IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Matthew Blumberg, deceased, by Deborah Blumberg,	:	
Petitioners	:	
v.	:	No. 477 C.D. 2011
Workers' Compensation Appeal Board (Levy, Stein and Blumberg and Donegal Mutual Insurance),	:	Argued: September 16, 2011
Respondents	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge (P.)

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: October 31, 2011**

Deborah Blumberg (Claimant) petitions for review of the Order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) granting the Petition to Review Compensation Benefits (Petition) filed by Levy, Stein and Blumberg and Donegal Mutual Insurance Company (together, Employer) through which Employer sought to subrogate a third-party recovery obtained by Claimant. Claimant asserts that the Board erred as a matter of law in holding that Employer was entitled to an immediate subrogation lien and credit against her benefits where she had neither received any workers'

compensation (WC) benefits nor would she receive any such benefits until her youngest child reached her majority.

On October 30, 2002, Matthew Blumberg (Decedent) died as a result of injuries he sustained in a work-related motor vehicle accident that occurred on October 16, 2002. Decedent was survived by Claimant and three minor children. On July 25, 2003, the parties executed a standard LIBC-338 Form, developed by the Bureau of Workers' Compensation (Bureau) and titled an "Agreement for Compensation for Death" (Agreement), in which Employer agreed that Decedent's death was work-related and that it would pay, based on Decedent's average weekly wage (AWW) of $2,501.43, death benefits in the amount of $662 per week, the Statewide Maximum AWW. (Agreement, R.R. at r-47, r-48.) The Agreement further set forth that

> [a]fter the 18th birthday [of each dependent, i.e., daughter,] if the dependent is enrolled full time at an accredited educational institution [the dependent] will continue to receive benefits until [she] complete[s] schooling, drop[s] out or turn[s] 23 years of age. If [Claimant] should re-marry, she will receive 104 weeks of benefits in a lump sum amount.

(Agreement at 2, R.R. at r-48.) Claimant and representatives from Employer signed the Agreement. Three years later, Claimant, acting as the Ancillary Executrix of Decedent's estate, entered into the third-party settlement agreement, in which she settled the underlying motor vehicle claim for $1.2 million dollars. This settlement was approved by the Surrogate Court of Orange County, New York, which also approved a counsel fee in the amount of $272,471.10 and a guardian ad litem fee of $800. (WCJ's Decision, January 29, 2009, Findings of Fact (FOF) ¶ 3.) The gross court-approved distribution of the settlement was $566,847.64 to Claimant and

$119,960.42 to each minor child, which would be held in trust until their eighteenth birthdays. (FOF ¶ 3.)

Employer filed the Petition on March 30, 2007, seeking to subrogate Claimant's portion of the third-party recovery. (FOF ¶ 4.) The Petition was assigned to the WCJ for hearings and disposition. Employer argued that, as of April 1, 2008, it had accrued a net lien for benefits already paid in the amount of $173,972.06 and sought credit of $511.26 per week against Claimant's future benefits until the remaining subrogation interest is exhausted. (FOF ¶ 5.) Claimant asserted that, pursuant to the Agreement, she had received no funds from Employer as those benefits were being paid to her children and that Employer's right to subrogation would not ripen until *she* began receiving the weekly benefits. (FOF ¶ 6.) Employer argued that, pursuant to Section 307 of the Workers' Compensation Act (Act), 77 P.S. § 561,[1] death benefits are always payable to the surviving spouse, if eligible, and that Claimant simply assigned those rights to her children. (FOF ¶ 6.)

The WCJ found that it is well-settled under the Act that children are not entitled to fatal claim benefits where there is an eligible surviving spouse but that,

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[1] Act of June 2, 1915, P.L. 736, as amended. Fatal claim or death benefits are governed by Section 307 of the Act, which states, in relevant part:

> [i]n case of death, compensation shall be computed on the following basis, and distributed to the following persons: . . . (3) [t]o the widow . . . who is the guardian of all of the deceased children, payment shall be as follows: (a) If there is one child, sixty per centum of wages, but not in excess of the Statewide average weekly wage; (b) If there are two or more children, sixty-six and two-thirds per centum of wages, but not in excess of the Statewide average weekly wage.

