

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 5, 2021

CLAIM NO. 201997677

ADVANCE AUTO PARTS

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

JASPER MINIX AND
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING & REMANDING

* * * * *

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

ALVEY, Chairman. Advance Auto Parts (“Advance”) appeals from the September 9, 2020 Opinion, Award and Order on Remand and the October 13, 2020 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ allocated 1/3 of Minix’s third party settlement to pain and suffering. In the Order on Petition for Reconsideration, the ALJ determined the pro

rata share of attorneys' fees and expenses as \$6,289.20. The ALJ then calculated the subrogation credit is \$8,900.14.

On appeal, Advance argues the ALJ erred in calculating the subrogation credit. Advance argues non-duplicative damages and pro-rata legal fees and expenses should be deducted from the third party settlement amount to calculate its subrogation credit. We first determine the ALJ followed the directives of this Board in its June 12, 2020 Opinion Affirming in Part, Vacating in Part and Remanding by allocating damages attributable to wage loss, medical expenses, and pain and suffering. However, the ALJ erred in calculating the subrogation credit. Therefore, we vacate and remand for a calculation of the subrogation credit in accordance with the methodology set forth in Quillen v. Tru-Check, Inc., 2009 CA-000747-WC; 2009 WL 3337239 (Ky. App. 2009).

Jasper Minix ("Minix") filed a Form 101 on July 1, 2019, alleging injuries to his back and neck from a December 11, 2018 motor vehicle accident while working as a delivery driver for Advance. The November 6, 2019 Benefit Review Conference Order reflects the parties stipulated Advance voluntarily paid temporary total disability ("TTD") benefits from December 12, 2018 through June 24, 2019 totaling \$2,907.84 and medical expenses totaling \$12,281.50. Subrogation was identified as a contested issue. Because the calculation of the subrogation credit is the only issue on appeal, we will not summarize the medical and lay evidence.

Advance filed the Release and Indemnification Agreement, dated April 15, 2019, between Kentucky Farm Bureau Mutual Insurance Company, as the insurer for Michelle Duff and Love Duff, and Minix. Minix received \$25,000.00 to

waive his third-party claim. That settlement was reached without litigation and the agreement does not provide an allocation of damages. A statement of services for the settlement indicates attorneys' fees were \$8,333.00 and expenses were \$1,100.00, for a total of \$9,433.00.

In the January 16, 2020 opinion, the ALJ determined Minix sustained a work-related low back injury in the December 11, 2018 motor vehicle accident, warranting an 8% impairment rating, increased by the three multiplier pursuant to KRS 342.730(1)(c)1. The ALJ denied Minix's request for vocational rehabilitation benefits. The ALJ determined Advance was entitled to a subrogation amount of \$13,439.45 from the proceeds of the \$25,000.00 settlement, stating as follows, *verbatim*:

The argument that the Defendant makes in its brief regarding the relative amount of subrogation credit it is entitled to under the current version of KRS 342.700(1) is correct. Once the Plaintiff has been made whole from his lost wages and medical expenses, as paid by the Defendant herein, there is no analysis required such as the Plaintiff sets forth in his brief.

Of his \$25,000.00 civil settlement the Plaintiff has already paid attorney fees and costs, relative to the civil settlement, of \$9433.00. His workers' compensation PPD award is $25.03 \times 425 = 10,637.75$ = a workers' compensation attorney fee of \$2127.55. $9433.00 + 2127.55 = 11,560.55$. $25,000.00$ (amount of the civil litigation from KFB) - $11,560.55$ (attorney's fee and costs from both his civil and workers' compensation claims) = $13,439.45$ as the total amount available for subrogation.

\$13,439.45 therefore represents the entire amount available for subrogation up to the point the Defendant has recouped lost wages and medical expenses.

Lost wages already paid in the form of TTD is \$2907.84. Medical expenses already paid are \$12,281.50. The total amount already paid on behalf of the Plaintiff which can serve as a basis for subrogation is \$15,189.34. This figure exceeds the total amount available for subrogation even before any analysis is done of the effect of the future PPD benefits.

