STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL P. HUGHES,

Plaintiff-Appellant,

v

SHEPLER, INC.,

Defendant-Appellee,

and

CNA TRANSPORTATION INSURANCE COMPANY,

Lien Claimant-Appellee.

UNPUBLISHED
October 26, 2010

No. 293354
Mackinac Circuit Court
LC No. 07-006370-NO

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order placing a $98,487 lien on his $230,000 settlement recovery in plaintiff's admiralty lawsuit against defendant Shepler, Inc. Plaintiff had received $98,487 in state workers' compensation benefits from appellee CNA Transportation Insurance Company (CNA) that never should have been awarded, and this formed the basis for the lien claimed by CNA. We affirm in part and reverse and remand in part.

Plaintiff injured his right shoulder while moving a loaded luggage cart during the course of his employment as a senior deckhand aboard a vessel owned by Shepler that ferries people between Mackinac Island and the mainland. Shepler's workers' compensation carrier, CNA, paid plaintiff benefits for wage loss and medical expenses totaling $98,487. While receiving workers' compensation benefits, plaintiff filed an admiralty suit against Shepler pursuant to the Merchant Marine Act, 46 USC 30104, commonly referred to as the Jones Act. Under the Jones Act, if a seaman becomes ill or injured while in the service of a ship, he or she is entitled to "maintenance and cure," i.e., a per diem living allowance and payment of medical costs. *Szopko v Kinsman Marine Transit Co*, 426 Mich 653, 657; 397 NW2d 171 (1986). Recovery of maintenance and cure "is not based on fault and is analogous to workers' compensation." *Id.* Further, a seaman can sue under the Jones Act on the basis of a vessel's unseaworthiness and pursuant to a standard negligence theory seeking damages for personal injury. *Id.* at 657-658.

Here, plaintiff sued Shepler for maintenance and cure, for damages based on breach of the duty of seaworthiness, and for damages based on negligence. The admiralty suit was defended by Shepler's admiralty insurer, North American Specialty Insurance Company (North American). Plaintiff's admiralty complaint alleged that plaintiff was a seaman and was acting as such when he was injured; therefore, "he [was] not entitled to land based workers compensation." The admiralty complaint, with respect to the maintenance and cure count, also alleged:

> The Plaintiff is entitled to maintenance at $50.00 per day from the date of his injury and until it is medically determined that he has reached a point of maximum cure, *subject to a credit to the Defendant or its insurance company for all compensation payments made to or on behalf of the Plaintiff arising out of this accident.* [Emphasis added.]

As part of the count, plaintiff also requested the payment of medical expenses arising out of the treatment of his injuries until it is medically determined that plaintiff has reached the point of maximum cure.

The trial court denied a motion for summary disposition filed by Shepler, finding that plaintiff was indeed a seaman for purposes of the Jones Act. Thereafter, the settlement agreement and release was executed whereby North American, on behalf of Shepler, agreed to pay plaintiff $230,000 and plaintiff agreed to release and discharge Shepler and North American from any and all claims. The settlement agreement and release further provided:

> This Release, on the part of the Claimant shall be a fully binding and complete settlement between the Claimant, the Insured [Shepler], and the Insurer [North American], their assigns and successors, save only the executory provisions of this Settlement Agreement. The Claimant and the Parsons Ringsmith Law Firm, agree[] to defend, indemnify and hold the Insured and the Insurer harmless from and against all such claims, demands, obligations, actions, causes of actions, damages, costs and expenses arising from any claims from third parties, including, *but not limited to the Workers' Compensation Lien asserted by CNA* . . . . Furthermore, Claimant and the Parsons Ringsmith Law Firm agree that the Settlement check shall not be dispersed . . . until the Insured and the Insurer receive proof that an agreement has been reached with the aforementioned lien claimant. *In the alternative, the parties agree to allow partial disbursement of the settlement proceeds so long as Claimant's attorney escrows the total amount of the Workers Compensation claimed lien.* The Escrow will be released when the insured and the insurer receive written verification of an agreement with the aforementioned lien claimant. [Emphasis added.]

According to CNA, it first became aware of plaintiff's admiralty suit when counsel for North American requested CNA's records regarding plaintiff's workers' compensation claim and benefits. Shortly thereafter, CNA filed a notice of dispute with the Workers' Compensation Agency, indicating that jurisdiction for compensation payments rested solely under the Jones Act. Subsequently, CNA filed a notice of lien in the admiralty suit, wherein it asserted a right to a lien in the amount of $98,487 against any recovery by plaintiff against Shepler in order for CNA to recover the workers' compensation benefits it paid to plaintiff. The settlement

agreement and release was later executed, and plaintiff then filed a motion to resolve the issue of CNA's claimed lien. The trial court ruled that CNA was entitled to the full recovery of the $98,487 pursuant to a lien against the settlement, which was necessary to avoid a double recovery.

On appeal, plaintiff contends that the trial court erred in allowing CNA to maintain the lien against the settlement amount based on the workers' compensation benefits paid by CNA, where the Jones Act settlement recovery already reflected or took into account a reduction equal to the $98,487 lien. Plaintiff also asserts that the trial court erred in allowing the lien, where there is no statutory support for the lien under the Workers' Disability Compensation Act (WDCA), MCL 418.1 *et seq*., where MCL 418.827(5), which allows a carrier to recover payments out of a judgment obtained by an employee, is only implicated when the suit was against a third party (not employer), and where the trial court improperly relied on public policy grounds. Next, plaintiff argues that, under MCL 418.833(2), CNA was only permitted to recoup workers' compensation benefits paid to plaintiff within one year of CNA's efforts to recoup the payments. Finally, plaintiff contends that, because CNA benefitted from the admiralty suit, CNA should be ordered to share in the costs borne by plaintiff in pursuing that action.

We find that *Thick v Lapeer Metal Products Co*, 419 Mich 342; 353 NW2d 464 (1984), governs this appeal. In *Thick, id.* at 345-346, our Supreme Court, noting the issue presented and reciting the facts, stated:

> At issue in this case is whether a non-settling insurance carrier in a workers' compensation case may offset its liability by the amount of the settlement paid by a second carrier for injuries determined to be covered solely by the non-settling carrier. Both the Workers' Compensation Appeal Board and the Court of Appeals refused to allow such a credit, and the non-settling carrier appeals. We reverse.
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> Plaintiff Marilyn B. Thick suffered a lower back injury in April, 1969, while employed by defendant Lapeer Metal Products Company. The injury necessitated disc surgery and resulted in some time off work as well as a change in work assignment until December 7, 1973, when she experienced a sharp back pain. Plaintiff has not returned to work since that date.
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> Defendant Lapeer was insured by two carriers successively during the period relevant to plaintiff's claim. Defendant Transamerica Insurance Group insured Lapeer for workers' compensation claims accruing up to and including June 30, 1969, at which time Great American Insurance Company took over the risk. Great American is not a party to this action.
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> In March, 1974, plaintiff filed a petition for benefits arising from her back condition, naming her employer Lapeer and both carriers as defendants. Before hearing, Great American agreed to settle its potential liability by paying plaintiff $20,000. The record of the hearing of approval of the redemption agreement establishes that the hearing referee clarified the settlement as eliminating only the employer's *post-June 30, 1969,* liability (*i.e.,* that insured by Great American) for

> plaintiff's condition and that any pre-existing liability remained unresolved. The hearing then proceeded against the remaining defendants, Lapeer and Transamerica, as to prior liability.
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> In short, both the hearing referee and the WCAB found plaintiff's back condition to be solely attributable to her earlier April, 1969, injury. Accordingly, Transamerica was held liable for the full amount of benefits owed from that date forward. The Court of Appeals affirmed, agreeing with the WCAB that Transamerica was not entitled to a credit for the $20,000 settlement paid by Great American. Transamerica appeals, challenging the denial of credit as well as the lower courts' determination that plaintiff's condition is solely attributable to the April, 1969, injury. [Emphasis in original.]

The *Thick* Court held that the judgment against the non-settling carrier had to be reduced *pro tanto* by the settlement amount to the extent that the settlement was in satisfaction on the same claim. *Id.* at 347. The Court found "the conclusion inescapable that the settlement for the later injury [was] necessarily subsumed by the award for all injuries, and therefore . . . Transamerica [was] entitled to a credit for the settlement amount." *Id.* at 348. As part of its reasoning, the Court stated:

> The fundamental principle underlying workers' compensation is full compensation for injuries sustained. Equally clear is the proposition that workers' compensation law does not favor double recovery. See *Stanley v Hinchliffe & Kenner*, 395 Mich 645, 657-659; 238 NW2d 13 (1976); *Cline v Byrne Doors, Inc*, 324 Mich 540, 554-559; 37 NW2d 630 (1949). In *Stanley*, *supra*, the petitioner sought compensation benefits from his Michigan employer after having already received benefits for the same injury from his previous California employer. There we applied the foregoing principle to allow the Michigan employer credit for the benefits received in California. [*Thick*, 419 Mich at 347.]

Although *Thick* addressed a factual scenario where a carrier sought an offset against an award it owed to an employee, and here CNA sought a lien against the settlement amount to be paid to plaintiff, the underlying principle against double recovery applies equally in both instances.[1] Indeed, plaintiff essentially recognized the potential of a double recovery when he filed the admiralty suit and requested maintenance and cure, where the complaint indicated that any award entered against Shepler or North American needed to be "subject to a credit . . . for all compensation payments made to or on behalf of the Plaintiff arising out of th[e] accident." The end result in *Thick* was that the plaintiff there received less than the final award because of the earlier $20,000 settlement payment that was offset against the award, and the end result in the

[1] We recognize plaintiff's argument that there is no double recovery because the settlement took into consideration the $98,487 already paid to plaintiff and was reduced accordingly. For the reasons stated below, we reject this argument.

case at bar will be that plaintiff will not receive the full $230,000 settlement because of the earlier payments made by CNA. There are no relevant differences between *Thick* and the instant case, such that we can distinguish *Thick* and ignore its principles.

We appreciate plaintiff's argument that the WDCA does not have a provision specifically authorizing the lien imposed in this case, and we recognize that MCL 418.827[2] does not apply because the admiralty suit was brought against plaintiff's employer, Shepler, and not a third party. See *Taylor v Second Injury Fund*, 234 Mich App 1, 16; 592 NW2d 103 (1999) ("MCL 418.827[5] . . . grants employers and carriers . . . a lien on any third-party recovery for the same injury for which worker's compensation benefits have been paid"). However, in *Thick*, the Court also recognized that the WDCA "does not speak to the precise issue raised by the case at hand." *Thick*, 419 Mich at 349. The Court found that the WDCA, while not providing for crediting, also did not forbid crediting under the circumstances, and that the principles flowing from the WDCA provided "persuasive support for application of a rule to prevent double recovery for what are in fact the same injuries." *Id.* at 350. The Court stated that it was not within the meaning or spirit of the WDCA to allow double compensation by refusing to give credit for compensation paid for the same accident. *Id.* at 350 n 5. Accordingly, we are bound by *Thick* to apply the principle that disallows double recovery in workers' compensation cases.

With respect to whether plaintiff actually obtains a double recovery if plaintiff were permitted to keep the full $230,000 settlement amount and the $98,487 already received, we find that there would be a double recovery. This issue necessarily overlaps plaintiff's argument that the prior compensation payments of $98,487 made by CNA were already taken into account in arriving at the $230,000 settlement recovery under the Jones Act. Plaintiff is essentially

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[2] MCL 418.827 provides in relevant part:

> (1) Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section. . . .
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> (5) [A]ny recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery . . . .

claiming that he was entitled to $328,487 in compensation, but willingly accepted a settlement for $230,000 because he already had received the $98,487. In support of his argument, plaintiff cites *Smith v Secure Contracting, Inc*, 236 F Supp 492 (ED La, 1964), and *Benders v Bd of Governors*, 728 F Supp 839 (RI Dist Ct, 1990).

Assuming the correctness, for the most part,[3] of plaintiff's position concerning the principles emanating from *Smith* and *Benders*, there is nothing in the record here, including the settlement agreement and release, supporting the contention that the $230,000 settlement amount reflected consideration of and reduction by the $98,487 already paid to plaintiff. Indeed, the settlement agreement and release reflects the contrary. Plaintiff agreed to defend, indemnify, and hold harmless Shepler and North American "from and against all such claims, demands, obligations, actions, causes of actions, damages, costs and expenses arising from any claims from third parties, including, but not limited to the Workers' Compensation Lien asserted by CNA[.]" Furthermore, the parties agreed to allow early partial disbursement of the settlement proceeds, but only if plaintiff's attorney "escrow[ed] the total amount of the Workers Compensation claimed lien." The settlement agreement language contemplates CNA proceeding against Shepler and/or North American to collect the $98,487, in which case plaintiff could become obligated to indemnify and hold harmless Shepler and North American. If plaintiff truly proceeded on the basis that the $230,000 settlement amount took into consideration the payments already made by CNA, it would somewhat defy logic to then agree to potentially be held liable for what would essentially be an "additional" $98,487, plus all the costs associated with mounting a defense to a suit brought by CNA against Shepler and/or North American. In fact, Shepler and North American were not even prepared to make an early partial settlement payment without the $98,487 being placed into escrow. We conclude that the $230,000 settlement amount had not been decreased to said amount after taking into account the payments made by CNA to plaintiff.[4]

Because plaintiff's admiralty suit included a claim for maintenance and cure, which is analogous to a claim for workers' compensation benefits, *Szopko*, 426 Mich at 657, and because the settlement agreement does not delineate between maintenance and cure payments and

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[3] Contrary to plaintiff's assertion, the *Benders* court did not hold that an admiralty settlement is "deemed" to have included a reduction for erroneously paid worker's compensation benefits; rather, the court expressly found that the parties to that particular settlement had taken into account the worker's compensation payments when settling the lawsuit. Such is not the case here as explained below.

[4] We recognize that this was a settlement and that, in all likelihood, the $230,000 reflected a compromise between the amount plaintiff believed he was entitled to and the amount, if any, that Shepler and North American believed that plaintiff deserved. Nonetheless, there is no indication that the presumed compromise took into account the lien claimed by CNA; rather, the opposite is true, considering the language in the settlement agreement and release.

damages relative to what comprised the $230,000 settlement agreement, we hold that CNA is entitled to a lien in order to prevent a double recovery by plaintiff.

Nevertheless, CNA's lien is necessarily subject to the limitations set forth in MCL 418.833(2), which provides:

> When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than 1 year prior to the date of taking such action.

This provision is a "statute of limitations restricting th[e] right [of] recoupment to one year back." *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 563; 710 NW2d 59 (2005). CNA effectively sought recoupment of overpaid benefits through use of the lien, and therefore MCL 418.833(2) was implicated. The trial court's reliance on *Reece v Consolidated Packaging Co*, 133 Mich App 684; 350 NW2d 308 (1984), to reach a contrary result was misplaced. In *Reece, id.* at 691, this Court stated:

> Moreover, we find that public policy dictates that § 833(2) be interpreted as applying only to reimbursement claims against disabled employees or the families of deceased employees, and not to claims of one insurance carrier against another as in the present case.

Here, CNA sought reimbursement from plaintiff, the disabled employee, when it claimed a lien against the $230,000 settlement that plaintiff was to receive; therefore, *Reece* supports application of § 833(2). Remand is thus necessary to calculate the extent of the lien amount under MCL 418.833(2).

Finally, plaintiff argues that, assuming that CNA is entitled to a lien, it should be made to share in the costs and attorney fees that plaintiff incurred in litigating the admiralty action given that CNA received a $98,487 benefit via the lien. Plaintiff relies on *Franges v Gen Motors Corp*, 404 Mich 590; 274 NW2d 392 (1979), in support of his assertion. However, *Franges* relied on the statutory language in MCL 418.827 (third-party tort action) and, as plaintiff himself argued earlier, that statute is simply not applicable here. Outside of the statute and *Franges*, plaintiff invokes equitable principles as a basis to make CNA share in the burden of the costs associated with pursuing the admiralty action. We find that plaintiff is on the wrong side of equity here, even assuming that costs and attorney fees could be allocated to CNA under equitable principles. Plaintiff, as acknowledged in his admiralty complaint, was never entitled to state workers' compensation benefits, and when faced with an effort by CNA to recoup those improperly received benefits, plaintiff litigated the matter with CNA. CNA was forced to incur its own costs and attorney fees in simply trying to correct the wrong, even after plaintiff obtained a sizeable settlement. Reversal is unwarranted on this issue.

Affirmed with respect to the trial court's order imposing a lien on the settlement, but reversed and remanded for a calculation as to the extent of the lien amount under MCL 418.833(2). We do not retain jurisdiction. No party having prevailed in full, taxable costs are not awarded under MCR 7.219.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly