiff's entitlement to reimbursement, Plaintiff respectively requests that this Court reverse the Superior Court's decision below and award Plaintiff the full recovery of $13,133.25 based on the evidence of medical bills paid and benefits paid per the Board-approved Commutation Order.

In the alternative, the Plaintiff requests that this honorable Court reverse the Superior Court's decision below set forth Plaintiff's burden of proof for establishing that the benefits paid to Waters via commutation constituted benefits paid or payable under the Workers' Compensation Act in order to for reimbursement for same in accordance with §2363. In this alternative, Plaintiff requests that this Court reverse and grant Plaintiff the opportunity to present evidence to establish the basis for the benefits paid to Waters via commutation.