Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 20, 2015

CLAIM NO. 201400607 & 200973099

TAMORAH MITCHELL PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

FRESENIUS MEDICAL CARE HOLDINGS, INC.
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

and

FRESENIUS MEDICAL CARE HOLDINGS, INC. PETITIONER

VS.

TAMORAH MITCHELL
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
VACATING IN PART, AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Tamorah Mitchell ("Mitchell") and Fresenius Medical Care Holdings, Inc. ("Fresenius") appeal from the August 8, 2014, Opinion, Award, and Order of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") and permanent partial disability ("PPD") benefits based upon a 51% impairment rating increased by a 1.7 factor.[1] The ALJ also awarded medical benefits. The ALJ determined Mitchell's award should not be reduced pursuant to KRS 342.165(1), Fresenius had no right of subrogation, and if it did, the requisite analysis resulted in no subrogation credit. Both parties appeal from the September 11, 2014, Order ruling on their petitions for reconsideration.

On November 12, 2009, Mitchell, a registered nurse, was injured when the PT Cruiser, operated by her husband and in which she was a passenger, swerved to avoid a deer, hit another vehicle on the side of the Western Kentucky Parkway, and rolled over.[2] There is no dispute the motor vehicle accident ("MVA") occurred in the course of Mitchell's employment since she was returning to her home in Paducah, Kentucky after attending a meeting of clinical

[1] See KRS 342.730(1)(b).
[2] See the accident report attached as Exhibit 1 to the July 24, 2012, hearing transcript.

managers in Louisville, Kentucky, which Fresenius required she attend. Mitchell severely injured both knees and had significant injuries to the right side of her face which the medical records at Lourdes Hospital, in Paducah, characterized as right medial orbital wall and inferior oral wall blow out fractures. Mitchell also asserted a claim for an injury to her right ankle occurring on September 27, 2013.[3]

The July 14, 2014, Benefit Review Conference Order and Memorandum ("BRC") reflects the contested issues were: "benefits per KRS 342.730, credit for civil/tort settlement allocation, medical benefits 'durable medical equipment,' and whether the award should be reduced by 15% pursuant to KRS 342.165(1) due to Mitchell's failure to wear a seat belt at the time of the MVA."

Mitchell testified at an April 30, 2012, deposition and the July 24, 2012, hearing. She later testified at a May 6, 2013, deposition and at the July 22, 2014, hearing. After the MVA, Mitchell was taken to Lourdes Hospital in Paducah, and later discharged that same day. The next day she was called by hospital personnel and

[3] During the pendency of her claim for the 2009 MVA work injuries, Mitchell sustained a right ankle fracture on September 27, 2013, in the course of her employment. Mitchell filed a Form 101 and both claims were consolidated. The ALJ resolved both claims in the August 8, 2014, Opinion, Award, and Order.

told the x-rays had been misread and she had a fracture of the right knee. Five days later, Mitchell returned to Lourdes Hospital where she stayed for five days. She was transferred to Vanderbilt where surgery was performed on her right knee. Mitchell testified that during her stay at one of the hospitals, an infected hematoma in the left knee ruptured through the skin. She experienced continuing substantial problems with both knees necessitating treatment by multiple doctors.

Mitchell testified the facial injuries caused numbness on the right side of her face from her nose to her ear. The residuals from her orbital fractures are occasional dizziness, headaches, light-headedness, and numbness. She also experiences intermittent double and blurred vision as well as decreased vision. Mitchell also experiences constant dull headaches accompanied by nausea. Mitchell provided a list of medications she takes. Two physicians recommended she undergo surgery for total replacement of both knees. Because the physicians recommended she lose weight before undergoing knee replacement surgery, Mitchell underwent lap band or bariatric surgery, at her cost. At the time of her first deposition, she had lost fifty pounds.

Mitchell uses a wheelchair at work and when off work. If her head is not elevated when she sleeps, she wakes up with horrible headaches and dizziness so extreme it causes nausea and vomiting. Mitchell purchased a hospital bed which she placed in her den because the hospital bed would not fit in her bedroom. She later purchased an adjustable mattress which fits the frame of the bed in her bedroom which enables her to sleep in her bedroom.

Mitchell returned to work at Fresenius in April 2010 as a home therapy program manager. She works with the assistance of a wheelchair or a walker which has wheels.

At the time of her first deposition, Mitchell had settled her tort claim against her husband for $250,000.00.

At the July 24, 2012, hearing, Mitchell estimated that in 2009 she earned slightly more than her husband.[4] Her and her husband's paychecks were deposited in a joint bank account. She testified the premium for their automobile liability insurance policy issued by Travelers

[4] The July 10, 2012, BRC Order reflects "[p]arties' agree to bifurcate the following issues for initial determination: 1) allocation of tort settlement, entitlement to subrogation credit; 2) compensability of left knee injury and surgery; 3) compensability of right knee surgery (R & N); 4) entitlement to certain medical benefits – wheelchair; attachment mechanism to vehicle, mattress; 5) compensability of bariatric surgery.

was paid from their joint checking account.[5] Mitchell testified she was told she was not wearing a seatbelt.

Mitchell testified she and her husband are now divorced and she chose to settle for the policy limits of their liability coverage rather than proceed against her husband for an amount exceeding the limits of the coverage.

Because of continual infection in both knees, Mitchell underwent numerous skin grafts and debridements. She had no surgical treatment of the facial fractures. Mitchell purchased a hoveround, an electric wheelchair, which she uses at work. The "four wheel walker" she uses at other clinics was her former mother-in-law's. She uses the walker because she cannot transport the hoveround. Mitchell is unable to work without both ambulatory aids. Mitchell testified she needs a lift so she can transport the hoveround within her vehicle. Mitchell offered to purchase the vehicle if CNA, the workers' compensation carrier, would pay for the lift.

[5] Travelers paid Mitchell the policy limits of $250,000.00 in settlement of her claim against her husband. The liability insurance declaration page was introduced as Exhibit 2 at the hearing. Also introduced as exhibits were Mitchell's complaint, her husband's answer, the settlement agreement and release, the order dismissing the complaint, and the settlement disbursement sheet. Copies of the checks totaling $7,200.00 representing basic reparations benefits for lost wage differential were also introduced.

The settlement disbursement sheet reveals Mitchell received $250,000.00 from which the attorney fee of $82,500.00 was deducted leaving a balance of $167,500.00. From that was deducted $182.08 in expenses. With the agreement of the workers' compensation carrier, Mitchell received $83,658.96. Her attorney retained that same amount pending the ALJ's decision regarding the amount to which the insurance carrier may be entitled.

Mitchell testified she used the settlement proceeds to purchase an adjustable bed which allows her to elevate her head at night. She also used a portion of the settlement proceeds to pay off the house in which she lives and to buy a second house. The second house was purchased because its design allows her to drive next to a door. She paid off the credit card debt she incurred for the lap band/bariatric surgery.

