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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2013-CA-000480-WC

ASTRA ZENECA

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-09-73052

ANGELA SPADY; HON. STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

AND

NO. 2013-CA-000613-WC

ANGELA SPADY

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-09-73052

ASTRA ZENECA; HON. STEVEN G. BOLTON,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

CROSS-APPELLEES

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART,  
AND REMANDING

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

NICKELL, JUDGE: Astra Zeneca petitions for review of an opinion of the Workers' Compensation Board (Board) affirming in part, vacating in part, and remanding the opinion and order of the Administrative Law Judge (ALJ). Angela Spady (Spady) cross-appeals. Having reviewed the record, we affirm in part, reverse in part, and remand for additional proceedings.

Spady began working for Astra Zeneca as a sales representative in April 2009. On November 5, 2009, she was involved in a motor vehicle accident in the course and scope of her employment. As a result of the accident, Spady sustained a right shoulder injury and developed Complex Regional Pain Syndrome (CRPS) of the right upper and lower extremities. She also developed depression and anxiety.

Spady applied for workers' compensation benefits on October 20, 2010. She also filed a civil action in the Pike Circuit Court against a third-party tortfeasor. While her workers' compensation claim was pending, Spady settled her civil claim with the third-party tortfeasor. The record contains two documents regarding the civil settlement. The settlement agreement and release executed on June 6, 2011, reflected a settlement amount of \$850,000. A June 12, 2011, settlement distribution form indicated attorney's fees, expenses, and reimbursement of a \$36,686.40 long term disability (LTD) lien were deducted from settlement proceeds of \$840,000. The settlement distribution form also

indicated Spady's insurance carrier had paid her \$10,000 in personal injury protection (PIP) benefits, and that a corresponding \$10,000 included in the settlement she received from the third-party tortfeasor's insurance carrier would be held in trust for reimbursement of the resulting PIP lien, which she would attempt to negotiate to a lesser amount.

On July 14, 2012, the original ALJ issued an opinion, award, and order. The ALJ determined Spady developed CRPS and psychiatric injuries as a result of the accident, and found her permanently totally disabled. The ALJ considered whether Astra Zeneca was entitled to a subrogation credit from the civil settlement proceeds. Because the settlement agreement did not apportion damages, the ALJ apportioned \$840,000<sup>1</sup> as follows: \$336,000 to pain and suffering; \$29,854.90 to past medical expenses; \$100,000 to past lost wages; \$350,000 to future lost wages; and \$24,845 to future medical expenses. The ALJ found Astra Zeneca's subrogation claim to be \$73,525.05 based on the total amount of benefits paid, including past medical expenses and temporary total disability (TTD) benefits. The ALJ further found Spady was entitled to deduct her civil legal fees and expenses, totaling \$320,360.49, from Astra Zeneca's subrogation claim. Finding the legal fees and expenses exceeded Astra Zeneca's subrogation claim, the ALJ determined Astra Zeneca was not entitled to any subrogation credit. The

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<sup>1</sup> The ALJ excluded \$10,000 for PIP reimbursement, although he did not specify he was doing so in the order.

ALJ assessed interest at a rate of 12% on past due benefits pursuant to KRS<sup>2</sup> 342.040(1).

The parties filed petitions for reconsideration alleging various errors. On August 30, 2012, the subsequent ALJ issued an order on the petitions. He reduced the net settlement amount to \$803,313.60 to account for the \$36,686.40 LTD lien, and corrected the amount of past medical benefits paid to \$43,940.15. The ALJ found no error in the decision to completely offset Astra Zeneca's subrogation credit.