Therefore, the amount the Defendant may recover in subrogation is \$13,439.45

Minix petitioned for reconsideration arguing the ALJ failed to allocate funds for pain and suffering from his civil settlement, resulting in an erroneous subrogation credit calculation. Advance argued the ALJ erred in deducting the presumed workers' compensation attorneys' fee from the civil settlement amount, and the subrogation credit, which should be adjusted to \$15,567.00.

In an Order rendered February 17, 2020, the ALJ sustained Advance's petition, stating as follows regarding subrogation:

The ALJ made an error of law in deducting the Plaintiff's presumed workers' compensation attorney fee from the amount available for subrogation. Therefore the total amount available is \$15,567.00.

....

As for the amount of the subrogation credit the ALJ freely admits that when analyzing the subrogation credit some bit of leeway exists. However, it is worth pointing out that in this matter the Plaintiff has been made whole, under the law, by a combination of his civil and workers' compensation claims. All lost wages and lost earning potential have been remedied and he is entitled to medical benefits under the Act. As such I believe the calculations of the subrogation credit reflect a fair and accurate amount and that the amount is supported by substantial evidence.

Minix appealed to this Board arguing the ALJ failed to award vocational rehabilitation benefits. He also argued the ALJ failed to perform the proper analysis by failing to exclude any amount attributable to pain and suffering from the settlement of the civil claim.

This Board issued an opinion on June 12, 2020, affirming the ALJ's determination that Minix is not entitled to vocational rehabilitation benefits. However, the Board vacated in part, and remanded the claim based upon the ALJ's subrogation analysis, stating as follows:

KRS 342.700 states in pertinent part:

Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some other person than the employer 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 shall not collect from both.....If compensation is awarded or paid under this chapter, the employer, his insurance carrier, the special fund, the Kentucky coal workers pneumoconiosis fund, the uninsured employers fund, or any of them, having paid the compensation or having become liable therefor, may, recover in 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 and medical expenses paid and payable to or on behalf of the injured employee, less a pro rata share of the employee's legal expenses.

In Whitaker v Hardin, 32 S.W.3d 497 (Ky. 2000), the Supreme Court held 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 the settlement proceeds. In Greene v. Paschall Truck Lines, 239 S.W.3d 94 (Ky. 2007), the court held it was the ALJ's duty to apportion the civil damages as the ALJ is charged with the duty to resolve all undecided issues in a case that falls under the purview of KRS chapter 342. The issue of subrogation clearly falls within that category.

In Mastin v. Liberal Markets, 674 S.W.2d 7 (Ky. 1984), the Supreme Court held the employer is only subrogated to the amounts of the settlement proceeds that are duplicative of the workers' compensation award. In Hillman v. American Mutual Liability Insurance Company, 631 S.W.2d 848 (Ky. 1982), the Supreme Court held the damages in a civil case allocated for pain and suffering are not subject to any claim of subrogation by the employer.

In his Opinion, Award, and Order, the ALJ stated, "once the Plaintiff is made whole from his lost wages and medical expenses, as paid by the Defendant herein, there is no analysis required such as Plaintiff sets forth in its brief." Thereafter, the ALJ set forth his calculations and determined of the \$25,000.00 settlement proceeds, all that would be deducted as not recoverable in subrogation would be Minix's attorney fees of \$11,560.55, later amended to \$9,433.00, leaving Advanced subrogated in the amount of \$15,567.00. However, the ALJ did not address what portion, if any, of the civil settlement compensated Minix for the pain and suffering he endured, and would have been compensated for in the civil action, and therefore not subject to subrogation. *See, Quillen v. Tru-Check, Inc.*, 2009-CA-000747-WC; 2009 WL 3337239 (Ky. App. 2009).

We do not believe the ALJ performed the proper analysis. As can be seen from the above case law, the ALJ is charged with the duty to review the civil settlement as an independent and impartial trier of fact and set forth the proper allocation of damages attributable not only to wage loss and medicals, but shall

also consider what amount of the settlement proceeds, if any, are attributable to pain and suffering. The ALJ must address the issue with sufficient clarity for meaningful review.

