RENDERED: APRIL 8, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001306-WC

C.A. & I., INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-07-99325

CHRISTOPHER E. COOK;
HON. HOWARD E. FRASIER, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION
BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: C.A. & I., Inc. (C.A. & I.) appeals from a Workers' Compensation Board (Board) opinion that re-calculated the subrogation credit awarded by the Administrative Law Judge (ALJ) against the workers'

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

compensation benefits that C.A. & I. paid to its employee, Christopher Cook (Cook). On appeal, C.A. & I. raises three issues: (1) whether *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415 (Ky. 2006), requires the ALJ to make a baseline comparison between the total amount of attorney fees and costs and the amount of the subrogation credit with any difference payable to the employer; (2) whether the Board erred in applying the "made whole" doctrine to this subrogation claim under KRS 342.700; and (3) whether the formula utilized by the Board created double recovery by subtracting pain and suffering from the gross settlement proceeds and then subtracting the attorney fees incurred in the pursuit of pain and suffering damages. After a careful review of the briefs, applicable case law, and the record, we affirm.

Cook is thirty-four years old and has a twelfth grade education. He was employed as a coal truck driver by C.A. & I. On January 5, 2007, Cook was injured on the job when the coal truck that he was driving was struck head-on by another vehicle.[2]

Cook filed a workers' compensation claim based upon the injuries that he sustained. Pursuant to KRS 342.040, C.A. & I. paid temporary total disability benefits at the rate of $484.64 per week from January 6, 2007 through April 24, 2008, which totaled $33,232.96. On December 9, 2009, the ALJ awarded Cook benefits in the amount of $276.23 per week for a period of 425 weeks for a permanent disability rating based upon a 19% AMA whole person impairment.

[2] The driver of the vehicle that struck Cook was pronounced dead at the scene as a result of the injuries that she sustained in the crash.

This portion of Cook's benefits totaled $117,397.75. C.A. & I. also paid Cook's medical expenses in the amount of $24,774.51. Cook's workers' compensation benefits totaled $174,779.58.

Cook also filed an action against the driver of the vehicle involved in the accident. On August 27, 2008, Cook received a settlement from the third party in the amount of $25,000.00. Based upon Cook's settlement, C.A. & I. claimed an entitlement to a subrogation credit.

In an order entered on December 9, 2009, the ALJ awarded C.A. & I. a subrogation credit in the amount of $2,358.19. Although Cook settled his claim with the third party for $25,000, the ALJ determined that Cook's actual damages were $132,331.69. The ALJ reached this amount by adding together Cook's damages for past medical expenses ($24,774.51), lost wages ($33,232.96), and pain and suffering, which the ALJ calculated by tripling Cook's past medical expenses ($24,774.51 x 3 = $74,323.53).

ALJ Calculation of Cook's Actual Damages

Past Medical Expenses	$24,774.51
Lost Wages	$33,232.96
Pain and Suffering	+ $ 74,323.53
Actual Damages	$132,331.69

The ALJ determined that Cook's personal injury settlement only equaled 17.86% of Cook's actual damages. The ALJ therefore reduced each damage item to 17.86% of the actual damage amount, resulting in a potential subrogation claim of $10,358.19 ($132,331.69 x 17.86% = $10,358.19). The ALJ

then reduced the potential subrogation claim by $8,000, the amount of attorney fees, and granted C.A. & I. a subrogation credit of $2,358.19.

On June 11, 2010, the Board issued an opinion concluding that the ALJ miscalculated C.A. & I.'s subrogation credit. By its calculations, the Board concluded that the employer's subrogation credit was $1,588.87 rather than $2,358.19. The Board concluded that the settlement agreement constituted 18.8919 % of Cook's actual damages. The discrepancy between the percentage used by the ALJ and the Board was caused by the amount of the settlement agreement used in each calculation. The Board correctly determined that the settlement agreement was $25,000.00. In its calculations, however, the ALJ cited that the settlement amount was $23,360.00, which was erroneous.

To arrive at C.A. & I.'s total subrogation credit, the Board deducted 18.8919 % of the pain and suffering damages, $14,041.13, from the $25,000 personal injury settlement to arrive at C.A. & I.'s potential subrogation claim of $10,598.87. This calculation was based upon the Board's conclusion that pain and suffering damages are not recoverable in workers' compensation subrogation claims.

The Board's calculations also differed from the ALJ's calculations in the amount of attorney's fees and costs. The Board subtracted $8,250.00 in attorney's fees from C.A. & I.'s potential subrogation credit. Then the Board deducted two additional expenses in the amounts of $85.00 and $35.00 from the

subrogation amount. This calculation yielded a total subrogation credit of $1,588.87.

Board Calculation of Subrogation Credit

Settlement/Actual damages ratio: $25,000 ÷ $132,331.69 =18.8919%

Pain & suffering damages in settlement: 18.8919% x $74,323.53 = $14,041.13

Personal injury settlement	$25,000.00
Pain & suffering (deduction)	$14,041.13
Attorney fees (deduction)	$8,250.00
Medicaid lien (deduction)	$1,000.00
Expense (deduction)	$85.00
Expense (deduction)	$35.00
C.A. & I. Net Subrogation Credit	$1,588.87

This appeal follows.

