RENDERED: OCTOBER 16, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000747-WC

JAMES QUILLEN — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-99276

TRU-CHECK, INC.;
HONORABLE HOWARD E. FRASER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

DIXON, JUDGE: James Quillen seeks review of a decision of the Workers' Compensation Board, which reversed in part and remanded an Administrative Law

Judge's opinion on the issue of subrogation credit for Quillen's former employer, Tru-Check, Inc. We affirm.

Quillen was involved in an automobile accident during the course of his employment with Tru-Check, a meter reading company. As a result, Quillen sustained a back injury that rendered him unable to continue his employment with Tru-Check. In April 2008, Quillen filed a claim for workers' compensation benefits against Tru-Check, and shortly thereafter, Quillen accepted a $50,000 settlement from Glenn Singleton, the driver responsible for the accident. The settlement agreement did not itemize damages, and after attorney's fees, Quillen's net recovery was $33,333.33.

Following an administrative hearing, the ALJ assigned Quillen a 5% impairment rating and awarded temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits, medical expenses, and vocational rehabilitation. The ALJ also granted Tru-Check a subrogation credit for its workers' compensation liability against the proceeds of Quillen's settlement. The ALJ concluded:

> For purposes of any jury award on April 3, 2008, the undersigned finds the damages, based on the proof submitted by the parties, would be the following:
>
> | | |
> |---|---|
> | Past wages | $ 7,871.25 |
> | Future wages | 11,309.68 |
> | Past medical expenses | 7,101.76 |
> | Pain and suffering | 30,000.00 |
> | | $56,282.69 |

> Of these elements of damages, the Defendant is only entitled to a credit for past wages, future wages, and past medical expenses out of the remaining amount available of $33,333.33, out of a total settlement amount of $50,000.00. Because the settlement amount of $50.000.00 is only 88.83726% of the damages found above, it is necessary to reduce each element of damages to be considered for subrogation purposes as follows:
>
> | | |
> |---|---|
> | Past wages | $ 6,992.64 |
> | Future wages | 10,047.20 |
> | Past medical expenses | 6,309.00 |
> | Pain and suffering | 26,651.16 |
> | | $50,000.00 |
>
> Moreover, because only $33,333.33, after subtraction of litigation expenses, is available for consideration of subrogation, it is also necessary to determine which portion of this remaining sum represents each of the element of damages as follows:
>
> | | |
> |---|---|
> | Past Wages | $ 4,661.76 (13.985% of $50,000.00) |
> | Future Wages | 6,698.13 (20.094% of $50,000.00) |
> | Past Medical Exp | 4,206.00 (12.618% of $50,000.00) |
> | Pain and Suffering | 17,767.44 (53.302% of $50,000.00) |
> | | $33,333.33 |
>
> Based on these calculations, the undersigned finds that the Defendant is entitled to a subrogation credit of $11,360.49 toward the TTD awarded above. As to past medical expenses, the undersigned finds that the Defendant is entitled to a subrogation credit of $4,206.00. Because pain and suffering is not an element of damages recoverable in a workers compensation claim, no subrogation credit is permitted for the $17,767.44 representing the pain and suffering portion of the remaining settlement proceeds of $33,333.34.

Both Quillen and Tru-Check filed petitions for reconsideration with the ALJ. The ALJ denied Quillen's petition challenging the subrogation credit,

and the ALJ granted Tru-Check's petition relating to an offset against PPD benefits. Thereafter, Quillen appealed to the 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 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.

Quillen thereafter filed this petition for review. Quillen does not challenge the Board's *sua sponte* finding regarding attorney's fees; rather, he argues Tru-Check was not entitled to any subrogation credit pursuant to the "made

whole" rule. Quillen further contends the Board erroneously calculated pain and suffering and lost wages.

When this Court reviews a workers' compensation decision, our function is to correct the Board only where we believe "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Kentucky Revised Statutes (KRS) 342.700(1) states in relevant 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 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.

Quillen asserts he was entitled to be "made whole" by the settlement proceeds before Tru-Check was entitled to a subrogation credit. As a result,

Quillen contends Tru-Check was precluded from receiving any credit because Quillen's civil damages exceeded the total value of the settlement.[1] We disagree.

The "made whole" rule was adopted in *Wine v. Globe American Cas. Co.*, 917 S.W.2d 558 (Ky. 1996), and thereafter made applicable to workers' compensation cases in *Great American Ins. Companies v. Witt*, 964 S.W.2d 428 (Ky. App. 1998). The *Witt* Court concluded, "KRS 342.700(1) merely establishes a right of subrogation to the carrier. The statute does not make any reference to priority of rights between the injured employee and the workers' compensation insurance carrier." *Id*. at 430. Accordingly, the Court held that the "made whole" rule applied, giving priority to the injured worker to recover damages from a third party tortfeasor, thereby making the worker "whole" before the employer was entitled to a subrogation credit. *Id*.