Accordingly, the Opinion, Award, and Order of Hon. Chris Davis, ALJ, rendered on January 16, 2020, and the Order on Reconsideration rendered on February 17, 2020 are **AFFIRMED IN PART** and **VACATED IN PART**. This claim is **REMANDED** for entry of an amended opinion consistent with the views expressed herein.

In the Opinion on remand, rendered September 9, 2020, the ALJ determined Advance is entitled to a subrogation credit of \$5,106.12, stating as follows:

Of his \$25,000.00, civil settlement the Plaintiff has already paid attorney fees and costs, relative to the civil settlement, of \$9433.00. His workers' compensation PPD award is $25.03 \times 425 = 10,637.75$ = a workers' compensation attorney fee of \$2127.55. $9433.00 + 2127.55 = 11,560.55$. It is reasonable to assume that the workers' compensation carrier will pay future medical expenses but at this time, I have no way to quantify them.

Those facts are not in dispute. What has not been proven, or had any evidence introduced on the subject, is the position of either the Plaintiff or Kentucky Farm Bureau as to what value they placed on pain and suffering when reaching a settlement.

His medical expenses and lost wages, as paid by his compensation carrier, to that point totaled \$15,189.34. However, just as I have no way of knowing what value the parties in the civil settlement allocated to pain and suffering I do not know how much was allocated to other factors, including but not limited to future lost wages or future expenses, that maybe paid by the workers' compensation carrier.

In short, while required to do a calculation as to the value allocated to pain and suffering, and thus exempt

from subrogation, that value could be between zero and \$25,000.00 and there is really no evidence to guide me and no law to require me.

That being said, and in fairness, I doubt the parties in the third party allocated zero and I doubt they allocated \$25,000.00. The Plaintiff continues to complain of headaches, neck pain and low back pain. He claims he needs to sit or lie down frequently. He has difficulty turning his head. It can be difficult to walk. Pain and suffering, even in a legal realm, are inchoate matters and in a case like this they are believed or not. However, one can presume if his civil case had not settled the Plaintiff would have made those claims to a jury and the Defendant took that risk into account.

As such, I will allocate 1/3 to lost wages, 1/3 to medical expenses and 1/3 to pain and suffering. 1/3 of \$25,000.00 is \$8333.33. As already stated the Plaintiff's combined attorney's fee and costs are \$11,560.55. The total value not available for subrogation is \$19,893.88. Leaving a value available for subrogation of \$5106.12. Far less than the amount of the workers' compensation benefits already paid to the Plaintiff.

The Defendant is entitled to a subrogation credit of \$5106.12.

Advance petitioned for reconsideration, arguing the ALJ erred in deducting the workers' compensation attorneys' fee from its subrogation credit. It also argued the attorney fee and expenses should not be deducted from its subrogation credit in their entirety, since the most recent version of KRS 342.700(1) provides only the pro rata share of the employee's fees and expenses incurred in obtaining the third party recovery should be deducted from the subrogation credit. "Consequently, only 2/3 of the 9,433.00 attorney's fees and expenses, or \$6,288.66 should be subtracted from the subrogation credit based on the ALJ's apportionment." Therefore, according to Advance, the subrogation calculation

should be \$25,000 (third party recovery) – \$8,333.33 pain and suffering – \$6,288.66 (pro-rata attorney fees and expenses) = \$10,378.01 (subrogation credit).

Minix argued the ALJ is first required to determine the amount of the settlement available for subrogation, which he asserted is \$16,667.50 (\$25,000 (total settlement) – \$8,332.50 (1/3 of \$25,000 for pain and suffering)). Then, the pro rata attorneys' fees and expenses are calculated, in this instance \$6,289.20 (\$9,433.33 (total attorneys' fee and expenses) x .6667 (2/3 pro rata share)). The subrogation lien is then reduced by the pro rata attorneys' fees and expenses. In this instance, \$15,189.24 (TTD and medical expenses paid for by Advance) - \$6,289.20¹ (\$9,433.33 x .6667) = \$8,900.04. Minix argued Advance erred in deducting the non-economic damages and pro-rata attorneys' fees and expenses from the settlement total to calculate the subrogation credit amount. Instead, the correct method of calculation is to deduct the pro-rata attorneys' fees and expenses from the subrogation lien, which is the total medical expenses and lost wages paid by Advance.

