IN THE SUPREME COURT OF TEXAS

No. 17-0462

WAUSAU UNDERWRITERS INSURANCE COMPANY, PETITIONER,

v.

JAMES WEDEL AND MICHELLE WEDEL, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS

Argued March 1, 2018

JUSTICE BROWN delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE DEVINE, and JUSTICE BLACKLOCK joined.

JUSTICE JOHNSON filed a dissenting opinion, in which JUSTICE BOYD joined.

The workers'-compensation carrier in this case paid benefits to an injured employee. It later sought reimbursement of those payments from any settlement proceeds the employee might receive from an allegedly liable third party. Ordinarily, Texas law grants it that right. But the policy in this case includes an endorsement waiving the carrier's right to recover from the third party sued by the employee. The carrier concedes it can't recover directly from the third party but insists it can recover indirectly from any settlement the third party pays to the employee. Standing on over twenty years of unanimous case law to the contrary, as well as Texas Department of Insurance rulings consistent with that case law, we disagree. The carrier signed away its right to recover

benefits it paid to the employee and received a higher premium in exchange for assuming that risk. It cannot now seek to indirectly recover the same proceeds it agreed not to pursue directly. We affirm the court of appeals' judgment.

I

James Wedel, a truck driver for Cactus Transport, Inc., was injured on the job. The accident occurred while he was loading asphalt at a terminal owned by Western Refining Company, L.P. Wedel received workers'-compensation benefits from Cactus's insurance carrier, Wausau Underwriters Insurance Company (Underwriters). But he separately sued Western Refining for alleged negligence contributing to his accident.

To gain access to its terminals, Western Refining required Cactus to furnish workers'-compensation coverage to its employees. Western Refining also mandated that Cactus's workers'-compensation policy "contain a waiver of subrogation rights" against Western Refining. The parties agree this meant the policy must include a waiver of Underwriters' right to seek reimbursement directly from Western Refining for benefits Underwriters paid under Cactus's policy. It is also undisputed that Cactus paid a higher premium in exchange for Underwriters' assumption of that risk.

Underwriters nonetheless intervened in Wedel's lawsuit against Western Refining, asserting subrogation rights against it for past and future medical expenses and indemnity payments. Relying on the policy's subrogation waiver, Western Refining argued Underwriters had no right to recover. Underwriters later non-suited its intervention. Wedel and Western Refining then began settlement negotiations but reached an impasse when Underwriters announced it would seek reimbursement from any settlement paid to Wedel. Wedel then joined Underwriters as a third-

party defendant. He moved for summary judgment declaring Underwriters had waived its right to recover any proceeds from the lawsuit, whether directly from Western Refining or indirectly from Wedel's recovery from Western Refining. The trial court granted summary judgment for Wedel. The court of appeals affirmed, concluding Wedel established that Underwriters "contractually waived its statutory right of subrogation and this waiver encompasses the right of reimbursement [against the employee] as well." 518 S.W.3d 615, 630 (Tex. App.—El Paso 2017). We agree and affirm the court of appeals' judgment.

II

In most cases, workers'-compensation benefits are the exclusive remedy against a workers'-compensation subscribing employer for on-the-job injuries. *See* TEX. LAB. CODE 408.001(a); *Port Elevator-Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238, 241 (Tex. 2012). But an employee may still seek damages from a liable third party in addition to receiving workers'-compensation benefits. *See* TEX. LAB. CODE § 417.001(a); *State Office of Risk Mgmt. v. Carty*, 436 S.W.3d 298, 302 (Tex. 2014). Similarly, a workers'-compensation carrier is "subrogated to the rights of the injured employee and may enforce the liability of the third party in the name of the injured employee." TEX. LAB. CODE § 417.001(b). Under either scenario, the "net amount recovered by a claimant in a third-party action shall be used to reimburse the insurance carrier for benefits, including medical benefits, that have been paid for the compensable injury." *Id.* § 417.002(a). The upshot of these provisions is that "until the carrier 'is paid in full[,] the employee or his representatives have no right to any funds.'" *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 33 & n.1 (Tex. 2008) (quoting *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 530 (Tex. 2000)).