When an employee is injured on the job the worker may recover workers' compensation benefits. When the worker is injured on the job through the fault of a third party, the worker may also seek damages from the third party. KRS 342.700 (1). The employer[3] may seek subrogation against the third party for the workers' compensation benefits paid to the employee. *Id*. KRS 342.700 (1) provides:

> Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer a legal liability to pay damages, the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, but he shall not collect from both. If the injured

[3] The employer or the employer's insurance company may seek subrogation for workers' compensation benefits paid to the employee.

> employee elects to proceed at law by civil action against the other person to recover damages, he shall give due and timely notice to the employer and the special fund of the filing of the action. If compensation is awarded under this chapter, the employer, his insurance carrier, the special fund, and the uninsured employer's fund, or any of them, having paid the compensation or having become liable thereof, may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expense. . . .

C.A. & I. first questions whether *Minton*, 192 S.W.3d at 415, requires the ALJ to make a baseline comparison between the total amount of attorney fees and costs and the amount of the subrogation credit and allocate the difference to the employer. Although employers may seek subrogation from third party tortfeasors, the Kentucky Supreme Court stated, in *AIK Selective Self-Insurance Fund v. Bush*, 74 S.W.3d 251 (Ky. 2002), that KRS 342.700 (1) requires the employee's *entire* legal expense to be deducted from the employer's subrogation credit. *Id*. at 257. In *Minton*, the Supreme Court reasoned that "[t]ort claims involve a significant risk and require substantial energy in pursuing recovery. It is only fair to require employers/insurers benefitting from the fruits of such an endeavor to share in its costs." *Minton*, 192 S.W.3d at 418.

C.A. & I. argues that this literal interpretation of KRS 342.700 (1) is unfair and will result in employers failing to pursue subrogation for small workers' compensation claims. This argument has been previously rejected by the Supreme Court. The Court concluded that it is not unreasonable to deny subrogation credits

from tort awards where the attorney fees and litigation costs exceed the amount of the subrogation claim. *Minton*, 192 S.W.3d at 419.

Second, C.A. & I. claims that the Board erroneously held that the "made whole" doctrine applies to statutory subrogation authorized by KRS 342.700 (1). The "made whole" doctrine is a common law principle that requires the injured person to be "made whole" before the insurer recovers subrogation credit. The "made whole" doctrine was adopted in *Wine v. Globe American Cas. Co.*, 917 S.W.2d 558 (Ky. 1996), and made applicable to workers' compensation cases in *Great American Ins. Cos. v. Witt*, 964 S.W.2d 428 (Ky. App. 1998). However, *Witt* was overruled by *AIK Selective Self-Insurance Fund v. Bush*, 74 S.W.3d 251 (Ky. 2002).

C.A. & I. relies on *Bush* to argue that the common law "made whole" doctrine is precluded by KRS 342.700 (1). In *Bush*, the Supreme Court stated:

> . . . KRS 342.700 (1) expresses a legislative purpose that the employer or insurer is entitled to recoup from the third-party tortfeasor the workers' compensation benefits it paid to the injured worker: thus, the common law 'made whole' rule cannot be applied to preclude that recovery.

Id. at 257 (internal citations omitted).

Four years after *Bush* was rendered, the Kentucky Supreme Court specifically re-addressed this issue in *Minton*. The Court concluded that KRS 342.700 (1) effectively codified the "made whole" doctrine in workers' compensation subrogation claims. *Minton*, 192 S.W.3d at 419.

> While the 'made whole' doctrine may not be employed to trump or undermine the statutory scheme set forth in workers' compensation cases . . . its underlying principles remain relevant when explicating the statute's primary functions. Paying workers' compensation benefits is an obligation derived by contract. In exchange for agreeing to pay benefits, employer-subrogees receive revenues and profits from the labor of its employees, as does the insurer-subrogee consequently receive its revenue and profits from the premiums paid by the employer. Thus, in order for the injured worker to receive the full benefit of his bargain, his right to receive a maximum recovery under the statute must take priority over the right of the employer/insurer to receive reimbursement for the benefits which it was already obligated to pay by contract. . . . The conditional right to subrogation authorized by KRS 342.700 (1) merely recognizes and codifies this underlying principle of the 'made whole' doctrine.

Id. (internal citations omitted). In light of the Supreme Court's opinion in *Minton*, the Board did not err in concluding that the "made whole" doctrine applied to workers' compensation claims through KRS 342.700 (1).

Finally, C.A. & I. claims that the Board's calculations resulted in double recovery by subtracting pain and suffering damages from the settlement proceeds and then subtracting attorney fees which were incurred in the pursuit of pain and suffering damages. This issue was also specifically addressed by the Court in *Minton*. The Court concluded that the failure to apportion fees incurred in the pursuit of pain and suffering damages from other fees deducted from the subrogation claim does not constitute double recovery. The Court reasoned that, "[i]t is not irrational for the legislature to regard the cost of the injured worker's pursuit of a tort judgment as a whole and singular endeavor, not subject to

apportionment based on the elements of damages actually awarded." *Id*. at 419. Therefore, no error existed in the Board's failure to deduct fees incurred in the pursuit of pain and suffering damages.

Accordingly, we affirm the Board's opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Barry Lewis
Hazard, Kentucky

BRIEF FOR APPELLEE:

John Earl Hunt
Stanville, Kentucky