The ALJ issued an Order on October 13, 2020, appearing to adopt Minix's methodology in calculating the subrogation credit, stating as follows:

This matter comes before the undersigned on the Defendant's Petition for Reconsideration and the Plaintiff's Response and Objection thereto. It is fair to say, at this point, that the parties agree on most aspects of the subrogation credit, at this point, except with the definition of the phrase "prorate" in KRS 342.700 when analyzing a pro-rata share of fees and costs. There is no published case law on this matter or guidance from the Board, of which I am aware. I am inclined to agree with the Plaintiff that in this instance pro-rata means the same percentage of the damages that were, at the start of

¹ Minix erroneously calculated $\$9,433.33 \times .6667 = \$6,283.20$. Instead, the correct calculation is $\$9,433.33 \times .6667 = \$6,289.20$

the calculation, available for subrogation. In this claim that was 2/3 of the \$25,000.00 tort settlement. So 2/3 of the fees and costs from the tort settlement is \$6289.20. This leaves \$8900.14 available for subrogation.

On appeal, Advance argues the ALJ erred in calculating the subrogation credit. Advance again asserts its subrogation credit should be calculated in accordance with Quillen v. Tru-Check, Inc., 2009 WL 3337239 (Ky. App. 2009)(unpublished opinion), as follows:

\$25,000.00 (third party recovery)
- \$8,333.33 (1/3 pain and suffering allocation)
- \$6,288.66 (pro-rata attorney fees and expense \$9,433.00 x 2/3)
\$10,378.01 subrogation credit

Advance asserts the ALJ erroneously relied upon Minix's calculation in the October 13, 2020 Order. Advance argues its subrogation credit should not be limited by the amount it voluntarily paid at the time the ALJ's opinion and award was issued. The parties do not dispute the most current version of KRS 342.700(1) is applicable, since Minix's work injury occurred subsequent to July 14, 2018. The current version of that statute provides as follows:

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 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 or paid under this chapter, the employer, his insurance carrier, the special fund, the Kentucky coal workers' pneumoconiosis fund, and the uninsured employer's

fund, or any of them, having paid the compensation or having become liable therefor, 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 and medical expenses paid and payable to or on behalf of the injured employee, **less a pro rata share of the employee's legal fees and expense. . . .**

(Emphasis Added)

KRS 342.730(1) allows an injured worker to pursue both a workers' compensation claim and a civil action against a third party tortfeasor for tort damages. To the extent the injured worker successfully recovers damages in tort; KRS 342.700(1) provides subrogation rights to an employer who has paid workers' compensation benefits resulting from the same injury, preventing the injured worker from receiving a double recovery. The Supreme Court in Wine v. Globe American Casualty Co., 917 S.W.2d 558, 562 (Ky. 1996), explained subrogation prevents double recovery by a plaintiff and prevents a windfall to the tortfeasor by benefiting from the payment of the insurance carrier without ultimately bearing at least some of the cost. The Court further instructed that:

“[u]nder general principles of equity, in the absence of statutory law or valid contractual obligations to the contrary, an insured must be fully compensated for injuries or losses sustained (made whole) before the subrogation rights of an insurance carrier arise.” Id.

The previous version of KRS 342.700(1) provided the employer or its insurance carrier “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 and medical expenses paid and payable to the injured employee, less the employee's legal fees and expense.” Under the previous version of the statute, the

Kentucky Supreme Court held KRS 342.700(1), “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.” AIK Selective Self Insurance Fund v. Bush, 74 S.W.3d 251, 257 (Ky. 2002). See also AIK Selective Self Insurance Fund v. Minton, 192 S.W.3d 415 (Ky. 2006). However, pursuant to the most recent version, the employee’s “pro rata share” of legal fees and expenses must be deducted from the employer’s portion of any recovery.

In the Opinion on Remand, the ALJ addressed what portion of the civil settlement compensated Minix for pain and suffering, and therefore is not subject to subrogation. The ALJ apportioned the proceeds from the settlement as 1/3 to lost wages, 1/3 to medical expenses, and 1/3 to pain and suffering. On appeal, the parties do not dispute the allocation of 1/3, or \$8,333.33, of the \$25,000 settlement to pain and suffering. Likewise, the parties also do not dispute the ALJ’s calculation of the pro rata share of legal fees and expenses in the Order on Petition for Reconsideration. As noted above, the ALJ determined the pro rata share is 2/3 of the total legal fees and expenses, or $\$9,433.33 \times .6667 = \$6,289.20$.

The sole issue on appeal is whether the pro rata share of legal fees and expenses is deducted from the third party settlement amount or from the indemnity and medical expenses Advance had already paid at the time the ALJ issued the opinion and award.

KRS 342.700(1) effective July 14, 2018, provides for a pro rata deduction of legal fees and expenses incurred by the injured worker due to the third party action, precluding double recovery for any tangible damages incurred by the

injured worker. Because any recovery for pain and suffering in a third party action is unrelated does not replicate of workers' compensation benefits, such damages do not represent double recovery and are not subject to subrogation under KRS 34.700(1). AIK Selective Self Insurance Fund v. Minton, 192 S.W.3d at 417; Hillman v. American Mut. Liability Ins. Co., 631 S.W.2d 848 (Ky. 1982).

The proper method of calculating subrogation credit was previously addressed by the Kentucky Court of Appeals in Quillen v. Tru-Check, Inc., 2009-CA-000747-WC, 2009 WL 3337239 (Ky. App. 2009), an unpublished decision which is referenced for guidance. Like Minix, Quillen asserted a third party claim against a tortfeasor. In Quillen, the Court of Appeals affirmed the opinion of this Board:

The Board rejected Quillen's primary argument that Tru-Check was entitled to no subrogation credit because Quillen was not "made whole" by the third party settlement. However, the Board, *sua sponte*, determined the ALJ had incorrectly calculated the subrogation credit by subtracting the attorney's fee at the beginning of the calculation. The Board concluded:

[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 subro-gation 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.

Slip Op. at 2.

In Quillen v. Tru-Check Inc., Claim No 2008-99276, rendered March 27, 2009, this Board deducted those elements of damages from the civil settlement that were not duplicative of workers' compensation (e.g. pain and suffering) and then subtracted the legal fees and costs from that figure to calculate the Employer's subrogation credit. The use of this same analysis in determining a subrogation credit was affirmed by the Kentucky Supreme Court in Wells v. Wal-Mart Store, Inc., 2011 WL 287333, 2010-SC-000306 (Ky. 2011). The most recent version of KRS 342.700(1) does not alter this calculation method, with the exception of subtracting a pro rata share of the legal fees and costs rather than entire amount.

We determine the ALJ erred in calculating Advance's subrogation credit. Minix settled his third party tort claim for \$25,000.00. Of that amount, the ALJ excluded \$8,333.33 as damages for pain and suffering that are not subject to subrogation under KRS 324.700(1). Another 1/3, or \$8,333.33, is attributed to attorney fees from the \$25,000.00. There was an additional \$1,100.00 in expenses. The Total of the attorney fee and expenses in the tort claim was \$9,433.33.

The Total amount set forth for medicals and lost wages in the tort settlement is \$16,667.67. Of that amount, \$6,289.20 is attributed to the attorney fee

and expenses (reducing both the attorney fee and expenses by 1/3, presumed to be the pro rata share). Of this amount, \$10,377.47 remains for which Advance is entitled to credit pursuant to KRS 342.700(1).

The ALJ apparently erroneously deducted the pain and suffering amount and pro rata legal fees and expenses from the amount of TTD benefits and medical expenses already paid by Advance rather than from the settlement amount.

Accordingly, the September 9, 2020 Opinion, Award and Order on Remand and the October 13, 2020 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are **VACATED**. This matter is **REMANDED** for entry of an amended opinion calculating the subrogation credit in accordance with the direction herein provided.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON E SHANE BRANHAM
2452 SIR BARTON WAY, SUITE 101
LEXINGTON, KY 40509

COUNSEL FOR RESPONDENT:

LMS

HON JOHN C COLLINS
P O BOX 475
SALYERSVILLE, KY 41465

ADMINISTRATIVE LAW JUDGE:

LMS

HON CHRIS DAVIS
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601