As Quillen points out, the "made whole" rule was also applied in the subsequent cases of *Whittaker v. Hardin*, 32 S.W.3d 497, 499 (Ky. 2000), and *Davidson v. Travelers Ins. Co.*, 56 S.W.3d 457, 459-60 (Ky. App. 2001), to preclude a subrogation credit until the injured workers recovered all of their damages.

Pursuant to *Witt*, Quillen asserts that he was entitled to keep his entire settlement because his damages exceeded $50,000.00; consequently, he was not "made whole," and Tru-Check was entitled to nothing. Quillen opines his case

[1] Quillen cites his total civil damages as $56,282.69, pursuant to the ALJ's initial calculation.

turns on the theory that an injured worker is entitled to priority over the subrogee when the pool of available funds cannot fully compensate the injured worker.

However, in *AIK Selective Self Ins. Fund v. Bush*, 74 S.W.3d 251 (Ky. 2002), the Kentucky Supreme Court overruled *Witt*, holding:

> 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 257.

We find the mandate of *Bush*, *supra*, to be clear, and we are not persuaded by Quillen's attempt to distinguish *Bush* from the case at bar. Furthermore, based upon our review of the record, we believe Quillen is mistaken

that his civil damages exceeded his settlement. *Bush*, *supra*, is illustrative on this point. The claimant in *Bush* recovered 25% of his total damages from the third party tortfeasor, and he was precluded from recovering the remaining 75% because it was apportioned to the negligence of his employer. *Id*. at 256. The Court noted,

> Bush's reduced recovery is not due to the tortfeasor's inability to pay the judgment ([the tortfeasor] has satisfied the judgment in full), but to the fact that the law does not permit him to recover a judgment for the full amount of the damages he sustained. As would have been the case if his judgment had been reduced because of his own contributory fault . . ., Bush's judgment was reduced because, by law, he cannot recover that portion of the judgment attributable to the negligence of his employer.

Id. (citations omitted).

Similarly, Quillen's recovery was reduced because he chose to accept a $50,000.00 settlement for his civil claim, rather than proceed to trial. Although the ALJ initially allocated damages totaling $56,282.69, the ALJ properly reduced each element of damages proportionally to equal $50,000.00, as that was the value of Quillen's settlement.[2]

Quillen also relies on the most recent case to mention the "made whole" rule, *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415 (Ky. 2006). In *Minton*, *supra*, the Kentucky Supreme Court addressed the proper allocation of attorney's fees in the context of subrogation credit to a workers' compensation insurance carrier. *Id*. The Court concluded that the insurer could

[2] Quillen did not challenge the ALJ's reduction of damages.

not claim "an additional subrogation credit from the tort award unless the employer/insurer's subrogation claim is greater than the costs incurred to pursue the tort award." *Id*. at 419. In concluding a worker has priority to recover attorney's fees before the subrogee is entitled to credit, the Court noted: "The conditional right to subrogation authorized under KRS 342.700(1) merely recognizes and codifies this underlying principle of the 'made whole' doctrine." *Id*.

Despite Quillen's argument to the contrary, we do not believe the *Minton* Court's brief discussion resurrects the "made whole" rule enunciated in *Witt*, *supra*, as it was explicitly overruled by *Bush*, *supra*.[3] After thorough consideration, we conclude the Board did not err by finding the "made whole" rule inapplicable to the case at bar.

Quillen also disputes the Board's calculation of pain and suffering and lost wages. As to pain and suffering, Quillen asserts that the Board erroneously utilized the figure of $26,651.16, rather than $30,000.00. After reviewing the record, we conclude $26,651.16 was the proper allocation due to the ALJ's proportional reduction of all damages to equal $50,000.00. We note that Quillen failed to raise any alleged error with the ALJ at the time the factual finding was

[3] In *Minton*, Justice Cooper filed a concurring opinion noting that he did "not agree with the unnecessary dictum that suggests that KRS 342.700(1) codifies any principle of the so-called 'made whole' doctrine. [ ] 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." *Minton*, 192 S.W.3d at 420 (Cooper, J., concurring).

rendered. As the issue was not preserved for our review, we need not address it further.

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.

For the reasons stated herein, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Frank M. Jenkins, III Lexington, Kentucky	Timothy J. Walker Lexington, Kentucky