The policy in this case included a standard endorsement promulgated by the Texas Department of Insurance (the department). The parties call it a "subrogation waiver." *See* TEX. DEP'T OF INS., TEXAS WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY MANUAL: WC 42 03 04 A (2d reprt. 2011). It reads as follows:

> TEXAS WAIVER OF OUR RIGHT TO RECOVER
> FROM OTHERS ENDORSEMENT
>
> …
>
> We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule [Western Refining], but this waiver applies only with respect to bodily injury arising out of the operations described in the Schedule where you are required by a written contract to obtain this waiver from us.
>
> This endorsement shall not operate directly or indirectly to benefit anyone not named in the schedule.
>
> …
>
> The premium charge for this endorsement shall be 2 percent of the premium developed on payroll in connection with work performed for the above person(s) or organization(s) arising out of the operations described.

Underwriters argues this waiver (1) forecloses only its right to pursue reimbursement directly from Western Refining but (2) leaves intact its right to pursue reimbursement from an employee's recovery against the same. Moreover, construing the waiver to insulate an employee would violate the waiver's proviso that it not "operate directly or indirectly to benefit anyone not named in the schedule." Taken as a whole, Underwriters contends, the provision can be interpreted only to waive its "subrogation right" against Western Refining, a right Underwriters considers statutorily distinct from its "reimbursement right" against the employee.

Wedel insists the waiver also bars Underwriters' right to reimbursement from any proceeds he recovers from Western Refining. The waiver relinquishes Underwriters' "right to recover" from Western Refining, which includes direct recovery from Western Refining or indirect recovery from

funds it pays to Wedel. Either way, Wedel argues, the proceeds constitute a recovery from Western Refining even if they first pass through him. Wedel further points out that this is the only waiver of subrogation rights the department has approved for use in Texas. And every court that has interpreted it has concluded that it waives a carrier's right to reimbursement from an injured employee's recovery. He also maintains that Underwriters' interpretation of the waiver frustrates the rationale for paying a higher premium for the waiver. The practical effect of Underwriters' reading of the waiver, Wedel claims, would be that he could settle with Western Refining for only an amount that would satisfy Underwriters' eventual reimbursement claim against him. This scenario effectively forces the third party to reimburse the carrier, which is exactly what the employer paid a higher premium to avoid.

"A declaratory judgment granted on a traditional motion for summary judgment is reviewed de novo." *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015). When construing an insurance policy, we ordinarily "ascertain and give effect to the parties' intent as expressed by the words they chose to effectuate their agreement." *In re Deepwater Horizon*, 470 S.W.3d 452, 464 (Tex. 2015). But because the waiver at issue here was not freely negotiated by the parties, this is no ordinary policy. Rather, it is a standard endorsement the department has promulgated and mandated for use in Texas workers'-compensation policies. *See* TEX. LAB. CODE § 406.051(b) ("The contract for coverage must be written on a policy and endorsements approved by the Texas Department of Insurance."). And "where the policy forms are mandated by a state regulatory agency, the actual intent of the parties is not material." *Progressive Cty. Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex. 2003). "As a practical matter, the actual intent involved in the precise words is as much or more the intent of the [agency] which prescribes the wording of the

policy as it is the intent of the parties." *Id.* (quoting *United States Ins. Co. of Waco v. Boyer*, 269 S.W.2d 340, 341 (Tex. 1954)).

We are not provided any guidance on the department's intent in drafting the waiver, but we can glean insight from its actions since promulgating the waiver. First, the department has kept the form substantively the same in the face of more than twenty years of case law unanimously interpreting it to foreclose recovery from proceeds paid to an injured employee. *See Hartford Accident & Indem. Co. v. Buckland*, 882 S.W.2d 440, 445 (Tex. App.—Dallas 1994, writ denied); *Lumbermens Mut. Cas. Co. v. Carter*, 934 S.W.2d 912, 913 (Tex. App.—Beaumont 1996, no writ); *Am. Risk Funding Ins. Co. v. Lambert*, 59 S.W.3d 254, 259 (Tex. App.—Corpus Christi 2001, pet. denied); *Liberty Ins. Corp. v. SM Energy*, No. H-12-3092, 2012 WL 6100303, at *7–9 (S.D. Tex. Dec. 7, 2012). In two of these cases—*Hartford Accident and Indemnity Co. v. Buckland* and *Liberty Insurance Corp. v. SM Energy*—the opinions quote substantively identical versions of the department's endorsement at issue in this case. *See Buckland*, 882 S.W.2d at 441; *SM Energy*, 2012 WL 6100303, at *2. In light of the unanimity in these decisions, we find it noteworthy, though not dispositive, that the department has not substantively altered the endorsement. If the department believes its endorsement has been misinterpreted, it certainly has had ample time to revise the text and clarify its intent. Instead, two recent administrative orders the department's Division of Workers' Compensation benefit-review officers have issued construing the waiver reflect an interpretation consistent with unanimous judicial precedent. TEX. DEP'T OF INS., *Decision and Order*, Docket No. HE-10324483-02-CC-HI043 (Apr. 21, 2014) ("Carrier waived its right to reimbursement and/or subrogation under Texas Labor Code § 417.001 and § 417.002."); TEX. DEP'T OF INS., *Decision and Order*, Docket No. HW-11293057-01-CC-HW42 (Mar. 29,

2016) ("Carrier contractually waived its statutory right to subrogation as to the workers' compensation benefits paid to the Claimant, which include reimbursement for benefits it has paid or credit for benefits it will pay in the future.").

The courts' and the department's interpretations are consistent with the endorsement's plain language. The endorsement is titled "Texas Waiver of Right to Recover from Others Endorsement" and provides that a carrier that agrees to the endorsement waives its "right to recover." It then recognizes the carrier's "right to recover our payments from anyone liable for an injury covered by this policy" but provides that the carrier "will not enforce that right against" the named third party. The question is whether an effort to collect from settlement proceeds that third party pays to an injured employee—an obvious end-around to avoid the waiver—is any less an attempt to "enforce" the right the carrier has contractually waived.

We conclude it is not. Under the endorsement, the waiver of a carrier's "right to recover" from the third party named in the schedule includes both a direct recovery from the third party and an indirect recovery from proceeds the third party pays to an injured employee. There is no meaningful difference between the two. Under either scenario, the reimbursement the carrier attains flows from the third party. True, the waiver speaks to the carrier's right to recover from liable third parties, not injured employees. But any settlement the employee receives from the carrier *is* a recovery from a liable third party. Once paid, the money belongs to the employee, but it did not exist before the third party made the payment to dispose of the employee's lawsuit. The waiver's language does not compel us to ignore the source of the proceeds the carrier seeks to capture simply because they flowed through the employee.

Both Underwriters and the dissent argue, however, that we must read the endorsement in light of the separate and distinct rights of a workers'-compensation carrier to "subrogation" and "reimbursement" found in Labor Code sections 417.001 and 417.002—the former being the carrier's ability to "enforce the liability of the third party in the name of the injured employee," *see* TEX. LAB. CODE § 417.001(b), and the latter being the statutory mandate that the "net amount recovered by a claimant in a third-party action shall be used to reimburse the insurance carrier," *see* TEX. LAB. CODE § 417.002(a). Considered against this statutory backdrop, Underwriters and the dissent contend the endorsement addresses only a carrier's subrogation interest, not its statutory right to recover proceeds from an injured employee who settles.

Courts that have considered the distinction in this context—including the court of appeals in this case—have rejected it. *See, e.g.*, *Wedel*, 518 S.W.3d at 622 ("[I]n construing Sections 417.001 and 417.002, we observe that an insurance carrier's right of subrogation encompasses the right of reimbursement, and consequently encompasses the right to recover for benefits paid and to a credit against future benefits."); *SM Energy*, 2012 WL 6100303, at *8 ("Courts applying Texas law do not distinguish between a carrier's subrogation and reimbursement rights in the Worker's Compensation Act context."); *Buckland*, 882 S.W.2d at 445 ("[A] carrier's subrogation interest includes its right to reimbursement as well as its right to future amounts for which it is relieved of liability."). But even if we accepted the distinction, our reading of the waiver would not change. Although the endorsement may be called, colloquially, a "subrogation waiver," neither the word "subrogation" nor "reimbursement" actually appears in its text. Whether the two amount to independent statutory rights is a question separate from and unnecessary to interpreting the waiver's language. The question, as we see it, is simply whether the carrier's waiver of its "right

to recover" against the third party is limited to only a *direct* recovery against the third party. And we see nothing in the waiver compelling that result.

Moreover, Underwriters' and the dissent's reading of the waiver undermines the rationale for having such a waiver in the first place. The carrier requires a higher premium payment on policies that include the waiver. Why? Because the carrier is giving up the right to seek reimbursement from a liable third party if it has to pay workers'-compensation benefits following an accident. If an accident occurs, the carrier is on the hook regardless of fault and cannot proceed directly against the third party. But what if it could sit back and wait for the employee to recover from the third party and then get the same money from him? The practical effect would be that the third party's cost for resolving the case has increased, likely by the amount it would have had to pay the carrier if there had never been a waiver. The carrier's pending reimbursement claim will be taken into account during settlement negotiations and influence the amount necessary to dispose of the case.

This is not speculation—it is exactly what happened in this case. Settlement negotiations halted once Underwriters announced its intention to seek reimbursement from those proceeds. Despite the waiver, Underwriters sought the same money through the back door that it could not get through the front. Underwriters' position drove up the cost of settling the case, with Underwriters poised to claim the same money from Wedel that it could not get from Western Refining. Under these facts, the value of the case is the same as if there had been no waiver at all.

Nor are we persuaded that the waiver's admonition that it "shall not operate directly or indirectly to benefit anyone not named in the Schedule" allows the carrier to pursue the employee's settlement. First, if our reading of the waiver benefits the employee at all, it benefits the third

party—the one named in the Schedule—more. As explained above, the third party is better off if the carrier cannot recover against the employee, because the third party is then free to negotiate with the employee without a carrier's pending reimbursement claim driving up the cost to settle. Again, this is the reason for the waiver and the corresponding higher premium in the first place. *See Lambert*, 59 S.W.3d at 259 ("The third party having the benefit of the waiver is free to negotiate a settlement with the injured employee without having to pay additional to the employee to cover any subrogation of compensation of workers' compensation benefits."). In the event of an accident for which it was liable, Western Refining preferred to face only the injured employee rather than both the employee and his employer's workers'-compensation carrier—and required Cactus to pay a premium for that privilege.

Second, although the employee might on occasion incidentally benefit from the waiver, he benefits less than the third party, if at all. *See id.* ("The fact the third parties' settlement amount is lowered doesn't necessarily mean the employee is benefitted."). Certainly, a carrier's claim for reimbursement can drive up the cost of settling an injured employee's claim. But it does not necessarily follow that the employee will net a smaller recovery; it means only that the injured employee and the settling third party will have to take the carrier's reimbursement claim into consideration. The liable third party might ultimately pay more overall to satisfy both claims, but this would not necessarily benefit the injured employee. It is conceivable that a third party might be unable to be as generous in settling with an injured employee as it would if it did not have to also satisfy a carrier's reimbursement claim. But it is also possible that the injured employee would receive the same amount either way. In any event, the possibility that an injured employee might

indirectly benefit from the waiver in some cases does not cancel out the fact that the liable third party benefits more in every case that includes a subrogation waiver.

The dissent reads the waiver more narrowly. Its interpretation of the text is not unreasonable, but text is rarely interpreted on a blank slate. As we have mentioned, in this case we interpret the waiver's language to effect agency intent, and the department has acquiesced in decades of unanimous precedent from our courts of appeals and a federal district court interpreting the waiver as Wedel urges and has affirmed that interpretation in its own administrative rulings. We still must ask if the waiver's plain language supports that interpretation—the practical fallout of our reading of a policy cannot control the meaning we assign to the text used. But in this case, we see nothing in the waiver's language that compels us to undercut decades of settled and unanimous precedent, the department's interpretation of its own waiver, or the allocation-of-risk considerations for using a subrogation wavier—and charging a higher premium for it—in the first place.

* * *

The waiver in this case forecloses Wausau's right to recover from a liable third party. That includes direct recovery from Western Refining or indirect recovery of the same proceeds after Western Refining pays them to Wedel. The court of appeals' judgment is affirmed.

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Jeffrey V. Brown
Justice

OPINION DELIVERED: June 8, 2018