Astra Zeneca appealed to the Board, and Spady cross-appealed. On February 8, 2013, the Board issued an opinion affirming in part, vacating in part, and remanding. The Board affirmed the ALJ's finding of permanent total disability (PTD). In evaluating Astra Zeneca's subrogation claim, the Board calculated past benefits paid by Astra Zeneca by multiplying the weekly benefit amount of \$694.30 by the number of weeks elapsed from the beginning of Spady's award to the date of the civil settlement, totaling \$57,428.53. The Board agreed with the ALJ's holding that because the \$100,000 apportioned to past lost wages exceeded the employer's \$57,428.53 liability and this excess was not duplicative of workers' compensation benefits, Astra Zeneca was not entitled to a credit for this amount. As such, the Board deducted \$42,571.48 from the available settlement proceeds as excess settlement allocation for past lost income. The Board further

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<sup>2</sup> Kentucky Revised Statutes.

held the ALJ properly deducted Spady's LTD and PIP reimbursement. The Board calculated the available subrogation credit as follows:

Total settlement proceeds:	\$850,000.00
PIP	-\$10,000.00
LTD lien	-\$36,686.40
Pain and suffering	-\$336,000.00
Non-duplicative past lost income	-\$42,571.48
Attorney fees	-\$280,000.00
Expenses	<u>-\$40,360.49</u>
Subrogation credit	\$104,318.63

The Board further held Astra Zeneca was not entitled to a subrogation credit until the amount of benefits paid equaled or exceeded \$320,360.49, the amount of the attorney's fees and expenses incurred in the civil claim. This appeal and cross-appeal follow.

The function of this Court when reviewing a workers' compensation case is to correct the Board only when we perceive the Board has overlooked or misconstrued controlling statutes or precedent, or has committed an error in assessing the evidence so flagrant as to cause gross injustice. *See Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

KRS 342.700(1), granting a workers' compensation insurance provider a right of recovery against a third-party tortfeasor for liability it incurs on behalf of an injured worker, provides, in pertinent part, 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 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.

As an initial matter, we address a calculation error made by the ALJ affecting the apportionment of settlement funds. Whether an ALJ's award conforms with Chapter 342 is a question of law and can be resolved even if not properly raised on appeal. *Whittaker v. Reeder*, 30 S.W.3d 138, 144-45 (Ky. 2000); *Twin Resources LLC v. Workman*, 394 S.W.3d 417 (Ky. App. 2013). In apportioning \$840,000 in settlement proceeds pursuant to his authority under KRS 342.325, the original ALJ incorrectly allocated \$29,854.90 to past medical expenses. The subsequent ALJ thereafter issued an order reflecting the correct amount of past medical expenses, \$43,940.15. However, the remaining apportioned damages were not modified to account for the extra amount allocated to past medical expenses. In other words, in order for the ALJ to correctly add \$14,085.25 to the apportioned medical expenses, a like amount would necessarily have had to have been deducted from other apportioned figures. As a result of this

error, as it stands, the currently apportioned amounts do not equate to the \$840,000 settlement proceeds. Therefore, because of the modification to apportioned past medical expenses, we remand this matter to the ALJ to reapportion all elements of damages to reflect the \$840,000 settlement proceeds.

Next, both Astra Zeneca and Spady argue the Board erred in calculating past lost wages as of the date the civil settlement agreement was signed. They argue the Board should have calculated the amount of past lost wages as of the date the ALJ entered the original decision awarding benefits. We agree.

When the Board addressed accrued past lost wages, it calculated the amount of TTD and PTD benefits payable through the date of the settlement agreement as \$57,428.53. Instead, the Board should have used the date of the ALJ's original order as the basis for determining past lost wages, since this was the date Astra Zeneca was actually ordered to pay benefits. Any benefits payable up to that date, logically, would be classified as past benefits. On July 14, 2012, the ALJ ordered Astra Zeneca to pay Spady PTD benefits of \$694.30 per week beginning November 6, 2009, continuing so long as she remained totally disabled. As such, the correct amount of past benefits accrued to the date of the ALJ's order was \$97,301.18.<sup>3</sup>

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<sup>3</sup> One hundred and forty and one-seventh weeks elapsed from November 6, 2009, to July 14, 2012.

Next, Astra Zeneca argues the ALJ and the Board erred in excluding \$10,000 in PIP reimbursement from the available settlement proceeds. In reducing settlement proceeds for PIP reimbursement, the Board held the ALJ properly excluded this \$10,000 PIP amount because Spady paid for PIP coverage and is entitled to the benefit from this collateral source. On appeal, Astra Zeneca argues the Board erred in excluding this amount because there is no evidence Spady paid for the PIP insurance policy, and no evidence the PIP carrier has taken any steps to assert a lien against Spady's \$10,000 recovery.

PIP is also referred to as basic reparations benefits (BRB) and courts have used the terms interchangeably. *Samons v. Kentucky Farm Bureau Mut. Ins. Co.*, 399 S.W.3d 425, 428 (Ky. 2013). These are "benefits providing reimbursement for net loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle." KRS 304.39-020(2). Spady's civil settlement distribution form reads:

PIP – Gallagher Bassett Services, Inc. \$10,000.00 was paid by the PIP Carrier for excess wage loss benefits. In the Settlement Agreement, Angela Spady agreed to be responsible for reimbursement of this PIP lien. Nationwide Agribusiness has agreed to send an additional check in the amount of \$10,000.00 which has not been received. Upon receipt of this check, it will be held in our Trust Account pending resolution of this lien. While we will try to negotiate the amount of this lien to a lesser amount, there is no guarantee that we will be able to do so.



Aside from the settlement distribution form, the record contains no additional information regarding PIP benefits.<sup>4</sup> It is unknown whether Spady was ever successful in negotiating the lien to a lesser amount.

We hold the Board erred in reducing the available settlement proceeds by \$10,000 for PIP reimbursement. In *Jefferson County Bd. of Educ. v. Cowles*, 982 S.W.2d 224 (Ky. App. 1998), a workers' compensation insurance carrier (employer) filed a claim against a third-party tortfeasor pursuant to KRS § 342.700 seeking subrogation of benefits it paid to the injured employee. The employee also filed a lawsuit against the tortfeasor, and the two cases were consolidated. The tortfeasor moved for a \$10,000 credit against the employer's subrogation claim to account for BRB benefits, arguing the employer should not be entitled to recover this amount because the injured employee would not be entitled to this amount. This Court disagreed, holding the employer was entitled to recover the first \$10,000 in benefits it paid to an employee from the third-party tortfeasor and its subrogation right should not be reduced for BRB. *Id.* at 226. Otherwise, the Court explained, "[the employer], an innocent party, would be forced to assume that responsibility." *Id.* at 227.

Similarly, Astra Zeneca should not assume responsibility for the PIP reimbursement by having its subrogation credit diminished by \$10,000, regardless of whether Spady has repaid or kept this amount. A PIP carrier has a claim for

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<sup>4</sup> Based on the information on the form, it appears Spady's PIP carrier paid \$10,000 to Spady and asserted a lien. \$10,000 from the tortfeasor's settlement was to be held in trust pending resolution of the lien.

reimbursement of PIP benefits paid from the third party tortfeasor. *Carta v. Dale*, 718 S.W.2d 126, 128 (Ky. 1986). Here, the parties in the civil case arrived at an agreement whereby the tortfeasor assumed responsibility for the first \$10,000 of benefits by designating this amount from the settlement proceeds to be reimbursed to the PIP carrier. Reducing Astra Zeneca's subrogation credit by \$10,000 would wrongly transfer responsibility for this amount to Astra Zeneca.

Furthermore, while we agree with Astra Zeneca—there is no evidence in the record of whether Spady paid for the PIP insurance policy—we hold it does not matter who paid for the policy for purposes of evaluating whether Astra Zeneca's subrogation credit should be reduced for PIP. The effect of PIP, regardless of the source of its funding, is to compensate Spady for excess wage loss benefits. Contrary to the Board's holding, the common law collateral source rule is superseded by the Act, which gives Astra Zeneca a statutory right of subrogation. *Krahwinkel v. Commonwealth Aluminum Corp.*, 183 S.W.3d 154, 160 (Ky. 2005).

Next, Astra Zeneca argues the ALJ and Board erred by reducing the available settlement funds by \$36,686.40 due to a LTD lien. Astra Zeneca argues there was no evidence presented regarding the LTD policy or the basis for this payment being made from settlement proceeds. Astra Zeneca further argues Spady will receive a double recovery if it is not allowed to claim a credit. The only information of record regarding this LTD lien is on the settlement distribution form indicating total settlement proceeds were reduced by \$36,686.40 due to "Met Life

Recovery – LTD Reimbursement.” It is unknown whether this amount is being held in trust, or whether Met Life Recovery was directly reimbursed. Regardless, we hold the Board properly reduced Astra Zeneca’s subrogation credit for LTD reimbursement.

In *American Standard v. Boyd*, 873 S.W.2d 822 (Ky. 1994), our Supreme Court held an employer’s entitlement to workers’ compensation credit for an award of LTD pension benefits depends upon proof of several factors, “including, but not limited to, unilateral funding by the employer, duration and conditions of plan coverage, and whether the plan contains its own internal off-set provisions.” *Id.* at 823. As the purpose for allowing workers’ compensation credit is to avoid double recovery, the Supreme Court held it is fundamental to have a finding that the plan in question actually fulfills the same purpose as workers’ compensation benefits. *Id.* The party asserting entitlement to a credit is responsible for putting forward evidence to support its position. *Id.*

In the instant matter, Spady concedes the LTD policy through Met Life Recovery was funded by the employer. However, Spady argues Astra Zeneca never put forth evidence or sought credit for the LTD payments while the workers’ compensation claim was in litigation, and allowing Astra Zeneca a subrogation credit for funds Spady did not keep would create an unfair windfall. We agree, and hold Astra Zeneca is not entitled to credit for the LTD payments.

Although it is unclear from the record whether the LTD carrier has been reimbursed for the benefits, these funds were withheld from the settlement

proceeds. If Astra Zeneca wanted credit for these funds, it should have put forth evidence addressing the factors discussed in *American Standard*. As there is no evidence in the record regarding the terms and conditions relative to the LTD benefits, it is impossible to determine whether the plan fulfills the same purpose as workers' compensation benefits. Therefore, we hold the Board properly reduced the available settlement funds by \$36,686.40.

Next, Astra Zeneca argues statutory interest on past due benefits assessed by the ALJ should be included in calculating its subrogation credit. We disagree. Astra Zeneca cites no authority in support of its argument that interest payments are entitled to subrogation credit. KRS 342.700(1) grants a subrogation right for *compensation* payable by an employer, but an interest payment is not compensation. Rather, interest would be an avoidable penalty assessed only if Astra Zeneca failed to pay timely benefits. As such, Astra Zeneca is not entitled to a subrogation credit for interest payments.

Astra Zeneca argues the Board erred in reducing the available settlement proceeds by \$42,571.48 for non-duplicative past lost income. Astra Zeneca claims the available proceeds should not be reduced for past lost income because Spady is not entitled to be "made whole." In addition, Astra Zeneca argues any excess amount allocated to past lost wages should be credited to future lost income because the ALJ's award of future benefits will exceed the amount allocated to future lost wages, \$350,000.

Because we are remanding this matter for the ALJ to reapportion the settlement proceeds, we decline to address Astra Zeneca's arguments regarding an excess allocation for past lost wages. After the ALJ recalculates past lost wages, there may be no excess, rendering this issue moot.

Lastly, in her cross-appeal, Spady argues the Board erred by failing to find the subrogation credit completely offset by legal fees and expenses pursuant to KRS 342.700(1). Spady claims since the total benefits subject to subrogation due at the time of the ALJ's decision is less than the total legal fees and expenses of \$320,360.15, Astra Zeneca is not entitled to any subrogation credit. We disagree.

Spady's argument in favor of completely offsetting legal fees and expenses ignores the fact that Astra Zeneca is entitled to credit for the payment of future lost wages and medical expenses. Astra Zeneca may, in the future, pay benefits in excess of Spady's legal fees and expenses. We hold the Board properly accounted for attorney's fees and expenses—\$320,360.49 in total—by deducting this amount of available settlement funds. Further, the Board properly accounted for the continuing payment of future lost wages and medical expenses by holding Astra Zeneca was not entitled to a subrogation credit until the amount of benefits paid equals or exceeds Spady's attorney's fees and expenses.

The opinion of the Board is affirmed in part, vacated in part, and remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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