

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: February 28, 2018)

**KAREN HINGER AND
TIMOTHY HINGER**

v.

C.A. No. PC-2013-0421

**W.A.N.P., LLC. AND
JOHN DOE, ALIAS**

DECISION

LANPHEAR, J. This matter came on for hearing on February 22, 2018 on the Intervenor's motion to enforce a workers' compensation lien.

Ms. Hinger was injured at her employment in May 2010. After initiating a Workers' Compensation claim, payments were issued to her for \$39,078.28 by the workers' compensation insurer, Hartford Insurance. Workers' compensation awards do not normally pay for pain and suffering, and the statute specifically reserves to injured employees their right to pursue damages against third parties, other than the employer. G.L. 1956 § 28-35-58(a). Therefore, Ms. Hinger proceeded against W.A.N.P. for her remaining damages. Hartford Insurance intervenes in this action to claim a lien and protect its right to recover.

After her workers' compensation was resolved, Ms. Hinger filed suit against W.A.N.P. for injuries she received as a business invitee. Arbitration was requested in 2014 and eventually was completed in 2017. In January 2017, the arbitrator issued a written decision which, to the arbitrator's credit, specifies the percentages of liability and itemizes the damages: medical bills, disability compensation, and the like. He specifically excluded certain requested damages and

treatment bills. Ms. Hinger was awarded \$20,000 plus interest and costs by the arbitrator. After the arbitration award, the attorneys continued to negotiate settlement, and Ms. Hinger was paid a larger amount by W.A.N.P. to settle this action.

Hartford Insurance claims that the awards and percentages in the arbitrator's award should be applied to the new agreed settlement amount to determine the amounts due Hartford Insurance. Ms. Hinger claims that Hartford Insurance is only entitled to 20% of the settlement monies, as Ms. Hinger was obviously compensated for pain and suffering, but the arbitrator found her 80% at fault. The statute simply indicates that the insurer is entitled to recover, but does not reflect how the amount should be calculated.¹

¹ “§ 28-35-58. **Liability of third person for damages.** -- (a) Where the injury for which compensation is payable under chapters 29 – 38 of this title was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect of the injury, the employee may take proceedings, both against that person to recover damages and against any person liable to pay compensation under those chapters for that compensation, and the employee shall be entitled to receive both damages and compensation. The employee, in recovering damages either by judgment or settlement from the person so liable to pay damages, shall reimburse the person by whom the compensation was paid to the extent of the compensation paid as of the date of the judgment or settlement and the receipt of those damages by the employee shall not bar future compensation. An insurer shall be entitled to suspend the payment of compensation benefits payable to the employee when the damages recovered by judgment or settlement from the person so liable to pay damages exceeds the compensation paid as of the date of the judgment or settlement. The suspension paid shall be that number of weeks which are equal to the excess damages paid divided by the employee's weekly compensation rate; however, during the period of suspension the employee shall be entitled to receive the benefit of all medical and hospital payments on his or her behalf. If the employee has been paid compensation under those chapters, the person by whom the compensation was paid shall be entitled to indemnity from the person liable to pay damages, and to the extent of that indemnity shall be subrogated to the rights of the employee to recover those damages. When money has been recovered either by judgment or by settlement by an employee from the person liable to pay damages, by suit or settlement, and the employee is required to reimburse the person by whom the compensation was paid, the employee or his or her attorney shall be entitled to withhold from the amount to be reimbursed that proportion of

While each party alleges that this is an unsettled area of state law, this issue was well-handled in *Vellucci v. Miller*, 989 F. Supp. 2d 211 (D.R.I. 2013). Judge McConnell first recognized that some of the settlement funds may have been for pain and suffering, so “[o]ne cannot be reimbursed for something that it did not pay.” *Vellucci*, 989 F. Supp. 2d at 215. Judge McConnell concluded:

“Simply put, Mr. Vellucci’s third-party recovery includes compensation to him for ‘pain and suffering’ due to his injury as well as ‘unreimbursed lost wages beyond the 66 2/3 Mr. Vellucci received as weekly indemnity benefits.’ (ECF No. 15 at ¶ 8.) His compensation from the workers’ compensation insurer did not include those damages; therefore, under the plain language of the § 28–35–58 Ohio Casualty is not entitled to *reimbursement* of 100% of the \$150,000 recovery Mr. Vellucci received in settlement from two of the third-party defendants. However, Ohio Casualty is entitled to some portion of that amount under the statute because the settlement did include compensation for ‘medical bills and indemnity benefits.’ *Id.*; *id.* at ¶ 4. A trier of fact must determine the appropriate apportionment if the parties cannot otherwise agree.” *Id.* at 216 (footnotes excluded).

Clearly, Hartford Insurance has a lien on the proceeds of the settlement. However, the Court cannot determine how the amount of the lien or its payoff should be calculated. The Court cannot extrapolate from the non-binding arbitration which settlement funds went to which element of damages—the parties settled for a different amount than the arbitration award. A hearing is needed before a finder of fact. Accordingly, the Intervenor’s motion to enforce is granted, but the parties shall schedule a hearing before a finder of fact to determine the amount of the lien.

the costs, witness expenses, and other out-of-pocket expenses and attorney fees which the amount which the employee is required to reimburse the person by whom compensation was paid bears to the amount recovered from the third party.” Sec. 28-35-58(a). (Emphasis added.)



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Karen Hinger, et al. v. W.A.N.P., LLC, et al.

CASE NO: PC-2013-0421

COURT: Providence County Superior Court

DATE DECISION FILED: February 28, 2018

JUSTICE/MAGISTRATE: Lanphear, J.

ATTORNEYS:

For Plaintiff: Ronald J. Resmini, Esq.

For Defendant: Matthew D. Kelly, Esq.

For Interested Party: Dennis M. Teravainen, Esq.