77 P.S. § 561(3)(a), (b).

here, Claimant assigned her benefits to her minor daughters. (FOF ¶ 7.) The WCJ further held that an employer has an absolute right of subrogation under the Act and that, although Claimant could dispose of her benefits by having them received by her minor daughters, she could not dispose of Employer's right to subrogation. (FOF ¶ 8.) Accordingly, the WCJ found that Employer was entitled to subrogate the net amount Claimant had received from the third-party settlement, $508,727.49. (FOF ¶ 9; Conclusions of Law (COL) ¶ 2.) Additionally, the WCJ held that Employer was to be repaid for the sums it had paid to Claimant and her children beginning in October 2002 through the present, and was entitled to a credit against future compensation until the subrogation lien was exhausted. (FOF ¶ 9; COL ¶ 2.)

Claimant appealed to the Board arguing, *inter alia*, that the WCJ had misstated the Agreement and did not give full force and effect to the Agreement through which Employer waived its subrogation rights until Claimant began receiving the benefits.[2] The Board concluded that the WCJ correctly held that: (1) Claimant had the absolute right to "'give away the money she receives pursuant to her rights under the Act'"; (2) "under the Act, the children would not be entitled to compensation in a fatal claim scenario where the deceased is survived by a spouse"; and (3) Employer has a right to subrogation under the Act of which Claimant cannot dispose. (Board Op. at 4, February 22, 2011 (quoting FOF ¶ 8).) The Board affirmed the WCJ's decision

[2] The Board initially remanded the matter so that the Agreement, which was discussed during the WCJ's hearings but never admitted into evidence, could be admitted into the record. The Agreement was admitted into evidence, and the WCJ issued another opinion incorporating the findings of fact and conclusions of law of his January 29, 2009, decision. (WCJ Decision, March 24, 2010.) From this January 2009 decision, Claimant filed another appeal to the Board, which addressed the merits of the appeal in its February 22, 2011, opinion.

holding that the record contained substantial evidence to support the WCJ's findings of fact and that the WCJ did not commit any errors of law. (Board Op. at 4.) Claimant now petitions this Court for review.[3]

Claimant argues that the Board erred in affirming the grant of the Petition because the Agreement is a legal and binding contract entered into by Claimant and Employer, through which Claimant agreed to postpone her receipt of WC benefits in favor of payments to her minor children during their minority, who otherwise would not be entitled to any payments from Employer, and Employer agreed to waive or delay its subrogation interest. According to Claimant, she will not receive any WC benefits against which Employer could assert a subrogation interest until the payments to her children cease. Additionally, she asserts that the WCJ erred in finding that she assigned her rights under the Act to her minor children. Essentially, Claimant asserts that the payments her minor children received from Employer cannot be considered WC benefits because the children are not entitled to fatal claim benefits under the Act. She argues that, as these payments are not WC benefits, Employer has not made *any* WC payments to date and is not entitled to assert its subrogation interest until it does. After reviewing the Agreement, relevant statutory and regulatory provisions, and case law, we disagree with Claimant's interpretation of the Agreement.

[3] "Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated." Sysco Food Services of Philadelphia v. Workers' Compensation Appeal Board (Sebastiano), 940 A.2d 1270, 1273 n.1 (Pa. Cmwlth. 2008).

An employer's subrogation rights are established in Section 319 of the Act, which states, in pertinent part:

> Subrogation of employer to rights of employee against third persons; subrogation of employer or insurer to amount paid prior to award
>
> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer *shall* be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer . . . .

77 P.S. § 671 (emphasis added). In Gillette v. Wurst, 594 Pa. 544, 937 A.2d 430 (2007), our Supreme Court recognized that

> [t]he . . . Act provides *an absolute right of subrogation*, and its purpose is threefold: it prevents double recovery by the claimant for the same injury, it ensures that an employer is not required to pay for the negligence of a third party, and it prevents a third party from escaping liability for his wrongful conduct.

Id., 594 Pa. at 554, 937 A.2d at 436 (emphasis added) (citing Brubacher Excavating, Inc. v. Workers' Compensation Appeal Board (Bridges), 575 Pa. 168, 172, 174, 835 A.2d 1273, 1275, 1277 (2003)). "Subrogation has been equated to and interchanged with the word substitution and the basic idea is that of substituting the insurance carrier for the insured in the insured's action against a third party." Anderson v. Workmen's Compensation Appeal Board (Borough of Greenville), 442 Pa. 11, 16, 273 A.2d 512, 514 (1971). It "is an equitable doctrine and is applicable whenever a debt or obligation is paid from the funds of one person although primarily payable from the funds of another." Id.

