RENDERED: AUGUST 20, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000031-WC

JOSEPH A. STURM — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 95-38048

CORNING CLINICAL LABORATORIES;
CORNING LIFE SCIENCES;
HONORABLE ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, MCANULTY, AND MILLER, JUDGES.

MILLER, JUDGE: Joseph Sturm appeals from a decision of the Workers' Compensation Board (Board) rendered December 4, 1998. We affirm.

On July 6, 1995, Sturm received a work-related back injury when the vehicle he was driving was rear-ended by a vehicle driven by third party, Daniel Stone. The accident

occurred while Sturm was performing his duties as a courier for Corning Clinical Laboratories (Corning). Consequently, he was off work for a short period of time and was paid temporary total disability (TTD) benefits from July 14, 1995, through August 17, 1995, by Corning's workers' compensation insurance carrier, Lumbermens Mutual.

On October 3, 1996, Sturm and his wife negotiated a settlement (the settlement) with Daniel Stone and his insurance carrier, Jefferson Insurance Group (Jefferson Insurance). In exchange for $38,000.00, the Sturms executed a release which reads in relevant part as follows:

> . . . I, Joseph and [T]awajo Sturm . . . for and in consideration of . . . ($38,000.00) . . . discharge Daniel Stone and Jefferson Insurance Group of and from any and all claims, actions, causes of actions, demands, rights, damages, costs, property damage, loss of wages, expenses, hospital medical and nursing expenses, accrued or unaccrued claims for loss of consortium, loss of support or affection, loss of society and companionship on account of or in any way growing out of, any and all known and unknown personal injuries and damages resulting from an automobile accident which occurred on or about 7/6/95, at or near I-65 south bound, KY.

Sturm noted on the release that the $38,000.00 was to be paid to him and, in addition, certain medical bills would be paid by Jefferson Insurance. Sturm was not represented by legal counsel in negotiating this settlement. Thereafter, Jefferson Insurance paid Lumbermens Mutual $6,208.75 for reimbursement of medical expenses and TTD benefits paid to Sturm.

On August 14, 1997, Sturm filed a claim for workers' compensation benefits pursuant to Ky. Rev. Stat. (KRS) Chapter 342. On January 12, 1998, Arbitrator Walter Bedford, Jr., issued a benefit review determination dismissing Sturm's claim and noting that Sturm had failed to comply with a request for information necessary to determine the applicability of KRS 342.700. Sturm requested a *de novo* review before an administrative law judge (ALJ).

In an opinion and award dated July 20, 1998, the ALJ found Sturm to be 12% occupationally disabled. He also found that Corning and the Special Fund were entitled to a "full dollar for dollar credit for all income and future medical expenses against the $38,000.00 settlement that the plaintiff negotiated on his own with the third party tortfeasor's insurance carrier." Sturm appealed to the Board, which, in turn, affirmed the ALJ's decision. This appeal followed.

In contravention of Ky. R. Civ. Proc. 76.12(4)(c)(iv), Sturm has failed to properly set forth his arguments in his brief. Nevertheless, we glean the following complaints: 1) that Corning's right of subrogation under KRS 342.700 could be pursued only through a separate civil action and 2) that the ALJ's apportionment of the $38,000.00 settlement was erroneous.

Sturm first contends that pursuant to KRS 342.700, Corning and the Special Fund were compelled to file a civil action to pursue their rights to subrogation. In essence, he maintains that it was error for the ALJ to adjudicate Corning's

and the Special Fund's subrogation rights and to grant a "set off" or "credit." KRS 342.700(1) reads 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 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 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 paid and payable to the injured employee,less the employee's legal fees and expense. The notice of civil action shall conform in all respects to the requirements of KRS 411.188(2). (Emphasis added.)

We believe the plain language of this statute merely allows an employer, its compensation carrier, or the Special Fund to seek indemnity from a third-party tortfeasor through a civil action. Such would be necessary in cases where the claimant has not secured a judgment, whether by jury verdict or settlement, against the third-party tortfeasor. In any event, our supreme court embraced such "statutory subrogation" in Mastin v. Liberal Markets, Ky., 674 S.W.2d 7 (1984). We, therefore, find no error in allowing the setoff of the workers' compensation award absent the filing of a civil action by the employer or Special Fund.

Sturm next charges that the ALJ erred in apportioning the full $38,000.00 settlement to those items also covered by workers' compensation benefits. Sturm contends the settlement was intended to cover only those items not covered by workers' compensation benefits. In his decision, however, the ALJ noted that the settlement neglected to delineate what portion of the $38,000.00 settlement corresponded to the different types of damages. He further determined that Sturm failed to prove that the settlement was for items not covered by workers' compensation benefits. Consequently, to ensure Sturm did not receive a double recovery, the ALJ granted Corning and the Special Fund a credit up to $38,000.00 for all income benefits and future medical expenses for which they were liable.

KRS 342.700 expresses a clear public policy against double recovery. Sturm fails to direct us to any evidence in the record indicating what portion of the $38,000.00 settlement was not duplicated by workers' compensation benefits. It has long been held that an appellate court will not search a record for evidence where no reference to the record is furnished. Ventors v. Watts, Ky. App., 686 S.W.2d 833 (1985). Furthermore, the settlement on its face is silent as to apportionment. We believe Sturm had the burden of proving apportionment of the settlement and that he failed to meet said burden. In sum, we cannot say the ALJ erred by apportioning the full $38,000.00 to damages which duplicate workers' compensation benefits. See Stacy v. Noble, Ky., 361 S.W.2d 285 (1962).

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lawrence E. Osterhage
Louisville, KY

BRIEF FOR APPELLEE CORNING:

William P. Swain
Mary Ann Kiwala
Louisville, KY

BRIEF FOR APPELLEE FUND:

Joel D. Zakem
Louisville, KY