In the September 4, 2012, Opinion and Order, the ALJ determined right knee replacement surgery was compensable. However, since the only opinion concerning the need for the left knee replacement surgery was expressed by Dr. Warren Bilkey, the ALJ found Fresenius was not responsible for the surgery. The ALJ emphasized his findings should not be interpreted as meaning left knee replacement surgery is not reasonable and necessary as

there was no proof supporting a current recommendation for surgery.

The ALJ determined the lap band/bariatric surgery was compensable. He also directed Fresenius to pay for the wheelchair and the "attachment mechanism for her vehicle." In addition, Fresenius was ordered to pay for the adjustable bed. The ALJ determined Fresenius had no right of subrogation. In the alternative, after performing the analysis for determining a subrogation credit, the ALJ concluded Fresenius was not entitled to a subrogation credit against Mitchell's recovery from her husband's liability insurance carrier.

At the time of her May 6, 2013, deposition, Mitchell was still employed working solely at Fresenius' clinics. She had lost 92.1 pounds and still experiences the same symptoms arising from her facial injuries of double vision, severe headaches, dizziness, and nausea. She understands the facial injuries will always be symptomatic. She has difficulty walking due to the extreme pain in both knees. In spite of this fact, Mitchell decided to forego knee replacement surgeries because she fears potential complications of infection and the loss of her leg.

At all the clinics except one, Mitchell uses a motorized wheelchair to move around the clinic. Because one clinic is so small she has to use a walker which allows her to sit when she is tired. Mitchell believes she can only stand for a short period of time. She is unable to lay flat and the bed she purchased allows her to raise her head or feet. Mitchell's son and daughter-in-law do all of the laundry, cleaning, and shopping. Mitchell's wheelchair carrier is located on the outside of the van. Because of problems she experiences when it rains, she desires to transport her wheelchair within the van. Her bathroom needs to be modified so she can have a walk-in tub.

At the July 22, 2014, final hearing, the parties stipulated KRS 342.730(1)(c)1 and (1)(c)2 were applicable; however, Mitchell conceded she was not seeking benefits enhanced by the three multiplier as she had no intention of quiting her job. Mitchell testified her knee pain has worsened, but reiterated she no longer desires to have knee replacement surgery because of her fear of numerous complications which she previously identified. She still desired to have a walk-in tub. Her son and daughter-in-law continued to do all of the shopping, laundry, cleaning, cooking, and yard work. Mitchell remained unable to work without the use of a wheelchair and continued to need a

lift to place her wheelchair in the van so that she can take it to all the clinics. Her facial pain, headaches, double and blurred vision have worsened. Although she does not wear it at work, she sometimes wears an eye patch which helps her vision and alleviates headaches. At the time of the hearing, she had lost a hundred pounds.

In the August 8, 2014, Opinion, Award, and Order, the ALJ determined Mitchell had a 51% permanent impairment based on the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") finding as follows:

> **I. What is Mitchell's impairment from the 2009 injury?**
>
> The ALJ relies on Dr. Bilkey to find that Mitchell has 40% impairment for gait derangement stemming from her lower extremity injuries. Dr. Bilkey persuasively explained why this rating applied. Dr. Grossfeld is a credible evaluator, but her 14% rating does not accurately or fairly describe Mitchell's impairment in this instance. It does not appear that Dr. Grossfeld considered gait derangement when evaluating Mitchell's impairment (or evaluated her face/eyes). The Defendant's prior evaluator, Dr. Ballard, issued a rating roughly consistent with that of Dr. Bilkey, but she too apparently failed to consider gait derangement. (Dr. Grossfeld's report is so lacking in this instance that the Defendant urged in its Brief the adoption of the higher rating from Dr. Ballard over that of Dr. Grossfeld.)

> The ALJ further adopts Dr. Bilkey's ratings of 9% for lower extremity scarring and 10% for facial pain.
>
> The ALJ agrees with the Defendant that Dr. Bilkey's 20% rating for eye impairment is too unreliable to adopt. While any physician is technically competent to state an opinion on any matter of medicine, even one outside his training and expertise, in this instance there is insufficient foundation for Dr. Bilkey, a physiatrist, to give an opinion on an eye injury. Again, while he is technically able to adopt another physician's rating and have that opinion considered evidence, in this case the rating of the doctor whose opinion Dr. Bilkey adopted, a Dr. Taylor, is not of record. Mitchell's impairment is therefore 51% according to the combined values chart on page 604 of the AMA Guides (40% + 9% + 10%).

Concerning the applicability of KRS 342.165(1), the ALJ rejected two arguments raised by Mitchell, but concluded her third argument was meritorious, reasoning as follows:

> But the ALJ found Mitchell's third argument persuasive. She argues that she had no duty to use a seat belt because KRS 189.125(6) requires its use only for operators of motor vehicles, not passengers. She further cites *Tetrick v. Frashure*, 119 S.W.3d 89 (Ky.App. 2003) for the statement that there is no statutory duty for a passenger to wear a seat belt. The ALJ reviewed the *Tetrick* case and observed that the Court of Appeals, in ordering a new trial, said that a general duty instruction was appropriate for the

> jury's consideration as to his his [sic] potential comparative fault, but that an instruction specifically enumerating a duty to wear a seat belt was improper. The *Tetrick* case highlights that while it is potentially negligent to not wear a seat belt there is no statute or safety rule that requires its use for a passenger in a motor vehicle. There is no evidence of a handbook or company policy that Mitchell signed-off on that requires its use. Therefore, Mitchell's alleged negligence in failing to wear a seat belt does not give rise to application of the safety penalty deduction of KRS 342.165(1).

Concerning Fresenius' entitlement to a subrogation credit or a potential subrogation credit, the ALJ concluded:

> Plaintiff argues that this matter was submitted by agreement in 2012, and should not be revisited. However, the ALJ finds that the circumstances require the analysis to be performed again. To being [sic] with, the permanent indemnity claim has now been quantified, so the calculation needs to be reworked to ensure its accuracy. Because the evidence has changed, the holding of *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858 (Ky. App. 2009) is not applicable. And despite his bravado to the contrary in the prior Opinion, the ALJ made a mistake in the analysis of a potential subrogation credit that must be corrected; he failed to perform a crucial step in that analysis.
>
> Initially, however, the ALJ finds that the analysis is unnecessary because it is determined as a matter of law that the Defendant has no right to subrogation against the first party tort

settlement proceeds Mitchell obtained from her own insurance company. *Jewell v. Ky. School Board Association*, 309 S.W.3d 232 (Ky. 2010); *G&J Pepsi-Cola Bottlers, Inc. v. Fletcher*, 229 S.W.3d 915 (Ky. 2007). However, should appellate bodies disagree, the ALJ will proceed with the allocation analysis to determine entitlement to a subrogation credit, as follows.

Mitchell settled with her insurance carrier for the $250,000.00 limits of her and her husband's liability insurance policy for his negligence in causing her injuries. Attorney's fees ($82,500.00) and costs ($182.50) were deducted from the settlement in the sum of $82,682.08 [sic].

KRS 342.700 allows a party to pursue civil damages against a third-party tortfeasor, and maintain a workers compensation claim against the Employer, "but he shall not collect from both." Thus when, as in this case, an injured worker obtains a settlement in a civil case, the Employer is entitled to a credit against those elements of damages that are duplicative of workers compensation.

In regard to credit for the Employer's subrogation interest, the Kentucky Supreme Court has held that the employee is entitled to "have an independent and impartial trier of fact allocate elements of damages" when there has been a prior settlement with no allocation of settlement proceeds. *Whittaker v. Hardin*, 32 S.W.3d 497, 498 (Ky. 2000). When there has been no allocation of benefits by a civil court judge, the administrative law judge is then required in the workers compensation claim to allocate damages

after first giving priority to making the injured employee whole. *Id*. at 499.

As to the burden of proof, the Court held as follows: "The burden of proving the affirmative defense of entitlement to a credit is on the employer. Where prima facie evidence of a credit is introduced, the burden of going forward with evidence that a portion of the tort recovery is not available for subrogation credit should be properly placed on the employee." *Id.* The Court has also required that "the employee's entire legal expenses, not just a pro rata share, be deducted from the employer's or insurer's portion of any recovery." *AIK v. Bush*, 74 S.W.3d 251, 257 (Ky. 2002).

Because there was no allocation of Mitchell's $250,000.00 settlement, KRS 342.700(1), *Whitaker* requires the ALJ to perform that allocation.

The first issue is the subtraction of attorney's fees incurred in pursuit of the civil claim. The *Bush* case eliminates any doubt that the Kentucky Supreme Court did not intend for any "pro rata" application of litigation expenses. The ALJ finds that Mitchell is entitled to a credit for the entire portion of the attorney's fees ($82,500.00) and costs ($182.50) [sic] in the sum of $82,682.08.

The ALJ finds that while Mitchell ordinarily would have been awarded civil damages for medical expenses, past wage loss, future wage loss, and pain and suffering by a civil jury, she did not prove entitlement to all those damages for purposes of this analysis.

As to past medical expenses, the parties stipulated at the most recent BRC to increased medical benefits paid

totaling $229,818.96. The ALJ finds that an award by a jury for past medical expenses would be $229,818.96.

In regard to future medical expenses, neither party has provided the undersigned with expert testimony as to the cost of any future medications, doctor visits, or other treatment. Unlike pain and suffering that is largely left to the trier of fact to determine, future medical expenses are an element of damages that require some proof. An award for doctor visits might be appropriate, yet the undersigned cannot be expected to place a value on such services without at least some evidence of their value and the number of visits. The ALJ finds that a Kentucky circuit court judge would direct a verdict for the Defendant on the issue of future medical expenses.

As to past wage loss, the parties stipulated on the BRC Order to payments of $25,391.56 in temporary total disability benefits. Mitchell was probably correct in her previous Brief that the figure is in error (possibly a scrivener's or typographical error because the rate times the dates paid would equal about $**3**5,391.56, not $**2**5,391.56). (Unfortunately, the prior error was not corrected on the July 14, 2014, BRC Order.) The ALJ recognizes that TTD is paid at a two-thirds rate and is subject to a cap; there is no such limitation in a civil jury trial. Mitchell's AWW, as stipulated on the first BRC Order, was $1,055.60. She was paid TTD for being totally disabled for about 51 weeks; 51 x $1,055.60 = $53.835.60. The ALJ finds that an award by a jury for wage loss would be $53,835.60.

The next element of damages would be future wage loss, or the permanent impairment of the ability to earn money. Again, the parties have not submitted evidence from vocational or economic experts on this subject. The ALJ has found that Mitchell is entitled to permanent partial disability benefits of $452.46 per week for 425 weeks. The payout of that award is $191,870.05. While the award of an ALJ may not be admissible in a civil court case, this figure reasonably represents what a jury would return. The amount is about three times Mitchell's annual salary, and a jury could easily conclude that the work injuries have shortened her work life by three years.

The final element of damages is pain and suffering, and the ALJ finds that the amount suggested to by the parties in their Briefs upon original submission of this issue, $773,126.14, is a reasonable sum that a jury would award in this case. (See Defendant's Brief, 8/16/12, p. 6; Plaintiff's Reply Brief, 9/4/12). This figure is about three times the total of her medical bills ($229,818.96) and lost wages ($53,835.60), three times special damages being a typical yardstick in evaluating tort claims.

This finding is more than supported by the fact that Mitchell was in a high speed, high impact, roll-over motor vehicle accident; she was sent home from the emergency room after a right knee fracture was misread on x-ray; even though the right knee was fractured, her left leg pain was greater when readmitted to the hospital five days later; the right knee surgery required plates and screws; she suffered a right medial orbital wall blowout fracture; the right knee and leg became grossly

infected and required surgery and considerable follow-up care; she developed a large hematoma on the left leg and deep vein thrombosis of the right leg; she developed renal failure; she has undergone six debridement procedures, and endured skin grafting; and she was hospitalized on five different occasions. She exhibited considerable swelling of the knees at the Hearing last month.

The ALJ found the medical evidence submitted since the interlocutory Opinion, and Mitchell's persuasive testimony of her ongoing and increased pain and suffering in the near-two years since that Opinion, to support a higher figure than was utilized at that time. Mitchell was a good witness, a characteristic which, among other things, suggests that a jury could return an even higher verdict for this element of damages. As was apparent in the tone of the interlocutory Opinion, the ALJ intentionally underestimated some of the damages, including pain and suffering, to demonstrate the ease with which the subrogation credit has been exhausted; the new figure for pain and suffering substituted herein is clearly more realistic and still a conservative estimate of a potential verdict.

Therefore, for purposes of any jury award on January 1, 2009, the ALJ finds that the damages returned by a jury would be:

Medical expenses	$229,818.96
Future medical expenses	-0-
Lost wages	$ 53,835.60
Impairment of power to earn money	$191,870.05
Past and future pain and suffering	$773,126.14
Total	$1,248,650.75

The Workers Compensation Board in Quillen v. Tru-Check Inc. [sic], Claim No. 2008-99276, held that the proper method of calculating the credit subject to allocation was to remove those elements of damages from the civil settlement that are not duplicative of workers compensation, and subtract the attorney fees and costs from that figure to arrive at the employer's subrogation credit. The Board's detailed explanation for conducting the subrogation credit analysis was affirmed by the Court of Appeals, No. 2009-CA-00747. This ALJ's use of this same analysis in determining a subrogation credit for the employer was affirmed by the Supreme Court in *Wells v. Wal-Mart Stores, Inc.*, 2011 WL 287333, No. 2010-SC-000306, Claim No. 2006-97979.

Quillen states that the next step is to apportion the settlement proceeds to reflect the relative percentage that each element of damage represents as to the entire jury verdict amount. In this case, the settlement ($250,000) was 20.0216% of the total damages ($1,248,650.75). Therefore, the various elements of damages are reduced as follows:

Medical expenses	$ 46,013.46
Lost wages	$ 10,778.75
Future wage loss	$ 38,415.48
Pain and suffering	$154,792.31
	$250,000.00

Quillen next requires that the $250,000.00 settlement sum be reduced by the damages that are not duplicative of workers compensation. This includes the pain and suffering award of $154,792.31 and the amount of lost wages a jury would award over and above the total of temporary total disability benefits awarded. In this case, the latter

> figure is $18,444.04 ($53,835.60 - $35,391.56). (See p. 12). The total of those figures, $173,236.35, is deducted from the settlement proceeds of $250,000.00 to leave $76,763.65 that is "amenable to subrogation under KRS 342.700(1)." (Quillen at p. 22). From that sum is deducted the attorney's fee and costs to arrive at a "residual subrogation interest" for the Defendant. (Id. at p. 23). But in this case, the attorney's fees and costs of $82,682.08 exceed the $76,763.65 that is amendable to subrogation, and so there is no subrogation credit to which the Defendant is entitled.

Finally, the ALJ determined Mitchell was entitled to have a walk-in tub and an electric wheelchair with a lift to place it in her vehicle. The ALJ dismissed Mitchell's claim for income benefits for the 2013 right ankle fracture. Mitchell was awarded PPD benefits from November 12, 2009, for 425 weeks interrupted by the period during which TTD benefits were awarded from November 20, 2009, to November 15, 2010. Mitchell was awarded medical benefits for the care and relief from the effects of the facial injury, eye injury, knee injuries and resulting infection, as well as the right ankle injury. Both parties filed petitions for reconsideration.

In her petition for reconsideration, Mitchell asserted the award of PPD benefits should extend for 520 weeks. She argued there was no basis for the ALJ to reject

Dr. Bilkey's 20% impairment rating for her eye injury. Mitchell noted Dr. Bilkey relied upon Dr. Taylor's impairment rating set forth in his report.[6] Mitchell noted the Kentucky Rules of Evidence ("KRE") 703 permit Dr. Bilkey to rely upon Dr. Taylor's opinions, since "records review physicians" regularly obtain facts and data from treating physician's reports. Additionally, she noted Fresenius first objected to Dr. Bilkey's impairment rating in its July 2014 brief to the ALJ.

Fresenius argued, as it does on appeal, the ALJ erred in determining Mitchell's award should not be reduced due to a safety violation. It submitted the ALJ erred in determining it had no right of subrogation and his analysis of its potential subrogation credit was erroneous.

In the September 11, 2014, Order, the ALJ sustained Mitchell's petition for reconsideration to the extent the award of PPD benefits was extended to 520 weeks. The ALJ overruled that portion of Mitchell's petition for reconsideration concerning Dr. Bilkey's impairment rating for the eye injury stating as follows:

> Plaintiff's other point in her petition is that the ALJ improperly excluded impairment assigned by Dr. Bilkey for an eye condition. In the Opinion, the ALJ addressed some of the

[6] Dr. Taylor's first name was not provided.

> arguments anticipated from Plaintiff in her petition. Again, the ALJ recognizes that Dr. Bilkey's evidence was competent and admissible, and that the records of Dr. Taylor on whom he relied were not required to be filed. No objection to that portion of the report was required, and the ALJ had the discretion to disregard the opinion on eye impairment as not credible. The ALJ may choose to believe parts of the evidence from a witness and disbelieve other parts. *Caudill v. Maloney's Discount Stores,* 560 S.W.2d 15 (Ky. 1977).

The ALJ denied Fresenius' petition for reconsideration except for the following revision of his analysis concerning a potential subrogation credit:

> The Defendant's petition includes allegations of error in calculating the alleged subrogation credit. The calculation needs revising in light of the ALJ's error in awarded PPD benefits for 425 weeks, and therefore the petition is sustained to the extent set forth below; the petition as to other arguments raised on this issue is denied.
>
> The payout of Mitchell's 520-week award is $234,759.20, and the amount of future wage loss damages needs to be revised accordingly.

Medical expenses	$ 229,818.96
Future medical expenses	-0-
Lost wages	$ **53,835.60**
Impairment of power to earn money	$ 234,759.20
Past and future pain and suffering	$ 773,126.14
Total	$1,291,539.90

And that change requires the Opinion, beginning at page 15, to be revised as follows.

Quillen states that the next step is to apportion the settlement proceeds to reflect the relative percentage that each element of damage represents as to the entire jury verdict amount. In this case, the settlement ($250,000) was 19.3567% of the total damages ($1,291,539.90). Therefore, the various elements of damages are reduced as follows:

Medical expenses	$ 44,485.49
Lost wages	$10,420.92
Future wage loss	$ 45,441.75
Pain and suffering	$149,651.84
	$250,000.00

Quillen next requires that the $250,000.00 settlement sum be reduced by the damages that are not duplicative of workers compensation. This includes the pain and suffering award of $149,651.84 and the amount of lost wages a jury would award over and above the total of temporary total disability benefits awarded. In this case, the latter figure is $18,444.04 ($53,835.60 - $35,391.56). (See p. 12). The total of those figures, $168,095.88, is deducted from the settlement proceeds of $250,000.00 to leave $81,904.12 that is "amenable to subrogation under KRS 342.700(1)." (Quillen at p. 22). From that sum is deducted the attorney's fee and costs to arrive at a "residual subrogation interest" for the Defendant. (Id. at p. 23). But in this case, the attorney's fees and costs of $82,682.08 exceed the $81,904.12 that is amendable to subrogation, and so there is no subrogation credit to which the Defendant is entitled.

On appeal, Mitchell argues the ALJ arbitrarily rejected Dr. Bilkey's impairment rating for the eye injury with no reasoned explanation. She argues the ALJ should have stated the evidentiary basis for his finding as there is no reasonable basis to doubt Mitchell suffered the facial fractures. Mitchell observes her testimony regarding her symptoms is uncontradicted and Dr. Bilkey's initial report reflects he reviewed the records and reports of sixteen different physicians.

Mitchell notes that in his initial report of March 27, 2012, Dr. Bilkey devoted a paragraph to the treating ophthalmologist's assessment of a 20% whole person impairment utilizing the AMA Guides. Dr. Bilkey incorporated Dr. Taylor's rating into his evaluation of Mitchell's impairment rating for the eye injury. Mitchell observes there is no medical evidence rebutting Dr. Bilkey's opinion and the impairment rating assessed by Dr. Taylor. Further, no objection was raised to Dr. Bilkey's adoption of Dr. Taylor's impairment rating until Fresenius raised the issue in its brief to the ALJ after the final hearing. Mitchell notes the ALJ acknowledged KRE 703 specifically allows an expert witness to rely upon the examination, findings, and opinions of other experts. She contends Fresenius' assertion the impairment was not made

pursuant to the AMA Guides overlooks a paragraph in Dr. Bilkey's report concerning Dr. Taylor's report which specifically recites the impairment rating was based upon the AMA Guides. Mitchell maintains there should have been some objection to the report prior to the objection in Fresenius' brief to the ALJ. Mitchell requests remand with instructions the impairment rating assessed by Dr. Taylor incorporated within Dr. Bilkey's report be accepted and the award be amended to reflect she has a 61% whole person impairment.

In his March 27, 2012, report, Dr. Bilkey addressed, among other injuries, Mitchell's eye injury. He noted Mitchell had been treated by Dr. Wesley for her eye problems, and Dr. Wesley noted her eye symptoms included pain in the infraorbital division.[7] He stated Dr. Wesley noted Mitchell had 3mm of enophthalmos and motility was clinically full, but she had to turn her head to the right upon right gaze. It was Dr. Wesley's opinion surgery to pull the trapped eye muscles loose was not a reasonable risk. Dr. Wesley stated the implants to bring the eye out would be reasonable treatment, but Mitchell was not concerned at that time about the surgery. Dr. Wesley

[7] Dr. Wesley's first name was not provided.

stated it would be at least a two year ordeal before some of Mitchell's pain would cease.

Addressing Dr. Taylor's records, Dr. Bilkey noted Mitchell had been evaluated by him on September 30, 2010, at which time Dr. Taylor diagnosed double vision and pain in and around the eye. Dr. Taylor noted there was an untreated orbital floor fracture due to the November 2009 MVA. Dr. Bilkey noted Dr. Taylor issued a follow-up report on November 27, 2011, which addressed the residual symptoms and impairment. Dr. Taylor stated Mitchell had very mildly reduced vision in the right eye to a 20/30 level, and Mitchell experienced double vision intermittently in an up and down gaze but not in her primary position when looking straight ahead. Dr. Bilkey concluded by noting as follows: "according to the AMA Guides, according to Dr. Taylor, Ms. Mitchell has a 20% vision disability therefore."

In a subsequent paragraph, Dr. Bilkey noted Mitchell had a contusion injury which caused an orbital blow out fracture. Dr. Bilkey stated: "because of the shape of the orbit, the eye socket, now being enlarged by the fracture had sunk in." He noted the muscles that move the eye are entrapped within fracture fragments and they limit the coordination of the eye such that when Mitchell looks up and down she has double vision. He believed

Mitchell lost a mild degree of visual acuity and has acquired chronic facial and eye pain. In assessing an impairment for the eye, Dr. Bilkey stated as follows: "Finally, for impairment rating injury to the eye according to Dr. Taylor there is a 20% visual impairment. This is equal to a 20% whole person impairment." He pointed out there was no specific table for diplopia. Dr. Bilkey stated: "Table 12.2 is used according to an example on page 330, Example 13-33." He concluded Mitchell retains near normal vision and this supports a permanent impairment rating of 10% to 25%. He believed the impairment rating assessed by Dr. Taylor was reasonable.

In his July 1, 2014, deposition, Dr. Bilkey was asked to address any additional impairment Mitchell had pursuant to the AMA Guides in addition to that assessed for her knee injuries. Concerning Mitchell's visual impairment, Dr. Bilkey testified he utilized Dr. Taylor's 20% whole person impairment rating. Dr. Bilkey stated Dr. Taylor is the better specialist to assign this impairment rating. Dr. Bilkey went on to describe the change in Mitchell's appearance due to the facial fractures. Similarly, in a supplemental report dated June 23, 2014, attached to his deposition, Dr. Bilkey stated that combining the impairments for lower limb injuries,

impairments due to facial scarring, facial pain, and residual loss of function affecting the right eye yields a 61% whole person impairment.

The record reveals this is the only medical evidence relating to an impairment rating for Mitchell's right eye injury. Significantly, Mitchell's testimony regarding her continued symptoms was unchallenged and remained consistent. At the May 6, 2013, deposition and the July 22, 2014, final hearing, she testified she still has the same problems she previously identified which included facial pain, headaches, double and blurred vision. She believed those problems have worsened.

Although the ALJ is granted wide latitude in determining the evidence upon which he will rely, when faced with uncontradicted medical evidence, the ALJ must provide a sufficient explanation for rejection of that evidence. In Com. v. Workers' Compensation Bd. of Kentucky, 697 S.W.2d, 540, 541 (Ky. App. 1985), the Court of Appeals held as follows:

> While expressing surprise that the injury to her foot should continue to affect her, all three physicians who testified agreed that she is not able to return to any type of non-sedentary employment and attributed that inability to the work-related accident. This evidence, which establishes the existence of an injury of appreciable

> proportions and an occupational disability as defined in *Osborne v. Johnson*, Ky., 432 S.W.2d 800 (1968), went uncontradicted, and, therefore, the Board was without authority to reject it absent a sufficient explanation of its reasons for doing so. *Collins v. Castleton Farms, Inc.*, Ky. App., 560 S.W.2d 830 (1977). The Board failed to comply with that requirement.

The Court of Appeals concluded the evidence the claimant sustained both an injury of appreciable proportions and an occupational disability was so overwhelming as to compel a finding in her favor.

Here, where the evidence firmly demonstrates Mitchell sustained a significant eye injury, the ALJ must provide the basis for his decision. In Franklin Ins. Agency, Inc., v. Simpson, 2007-SC-000748-WC, 2007-SC-000914-WC, rendered November 26, 2008, Designated Not To Be Published, the Supreme Court specifically noted "[t]he ALJ must either state a proper basis for rejecting the claimant's evidence regarding the condition or rely on it." Slip Op. at 4. The Supreme Court instructed:

> Drs. Gaw and Concepcion testified for the claimant regarding sexual dysfunction. Dr. Gaw clearly attributed the condition to the effects of the back injury. Although Dr. Concepcion thought that the condition potentially resulted from the injury, such equivocal testimony did not rebut Dr. Gaw's opinion. The employer offered no

> affirmative evidence to the contrary. Thus, the claim must be remanded for the ALJ to address Dr. Gaw's testimony. The ALJ must state a proper basis for rejecting the evidence or rely on it.

Slip Op. at 5.

We believe the situation in the case *sub judice* is analogous to the facts in Com. v. Workers' Compensation Bd. of Kentucky, supra, and Simpson, supra. In the case *sub judice*, the ALJ declined to adopt Dr. Bilkey's 20% impairment rating for the right eye injury stating that while technically Dr. Bilkey was competent to state an opinion regarding a matter of medicine outside his training and experience, there was insufficient foundation for Dr. Bilkey, a physiatrist, to provide an opinion concerning the eye injury. He also noted Dr. Taylor's impairment rating is not in evidence. In the Order ruling on the petitions for reconsideration, the ALJ acknowledged Dr. Bilkey's impairment rating for the eye injury was competent and admissible and the records of Dr. Taylor were not required to be filed. He also noted no objection to the portion of the report was required. However, the ALJ then stated he had the discretion to disregard the opinion regarding the eye injury as not credible. We conclude the ALJ provided an insufficient explanation for the rejection of Dr. Bilkey's impairment rating.

The evidence establishes Mitchell sustained a significant eye injury and she has permanent symptoms and loss of eye function. Dr. Bilkey specifically noted Dr. Taylor assessed a 20% impairment rating pursuant to the AMA Guides. During his deposition, Dr. Bilkey testified that pursuant to the AMA Guides, Mitchell had a 20% impairment rating due to her visual impairment. Thus, the impairment rating of Dr. Bilkey was in accordance with and based upon the AMA Guides. As noted by the ALJ, the Kentucky Rules of Evidence allow Dr. Bilkey to rely upon the reports and opinions of other physicians in expressing his opinion. That being the case, the award of PPD benefits must be vacated and the claim remanded for further findings regarding the impairment rating, if any, attributable to Mitchell's eye injury. We stop short of directing a result as we believe the ALJ should be given the opportunity to explain his rejection of uncontradicted medical evidence and the impairment rating which was assessed pursuant to the AMA Guides.

Fresenius' first argument on appeal is the ALJ erroneously refused to reduce Mitchell's income benefits by 15%. It observes Mitchell admitted that she was told she was not wearing a seatbelt at the time of the MVA.

Further, it contends no evidence was introduced showing Mitchell was wearing her seatbelt.

Fresenius relies upon the opinions of Dr. John Michael Voor, an Assistant Professor of Orthopedic Surgery at the University of Louisville School of Medicine, and a Research Associate at the Mechanical Injuring and Bioengineering Departments at the University of Louisville J.B. Speed School of Engineering. It notes Dr. Voor concluded Mitchell's facial and orbital injuries and her lower extremity injuries were likely caused or exacerbated by her failure to wear a seatbelt or other safety device. Fresenius maintains nothing in the ALJ's decision indicates he disputed Dr. Voor's expertise on the subject of biomechanics or his conclusion Mitchell's failure to wear a seatbelt either caused or contributed to her injuries. Fresenius argues it established Mitchell was not wearing a seatbelt at the time of the MVA, and her failure to wear the seatbelt either directly caused or greatly exacerbated her resulting injuries. Therefore, the ALJ should have reduced the award by 15% pursuant to KRS 342.165(1).

Fresenius asserts the ALJ's reliance upon Tetrick v. Frashure, 119 S.W.3d 89 (Ky. App. 2003) is misguided as it stands for the proposition Mitchell is not subject to legal prosecution for her failure to wear a seatbelt. It

asserts KRS 342.165(1) is not limited in its application to only safety devices as it also mandates the use of any safety device available to Mitchell without regard to a legal or statutory obligation. Accordingly, it maintains Mitchell intentionally thwarted the intent of KRS 342.165(1) and KRS 189.125(6) by failing to use her seatbelt.

Next, Fresenius asserts the ALJ's refusal to grant it a subrogation credit was error. It maintains KRS 342.700(1) precludes an employee from recovering from a tortfeasor the same elements of damage for which he or she has already been compensated by way of workers' compensation benefits. In order to effectuate this purpose, the statute permits the employer/carrier to recover compensation paid on behalf of the injured employee from the person liable for the damage. In this case, that person is Mitchell's former husband. Fresenius asserts this right was specifically recognized in Zurich American Ins. Co. v. Haile, 882 S.W.2d 681 (Ky. 1994) and again in Waters v. Transit Authority of River City, 799 S.W.2d 56, 58 (Ky. App. 1990). Thus, Mitchell's claim is no different than any other case involving a workers' compensation carrier who asserts its right of subrogation recovery against a tortfeasor.

Fresenius notes the $250,000.00 received by Mitchell was a recovery resulting from her tort claim against her husband. It contends the fact that part of the premium for her husband's coverage was paid for by Mitchell is irrelevant. Also irrelevant is the fact the settlement proceeds were paid pursuant to a motor vehicle insurance policy issued to Mitchell and her husband. Fresenius contends the ALJ's reliance upon Jewell v. Kentucky School Bd. Ass'n, 309 S.W.3d 232 (Ky. 2010) and G & J Pepsi-Cola Bottlers, Inc. v. Fletcher, 229 S.W.3d 915 (Ky. 2007) is misplaced as neither addressed the issue in the case *sub judice* and do not preclude a subrogation recovery against proceeds paid directly by the tortfeasor.

Fresenius espouses those cases dealt with attempts to seek subrogation against contractual benefits in the form of underinsured motorist benefits and uninsured motorist benefits. Fresenius argues the subrogation right provided by KRS 342.700(1) may only be asserted against tortfeasors and not against underinsured or uninsured motorist coverage. Therefore, it requests the Board hold it is entitled to assert a subrogation lien against Mitchell's civil recovery.

Finally, Fresenius contends the ALJ's subrogation analysis was erroneous. It asserts the ALJ's calculation

pursuant to the Board's decision in Quillen v. Tru-Check, Inc., Claim No. 200899276, and affirmed by the Court of Appeals directs the ALJ's subrogation analysis should have been as follows:

Estimated Jury Award

Medical Expenses:	$229,818.96
Future Medical Expenses:	-0-
Lost Wages:	$53,835.60
Impairment of Power to Earn:	$234,759.20
Past and Future Pain and Suffering:	$773,126.14
	$1,291,539.90

Fresenius notes $149,651.84 in pain and suffering when subtracted from the $250,000.00 leaves $100,348.16. From that amount, Mitchell's attorney fees and expenses of $82,682.08 are to be deducted leaving a subrogation credit of $17,666.08.

We find no merit in Fresenius' first argument Mitchell's PPD benefits should be reduced pursuant to KRS 342.165(1). Contrary to Fresenius' assertion, there is evidence in the record indicating Mitchell was wearing her seatbelt at the time of the injury. Significantly, Mitchell did not admit she was not wearing a seatbelt at the time of the accident. Rather, she indicated she was told she was not wearing a seatbelt. The accident report introduced as Exhibit 1 to the July 24, 2012, hearing

transcript indicates both Mitchell and her husband were wearing seatbelts. This fact was testified to by Dr. Voor during his deposition as he noted the sheriff's report indicated both Mitchell and her husband were wearing seatbelts.[8] Notably, there is no stipulation by the parties Mitchell was not wearing a seatbelt. Thus, whether Mitchell was wearing a seatbelt at the time of the accident is in dispute.

More importantly, there is no finding by the ALJ that Mitchell was not wearing a seatbelt. In the opinion, award, and order the ALJ set forth Fresenius' burden of proof to obtain a reduction of Mitchell's PPD benefits pursuant to KRS 342.165(1). He then noted Mitchell had offered three arguments in opposition to Fresenius' claim for a reduction in benefits pursuant to KRS 342.165(1). In rejecting the first two arguments, the ALJ did not find Mitchell was not wearing a seatbelt. The ALJ found persuasive Mitchell's third argument that she had no duty to wear a seatbelt since KRS 189.125(6) required its use only for operators of motor vehicles, not passengers. The ALJ concluded Tetrick, supra, held that failure to wear a seatbelt was potentially negligent, but there was no

[8] See page 40 of Dr. Voor's deposition.

statutory or safety rule requiring a passenger in a motor vehicle to use a seatbelt. The ALJ also noted there was no evidence Mitchell had "signed off" on a handbook or company policy requiring the use of a seatbelt. The closest the ALJ came to finding Mitchell failed to wear a seatbelt is the following sentence of the August 8, 2014, Opinion, Award, and Order: "Therefore, Mitchell's alleged negligence in failing to wear a seatbelt does not give rise to application of a safety penalty deduction pursuant to KRS 342.165(1)." Since the ALJ did not expressly find Mitchell failed to wear a seatbelt, Fresenius' argument fails.

That said, Tetrick, supra, fully supports the ALJ's decision. Tetrick, a passenger in the vehicle, was injured when the car his wife was operating was struck by another car. There was no dispute the operator of the other vehicle was at fault. The Court instructed that Tetrick, as a passenger, had a duty to wear a properly adjusted and fastened seatbelt. The jury declined to award damages to Tetrick. On appeal, the Court of Appeals held the instruction given by the trial court was erroneous because it made reference to a duty on the part of Tetrick to wear a seatbelt. The Court of Appeals concluded KRS 189.125(6) did not impose a duty to wear a seatbelt on a passenger in a vehicle:

> "In the absence of statute it is not our function to declare that the law requires, or that it does not require, the occupants of an automobile to wear seat belts." *Wemyss*, 729 S.W.2d at 179. "[T]he enumeration of specific duties is the exception to the rule, reserved for statutory duties, and the 'general rule for the content of jury instructions' is to couch same in the terms of the general duty[.]" Id. at 181, *citing Rogers v. Kasdan, Ky., 612 S.W.2d 133, 136 (1981)*. Thus, as there is no statutory duty requiring a passenger in a vehicle to wear a seat belt, the court's instruction, as taken from Palmore's form book, was erroneously given.

Id. at 93.

KRS 342.165(1) reads, in relevant part, as follows:

> If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment. If an accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the commissioner or the employer for the safety of employees or the public, the compensation for which the employer would otherwise have been liable under

> this chapter shall be decreased fifteen percent (15%) in the amount of each payment.

In the case *sub judice*, Mitchell did not fail to use a safety appliance furnished by the employer. Mitchell did not fail to obey any lawful or reasonable order, or administrative regulation of the Commissioner or employer for the safety of employees or the public. As Tetrick, supra, establishes Mitchell had no statutory duty to wear a seatbelt, the ALJ's decision on this issue shall be affirmed.

We conclude the ALJ erroneously determined Fresenius did not have a right of subrogation against the settlement proceeds obtained from the tortfeasor. The fact the settlement proceeds were paid by Mitchell's insurance company and a portion of the premium for the liability coverage may have been paid by Mitchell is of no significance as the law is clear the workers' compensation insurance carrier has a right of subrogation against the proceeds paid by or on behalf of the third party tortfeasor. In Zurich American Ins. Co. v. Haile, supra, the Supreme Court noted as follows:

> With workers' compensation statutory subrogation, as with contractual subrogation, the insurer's right is a right to reimbursement,

> strictly derivative, with no right to maintain the action independently so long as the insured is pursuing the claim. We quote from *National Biscuit Co. v. Employers Mut. Liability Ins. Co.*, 313 Ky. 305, 231 S.W.2d 52, 54 (1950):
>
> > "It is the purpose of the statute to reimburse the employer or his insurance carrier out of any recovery against the third party tortfeasor to the extent of the award made under the Workmen's Compensation Act...."
> >
> > . . .
>
> And in *Fireman's Fund Insurance Company v. Government Employees Insurance Company*, Ky., 635 S.W.2d 475, 476 (1982), we stated, "a compensation carrier's rights against a third-party tortfeasor are entirely derivative, and are not independent of the injured party's tort claim."

Id. at 685.

The fact the tortfeasor is Mitchell's husband and she may have paid a portion of the premium for the liability coverage on their automobiles does not abrogate the workers' compensation carrier's right of subrogation recovery.

The ALJ's reliance upon G & J Pepsi-Cola Bottlers, Inc., supra, and Jewell, supra, is misplaced. In G & J Pepsi-Cola Bottlers, Inc., supra, while at work Fletcher was involved in an MVA and sustained serious

physical injuries due to the negligence of the driver of the other vehicle. Fletcher sued his automobile insurance carrier and the insurer of G & J's fleet of vehicles seeking underinsured motorist ("UIM") benefits provided by both carriers. The workers' compensation carrier for G & J asserted a subrogation claim against the benefits provided by the UIM carriers. The circuit court entered summary judgment dismissing G & J's subrogation claim. On appeal, the Court of Appeals identified the issue:

> The Court also emphasized that this result does not deprive the employer of its subrogation rights; it can still look to the tortfeasor as provided for in KRS 342.700(1). We are persuaded that nothing in *Samples* alters the logic of the *State Farm* analysis.
>
> The issue to be resolved in *Samples* is clearly stated by the Court:
>
> In *Krahwinkel v. Commonwealth Aluminum Corp.*, 183 S.W.3d 154 (Ky. 2005), we held that KRS 342.700(1) precludes a civil plaintiff from recovering from a tortfeasor the same elements of damages for which he had already been compensated by way of workers' compensation benefits; and that the tortfeasor is entitled to an offset or credit against the judgment for those damages awarded by the jury that duplicate workers' compensation benefits. 183 S.W.3d 16 160. **The issue in this case is whether the same principle applies to a civil plaintiff seeking to recover damages, duplicative of workers' compensation benefits,**

> **against a UIM (or for that matter uninsured motorist ("UM")) carrier who is sued for damages otherwise payable by the underinsured (or uninsured) tortfeasor.**

Emphasis in original. Id. at 917-918.

The Court of Appeals held as a matter of law G & J is not entitled to subrogation against the UIM carriers. Id. at 918.

In Jewell, supra, the Supreme Court reaffirmed that the workers' compensation carrier had no subrogation rights against proceeds paid pursuant to UIM coverage.

Therefore, the rights afforded the workers' compensation carrier pursuant to KRS 342.700(1) are unaltered by the fact Mitchell's husband was the tortfeasor and Mitchell's personal funds were in part used to pay for the liability coverage of the tortfeasor, her husband.

We next address the ALJ's analysis regarding any potential subrogation credit to which Fresenius may be entitled. The crux of Fresenius' third argument is the ALJ erred in deducting $18,444.04, the difference between the amount of the TTD benefits paid ($35,391.56) and Mitchell's actual wage loss ($53,835.60), from the settlement proceeds. The ALJ arrived at the total wage loss by multiplying 51, the number of weeks Mitchell was totally disabled, by her average weekly wage of $1,055.60.

Consequently, Fresenius did not pay her total lost wages as calculated by the ALJ.

Fresenius does not dispute the ALJ's allocation of the damages a jury would have assessed in Mitchell's personal injury claim. Fresenius does not take issue with the ALJ's proportional reduction of the medical expenses, lost wages, future wage loss, and pain and suffering. Fresenius agrees the ALJ correctly subtracted the reduced amount of pain and suffering ($154,792.31) and the attorney fees and costs of $82,682.08. However, it contends those were the only sums which should have been deducted from $250,000.00.

Mitchell argues her pain and suffering was reasonably valued by everyone at $773,126.14 and AIK Selective Self-Insurance Fund v. Minton, 192 S.W.3d 415 (Ky. 2006) codified the "made whole" doctrine. Therefore, the full amount of her pain and suffering ($773,126.14) should have been subtracted from the settlement proceeds. Mitchell also relies upon the Supreme Court's holding in Wells v. Wal-Mart Stores, Inc., 2010-SC-000306-WC, rendered January 20, 2011, Designated Not To Be Published.

We reject Mitchell's position that Minton, supra, codified the "made whole" doctrine and is controlling in this case. In AIK Selective Self Ins. Fund v. Bush, 74

S.W.3d 251 (Ky. 2002) the Supreme Court declined to codify the "made whole" rule stating as follows:

> KRS 342.700(1) does not merely provide for a right of subrogation, which, of course, the employer or insurer would be entitled to under common law principles, *Wine, supra*, at 561-62, but specifies that the employee "shall not collect from both" the employer and the third-party tortfeasor and that the employer or insurer can recover damages in its own name, not to exceed the compensation paid or payable to the injured employee, less the employee's legal fees and expense. Clearly, this is not a mere codification of the broad common law right of subrogation defined in *Wine.* KRS 342.700(1) specifies the rights and limitations of both the subrogor and the subrogee and tailors those rights and limitations to the peculiar nature of workers' compensation. It also requires that the employee's entire legal expense, not just a pro rata share, be deducted from the employer's or insurer's portion of any recovery. Unlike the uninsured motorists statute interpreted in *Wine*, 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. *Wine, supra*, at 562. To the extent that *Great American Insurance Companies v. Witt*, *supra*, holds otherwise, it is overruled.

Id. at 258.

Although the language in Minton, supra, contains *dicta* supportive of Mitchell's position, we believe the

Supreme Court stopped short of adopting the "made whole" doctrine. In doing so, we rely on the concurring opinion of Justice Cooper:

> I concur in the result reached in this case but do not agree with the unnecessary dictum that suggests that KRS 342.700(1) codifies any principle of the so-called "made whole" doctrine. *Ante,* at 418. In fact, as we held in *AIK Selective Self Insurance Fund v. Bush*, 74 S.W.3d 251 (Ky. 2002), the proscription against double recovery in KRS 342.700(1) precludes application of the "made whole" doctrine in the workers' compensation context. *Id*. at 256-57.

Id. at 420.

Wells, supra, provides no support for Mitchell's position. There, the ALJ noted Wells' tort claims had been settled for a total of $900,000.00. Unlike the ALJ in Quillen v. Tru-Check, Inc., 2009-CA-000747-WC, rendered October 16, 2009, Designated Not To Be Published, the ALJ in Wells, supra, did not determine the settlement amount was less than the actual value of the personal injury claim. Of the $900,000.00, the ALJ attributed a total of $440,659.21 as past and future income and medical benefits. He determined $455,919.64 represented items of damages which were not duplicative of workers' compensation benefits. The ALJ subtracted the amount of those damages ($455,919.64) and the attorney fees and costs in

determining the subrogation credit to which Wal-Mart was entitled.

In both Quillen, supra, and the case *sub judice*, the ALJ determined the amount of settlement was not representative of the actual value of the claimant's personal injury claim. In both, the ALJ concluded the value of the claimant's personal injury claim was greater than the settlement amount. Thus, a proportionate reduction in each item of damage was necessary. Significantly, the Court of Appeals affirmed the Board's rejection of Quillen's primary argument that Tru-Check was not entitled to a subrogation credit because Quillen was not made whole by the third party settlement. It also affirmed the Board's determination the ALJ incorrectly calculated the subrogation credit by subtracting the attorney fees at the beginning of his calculations. We stated the correct calculation is as follows:

> [T]he ALJ's calculation of Tru-Check's subrogation credit, while commendably meticulous, is in error. It is undisputed Quillen received $50,000.00 in third party proceeds as a result of his settlement with Singleton. Of that amount, the ALJ allocated $26,651.16 to damages for pain and suffering that are not subject to subrogation under KRS 342.700(1). Deducting that amount from the amount of the settlement leaves a balance of $23,348.84, representing that portion of Quillen's third party

> recovery for past and future lost wages and medical treatment amenable to subrogation under KRS 342.700(1). In accordance with the Supreme Court's instructions, $16,666.67, representing the whole of the attorney's fee paid as the result of Quillen's third party settlement with Singleton, must be subtracted from the remaining $23,348.84, yielding a residual subrogation interest of $6,682.17. The record contains no evidence of other legal expenses incurred by Quillen as a result of the third party settlement, so no other sums are subject to be deducted from the remaining $6,682.17. To the extent the ALJ's calculations concerning the amount of Tru-Check's subrogation credit differ from this opinion, the decision below is reversed.

In the case *sub judice*, the ALJ engaged in the appropriate analysis as required by Quillen, supra. The ALJ correctly subtracted the amount of pain and suffering ($154,792.31) as well as the attorney fees from the $250,000.00. However, the ALJ should not have subtracted the $18,444.04 which represents the difference between the amount of TTD benefits paid ($35,391.56) and the actual lost wages ($53,835.60) as determined by the ALJ. We are compelled to point out that by proportionally reducing the $53,835.60 of lost wages, the ALJ proportionally reduced both the amount of TTD benefits paid and the amount of lost wages exceeding the TTD benefits awarded. Consequently,

the ALJ could not deduct the $18,444.04 after proportionally reducing the total lost wages.

The correct analysis in determining the subrogation credit to which Fresenius is entitled is to subtract the amount of the pain and suffering ($154,792.31) and attorney fees and costs ($82,682.08) from the $250,000.00. Our conclusion is fully supported by the following language in Quillen, supra:

> Finally, Quillen contends the Board was obligated to reduce the subrogation credit by the difference between the lost wages found by the ALJ as civil damages and the lost wages recoverable pursuant to his workers' compensation award. Quillen again relies on *Witt*, 964 S.W.2d at 430, for the proposition that an injured worker has the right to collect damages from the third-party tortfeasor "for pain and suffering as well as any amounts of other damages that exceeded the amounts paid" by the workers' compensation carrier. After considering this argument, we reiterate that we are not persuaded by Quillen's insistence that he was entitled to be "made whole," as *Witt* was expressly overruled by *Bush, supra.* We find no error in the Board's allocation of Quillen's award.

Slip Op. at 10.

The above language establishes the ALJ should not have subtracted the $18,444.04 from the remaining balance of the tort recovery.

Accordingly, concerning Mitchell's appeal, the award of PPD benefits based upon a permanent impairment rating of 51% is **VACATED**. This matter is **REMANDED** to the ALJ for rendition of an amended opinion determining whether Mitchell's award should also be based upon the impairment rating assessed by Dr. Bilkey for Mitchell's right eye injury.

Concerning Fresenius' appeal, the ALJ's determination the PPD benefits should not be reduced pursuant to KRS 342.165(1) is **AFFIRMED**. The ALJ's determination Fresenius does not have a right of subrogation is **REVERSED**. Further, the analysis concerning a potential subrogation credit to which Fresenius would be entitled is **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion determining whether Mitchell is entitled to an award of additional PPD benefits and a correct analysis of the subrogation credit to which Fresenius is entitled in conformity with the views expressed.

ALL CONCUR.

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