Claimant asserts that the Agreement was entered into outside of the Act and is not subject to the Act's provisions; however, the Agreement is actually the standard LIBC-338 Form prepared by the Bureau for use in situations where, as here, the employer agrees that a work-related death occurred and that the decedent's dependents are entitled to benefits *under the Act*.[4] The regulation at 34 Pa. Code § 121.9 explains that the LIBC-338 Form, the "Agreement for Compensation for Death," "shall be executed between an employer and the deceased's dependents . . . and filed with the Bureau" in the instances where "a compensable injury results in death." Id. This regulation also anticipates that, when there is a change in the circumstances regarding the rate of compensation under an Agreement for Compensation for Death, i.e., the LIBC-338 Form, resulting in either an increase or decrease in the dependents' benefits, the employer is obligated to file amended documents identifying the change pursuant to either 34 Pa. Code § 121.12 (increase in compensation) or § 121.17 (decrease in compensation). Additionally, the purpose of the LIBC-338 Form is further described in Section 7.57 of Workers' Compensation Law & Practice, David B. Torrey & Andrew E. Greenberg, § 7.57 (2010-11 ed.) (Torrey). That section states:

> [i]n a voluntarily accepted claim, the "Agreement for Compensation for Death" is utilized. The [a]greement is structured to provide information so that both the employer and employee know when the dependency benefits of recipients, such as children and siblings, who have age-limited benefits, are to cease. . . . This is typically at age 18 for children and dependent siblings. A new supplemental agreement will be

[4] We note that there are multiple references to the Act on the LIBC-338 form, one example of which is that all wage information must be completed in accordance with "Section 309 of the Pennsylvania Workers' Compensation Act." (Agreement at 1-2, R.R. at r-47, r-48.)

> required, however, in the event that there is an unexpected change in the status of any dependent.

Torrey § 7.57, at 84-85.[5]

In addition to setting forth the relevant information regarding the Decedent, Employer, the responsible insurer, and the injury that resulted in Decedent's death, the Agreement and *all* LIBC-338 Forms provide the following: "[w]e, the following persons, *dependents of the aforementioned deceased employee, and the undersigned employer, agree upon the following matters which determine dependents' rights to compensation and its amount and duration*." (Agreement at 1, R.R. at r-47 (emphasis added).) Following this statement in the Agreement is a list of Decedent's dependents, beginning with Decedent's three children in chronological order by their date of birth and ending with Claimant. It is well-settled that the Act provides that it is the surviving spouse who will receive the fatal claim benefits; however, Section 307 of the Act also states that those benefits generally will be adjusted upwards to account for other dependents, i.e., minor children. In Anderson, our Supreme Court stated that:

[5] Our reading of the LIBC-338 Form and the regulations, leads us to believe that the purpose of this document is to reflect the number, ages, and types of dependents present in a fatal claim situation. This information would be used in most cases, but not here because of Decedent's high AWW, to determine the amount of a surviving spouse's WC benefits and the length of time that amount of benefits is payable to the surviving spouse, with reductions occurring as circumstances change. Thus, had Decedent's AWW not exceeded the Statewide Maximum AWW, the benefit amount would have been one amount for the period of time when Claimant had more than two eligible children (sixty-six and two-thirds per centum of the decedent's AWW), a lesser amount when she only had one eligible child (sixty per centum of the decedent's AWW), and still lesser when the last child was no longer eligible (fifty-one per centum of the decedent's AWW). 77 P.S. §§ 561(2), (3)(a)-(b).

> Children, as provided in [Section] 307, 77 P.S. [§] 561, are entitled to compensation in their own right only when the deceased is not survived by an eligible widow. When such a widow exists, the existence of the children serves to generate a larger compensation payment to the widow. The children, however, in such a situation, have no right of their own to recover compensation. . . . Therefore . . . *the payments to the widow are made so that she may acquit her legal obligation to support her children* . . . and are not recovered by the children in their own right.

Id. at 15-16, 273 A.2d at 514 (emphasis added). See also Ramich v. Workers' Compensation Appeal Board (Schatz Electric, Inc.), 734 A.2d 39, 41-42 (Pa. Cmwlth. 1999) (holding that, because there was a widow, the decedent's child was not eligible for benefits in his own right), rev'd in part on other grounds, 564 Pa. 656, 770 A.2d 318 (2001). The distribution process set forth in Section 307 is further explained in Section 7.54 of Torrey as reflecting that:

> when the employee dies leaving a spouse and minor children, the payments to the children go "through" the surviving spouse, and as long as the spouse is alive and continually entitled to fatal claim compensation payments, the minor children are not conceived as having their own cause of action.

Torrey § 7.54, at 81. Thus, the Agreement's purpose is to set forth all of a decedent's dependents, i.e., generally a surviving spouse and minor children, as such information will generally, although not here because of Decedent's high AWW, affect the amount of WC benefits payable and for how long the payments will be made. 77 P.S. § 561; 34 Pa. Code §§ 121.9, .11, .17. Accordingly, the listing of Claimant's and Decedent's minor children on the first page of the Agreement neither removes the Agreement from the Act's requirements nor transforms the payments made for the benefit of those children into compensation other than WC benefits.

Moreover, we note that, on its face, the Agreement does not expressly indicate or provide that Employer was to make payments to the minor children in lieu of fatal claim benefit payments to Claimant; rather, as mentioned above, it simply sets forth the names and ages of the dependents which, under other circumstances, would have impacted the amount of compensation distributed to the surviving spouse under Section 307. Accordingly, we agree with Employer that, at most, Claimant attempted to assign her right to WC benefits as the surviving spouse to her and Decedent's minor children. In any event, under Section 319, Claimant's right to the WC fatal claim benefits, assigned or otherwise, are subject to Employer's absolute right of subrogation under the Act. Gillette, 594 Pa. at 555, 937 A.2d at 436; Brubacher Excavating, 575 Pa. at 172, 835 A.2d at 1275. Section 319 clearly indicates that the subrogation interest attaches to the "right of the . . . [employee's] . . . dependent[], against such third party *to the extent of the compensation payable under this article by the employer*." 77 P.S. § 671 (emphasis added). In its plurality decision in Gillette, the Supreme Court focused on the plain language of Section 319 in holding that the claimant could not defeat the subrogation interest of her late husband's employer's insurer by disclaiming her right to the third party award, Gillette, 594 Pa. at 555, 937 A.2d at 436, and we will look to the plain language of Section 319 in this matter as well. Section 319 refers not to the amount of compensation *paid*, but "the extent of the compensation *payable* under" the Act. 77 P.S. § 671 (emphasis added). Thus, upon Decedent's death and Employer's acceptance of that death as work-related, Claimant, as the surviving spouse, had an immediate statutory right to the fatal claim compensation benefits *payable* under the Act. In this instance, the compensation payable was the Statewide Maximum AWW, identified in the Agreement as $662 per week. We find nothing in the Agreement that changes

Claimant's entitlement to WC benefits under Section 307 of the Act. We note that, notwithstanding her arguments that she has not received any WC benefits and that her minor children are the recipients of Employer's payments, Claimant acknowledges that *she* receives the payments and that the checks are, in fact, made out in her name. (Hr'g Tr. at 13-14, r-17, r-18.) If, as Claimant asserts, the Agreement provided for payments to her children exclusively, arguably the checks would be made out to the child eligible for the payment at that particular time. Finally, we hold that to accept Claimant's arguments that Employer's right to immediate payment of its subrogation lien is postponed by the Agreement would result in the risk that Employer would be unable to fully recover its entire subrogation lien, a risk that "[w]e do not believe . . . may be involuntarily imposed on Employer without statutory authority." Monessen, Inc. v. Workers' Compensation Appeal Board (Fleming), 875 A.2d 415, 419-20 (Pa. Cmwlth. 2005).[6]

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[6] Although not directly on point, Gillette offers additional support for our determination that the Agreement did not alter Employer's subrogation rights in this matter. Claimant maintains that this matter is distinguishable from Gillette, where she asserts the claimant *unilaterally* attempted to defeat the employer's subrogation rights, because Employer voluntarily entered into the Agreement waiving or postponing its subrogation rights under the Act. In Gillette, the widow of a teacher who was shot and killed by a student settled a wrongful death action against the student's parents on behalf of herself and her minor children and sought to disclaim her interest in the settlement. When the widow and parents sought approval of the settlement from a court of common pleas, the decedent's employer's insurer filed a petition to intervene asserting that, under Section 319 of the Act, it was entitled to subrogate the widow's share of the settlement to recover the amount it had paid the widow in fatal claim benefits. After concluding that it did not have jurisdiction to consider the subrogation issue, the court of common pleas approved the settlement, and the insurer appealed to the Superior Court. The Superior Court concluded that the widow could disclaim her interest and, therefore, there was no interest against which the insurer could assert its subrogation claim. The insurer appealed to our Supreme Court, which reversed. Recognizing that the right to subrogation under the Act is absolute, the Supreme Court concluded that the question in Gillette, whether the widow could disclaim her portion of the settlement and effectively extinguish the insurer's subrogation interest, was "resolved by the plain language" of Section 319, which indicates that the employer is "subrogated to the *right* of the employe [or] his representative . . . against such

(Continued…)

Finally, although Claimant is correct that an employer can agree to waive its entitlement to subrogation, Pennsylvania Manufacturers' Association Insurance Company v. Wolfe, 534 Pa. 68, 626 A.2d 522 (1993) (PMA); Monessen, Inc.; Rissi v. Workers' Compensation Appeal Board (Tony DePaul & Son), 808 A.2d 274 (Pa. Cmwlth. 2002), we conclude that Employer did not do so here. As Employer points out, there is no mention in the Agreement of either Employer's subrogation interest under Section 319 or the waiver of that interest. Therefore, PMA and Rissi are distinguishable. In PMA, our Supreme Court held that the employer waived its entitlement to recover its entire subrogation interest by entering into an escrow agreement that "embodie[d] the outer limits of the parties (sic) rights and liabilities with respect to the priority of their claims," but did not represent the total value of the employer's subrogation interest. PMA, 534 Pa. at 73, 626 A.2d at 524-25. In Rissi,

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third party." Gillette, 594 Pa. at 555, 937 A.2d at 436 (emphasis and alteration in the original) (quoting 77 P.S. § 671). Justice Eakin, Justice Castille, and Justice Baldwin, agreed that the claimant's disclaimer of her right to the third party settlement did not defeat the insurer's subrogation interest, holding that "the insurer, having paid [widow], is not subrogated to the amount actually received by [the widow]; rather, it is subrogated to the share that [the widow] has the *right* to receive." Id. (emphasis in original.) In other words, the widow's right to the wrongful death award was "effectively passed to [the insurer] by virtue of its legitimate subrogation claim." Id. Chief Justice Cappy issued a concurring opinion in which he stated that the claimant's disclaimer was valid, resulting, essentially, in her pre-deceasing the decedent for the purposes of the Act. Id., 594 Pa. 556-57, 937 A.2d at 437-38 (Cappy, C.J., concurring). This, according to Chief Justice Cappy, resulted in there not being a surviving spouse for the purposes of the Act and the WC benefits were payable to the children, whose own rights in the third party settlement award were subject to subrogation. Id. Thus, although Gillette was a plurality opinion, four of six Justices agreed that the employer was entitled to subrogate to the *right* of the decedent's dependent. Here, similar to the part of Section 319 relied upon by the plurality opinion of the Supreme Court, we note that Section 319 does not say that subrogation is based on the amount of WC benefits *paid*, but on the compensation *payable*. Claimant, through her interpretation of the Agreement, is attempting to eliminate, or at least postpone, Employer's right to subrogation under the Act by asserting that she is postponing her right to be *paid* WC benefits under the Act; this is similar to the actions of the claimant in Gillette, which were rejected by the Supreme Court.

the employer and the claimant agreed to terms for satisfying the employer's subrogation claim but, when a WCJ ordered the employer to pay certain outstanding medical bills accrued after the subrogation agreement, the employer appealed arguing that the WCJ erred in directing it to pay the claimant's medical bills without simultaneously ordering a "credit on account of the third party recovery." Rissi, 808 A.2d at 276, 279 (citation omitted). This Court affirmed the WCJ's decision, stating:

> although certainly aware of the possibility of future medical expenses, the parties made no such provision when they agreed to the terms for satisfying [the employer's] subrogation rights. The WCJ did not err in leaving that agreement unchanged. [The employer's] subrogation interest is fully satisfied under the terms to which the parties agreed and are now bound.

Id. Consequently, in both PMA and Rissi, the employers limited their own subrogation interests by entering into subrogation agreements specifically defining what those interests were. Here, there is no such agreement waiving or otherwise limiting Employer's subrogation rights.

Accordingly, the Order of the Board is affirmed.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Matthew Blumberg, deceased, by Deborah Blumberg,	:	
Petitioners	:	
v.	:	No. 477 C.D. 2011
Workers' Compensation Appeal Board (Levy, Stein and Blumberg and Donegal Mutual Insurance),	:	
Respondents	:	

O R D E R

NOW, October 31, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge