Missouri Court of Appeals

Southern District

Division Two

DELORES DEMORE,	)	
Appellant-Respondent,	)	
vs.	)	Nos. SD32351 and SD32361 Consolidated
DEMORE ENTERPRISES, INC.,	)	FILED: July 15, 2013
Respondent,	)	
AMERICA FIRST INSURANCE CO.,	)	
Respondent-Cross Appellant.	)	

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

AFFIRMED AS MODIFIED

Delores Demore and her parents, Hershel and Doris, worked for their family business, Demore Enterprises ("DE").[1] Delores got a phone call, at DE's office during business hours, reporting vandalism of nearby DE property. It was the fourth recent burglary, theft, or vandalism of DE property in that vicinity.

[1] For convenience and clarity, we will refer to the Demores by their first names and to respondent-cross appellant America First as "Insurer."

The three Demores headed to the scene in Hershel's personal vehicle. En route, all were injured in a crash so severe that it took 25 minutes to extract them from the wreckage. They each filed for workers compensation after Insurer refused benefits or medical treatment, and each obtained an award.

Three appeals and two cross-appeals were filed, which we consolidated for argument. Our analyses today as to Doris's award[2] compel the same disposition and results here as to Delores's award, except Point III of Insurer's cross-appeal here has no counterpart in Doris's case. Thus, we focus here on that additional claim.

Insurer's Cross-Appeal – Point III

At issue is how to credit Delores's $80,000 third-party settlement[3] against her award here (future medical treatment, plus $90,842.08 in past benefits). Citing § 287.150 and ***McCormack v. Stewart Enterprises***, 916 S.W.2d 219 (Mo.App. 1995),[4] the Commission deemed the $80,000 "an advance payment of future medical treatment due," not a setoff against Insurer's obligation for past benefits.

Insurer takes issue, citing ***Eagle v. City of St. James***, 669 S.W.2d 36 (Mo.App. 1984). For reasons that follow, we uphold the Commission's decision.

Under the ***Ruediger*** formula,[5] Delores initially received her full $80,000 settlement, to Insurer's exclusion, because Insurer had not paid any benefits. By

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[2] *See* ***Doris Demore v. Demore Enterprises, Inc.***, SD32350 & SD32362 (Mo.App. July 15, 2013).

[3] From Hershel's auto liability insurer for Delores's accident-related damages.

[4] Statutory citations are to RSMo as amended through 2005. ***McCormack*** is among cases we cite that were overruled on an unrelated issue by ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220, 224-32 (Mo. banc 2003).

[5] ***Ruediger v. Kallmeyer Bros. Serv.***, 501 S.W.2d 56, 59-60 (Mo. banc 1973).

statute and case law, this settlement money is treated as Insurer's "advance payment … of any future installments of compensation …." § 287.150.3; ***McCormack***, 916 S.W.2d at 226 (expressly ruling that future medical expenses "are included as future payments of compensation, and [Insurer] is allowed subrogation against such payments").

Per ***McCormack***, if an award contemplates future compensation payments, settlement credit offsets future payments, not unpaid past benefits. 916 S.W.2d at 224-26. ***McCormack*** distinguished ***Eagle***, where settlement credit was used to reduce a liquidated award of past benefits only – no future medical care. ***Id***. at 225; *see also* ***Eagle***, 669 S.W.2d at 44 (upholding Commission's "omission to provide for future medical care for the employee ….").

This case is like ***McCormack***, not ***Eagle***. Under § 287.150.3 as interpreted in ***McCormack***, Delores's settlement is treated as advance payment of, and a credit against, her future medical expense. The Commission did not err. Point denied.[6]

Delores's Appeal – Point I

Delores rightly objects to the Commission ordering "employer/insurer" to direct her future medical treatment, since employers alone (not insurers) have that right.[7] Insurer candidly agrees. As we did in Doris's case, we grant this point and will substitute DE, as employer, for "employer/insurer."[8]

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[6] We deny all other cross-appeal points for reasons set forth in our opinion in Doris's case.

[7] *See* § 287.140.10; ***Teale v. American Mfrs. Mut. Ins. Co.***, 687 S.W.2d 218, 220 (Mo.App. 1984).

[8] We deny all other appeal points for reasons set forth in our opinion in Doris's case.

Conclusion

For reasons stated herein and in our opinion filed today in ***Doris Demore v. Demore Enterprises, Inc.***, SD32350 & SD32362 (Mo.App. July 15, 2013), we modify the Commission's award to specify that Demore Enterprises, Inc., as employer, shall control selection of Delores's future treatment providers. Finding no merit in any other claim on appeal or cross-appeal, we affirm the Commission's award as modified. *See* ***Thompson v. ICI Am. Holding***, 347 S.W.3d 624, 636 (Mo.App. 2011) (award affirmed as modified by the court).

DANIEL E. SCOTT, P.J. — OPINION AUTHOR

DON E. BURRELL, C.J. — CONCURS

MARY W. SHEFFIELD, J. — CONCURS