

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHERYL MCKOY a/k/a CHERYL
JACOBSON,

Claimant,

vs.

ITA GROUP, INC.,

Employer,

and

TWIN CITY FIRE INS. CO.,

Insurance Carrier,
Defendants.

File No. 5065221.01

ARBITRATION DECISION

Head Note No: 3400

STATEMENT OF THE CASE

Petitioners, ITA Group, Inc., (employer) and Twin City Fire Insurance Company, (insurer), filed a petition in arbitration against respondent/claimant Cheryl McKoy (a/k/a Cheryl Jacobson), (Jacobson), seeking reimbursement of a workers' compensation lien of a third-party settlement. This matter was submitted on the record on February 9, 2021, with a final submission date of February 17, 2021.

The record in this case consists of Petitioners' Exhibits 1-7 and Respondent's Exhibits A-F.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUE

The only issue for determination is if the respondent is entitled to reimbursement of the workers' compensation lien of the third-party settlement.

FINDINGS OF FACT

On October 8, 2015, claimant Jacobson was attending a conference at the Iowa Events Center in Des Moines, IA. A speaker at the conference encouraged people to the stage by using money to motivate people to participate in the program. Claimant moved toward the stage when another person at the conference ran into the claimant.

The accident occurred while claimant was in the course and scope of employment with the ITA Group. (Petitioners' brief, p. 2; Respondent's brief, p. 1)

Claimant was ultimately paid \$148,501.60 in medical and indemnity benefits by insurer. (Ex. 7; Petitioners' brief, p. 2)

On March 14, 2017, claimant entered into an attorney fee agreement that indicated claimant's counsel was to be paid one-third of any recovery made. (Ex. F)

On or about August 29, 2017, claimant filed a third-party action in District Court for the October 8, 2015 date of injury.

On September 7, 2018, The Hartford sent the employer a letter indicating claimant's case was closed. (Ex. A) Claimant continued to receive benefits after September 7, 2018. (Ex. 7)

On or about June 26, 2018, an agreement for settlement was approved by the Iowa Workers' Compensation Commission. The agreement indicated insurer had paid \$148,501.60 in medical and indemnity benefits. The agreement for settlement left the medical benefits open.

On October 17, 2018, the claimant/respondent's attorney sent a demand letter to defendant third-party tortfeasor. That letter demanded \$750,000.00 for a full release of the District Court action. That demand letter alleged claimant had \$292,411.00 in economic loss for past and future lost wages and earning capacity. (Ex. 3) In discovery, claimant admitted that she had claimed lost wages in discovery in the third-party action as an element of damages. (Ex. 6)

The third-party action was set for trial in District Court in November 2020. (Petitioners' brief, p. 2) Prior to trial, claimant/respondent settled the third-party action for \$175,000.00. Claimant admitted in discovery that in correspondence with the mediator at settlement, she identified lost wages as an element of her damages. (Ex. 6, p. 1)

Petitioners consented to the settlement. The consent indicates petitioners paid \$148,501.60 in indemnity and medical benefits and that claimant had received workers' compensation benefits. The consent did not waive claimant/respondent's obligation to indemnify the insurer. The settlement was filed in the District Court on May 14, 2020. (Ex. B)

On June 4, 2020, petitioner filed a notice of lien with the District Court regarding the settlement. (Ex. C)

On June 8, 2020, claimant/respondent signed a release and settlement agreement. Paragraph 3 of that release states, in relevant part:

The above payment is for pain and suffering, loss of function and medical bills. Further, nothing in this settlement is for lost wages and loss of future

earning capacity, as these were compensated for by the underlying worker's compensation settlement.

(Ex. D, p. 6)

The settlement and release agreement was signed by claimant, but was not signed by petitioners. (Ex. D)

CONCLUSION OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

Iowa Code section 85.22(1) provides:

If compensation is paid the employee . . . under this chapter, the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed . . . and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

[T]he purpose of . . . section 85.22(1) is to permit the employer to recoup monies it has been required to pay under the provisions of chapter 85 from a tortious third party whose conduct has produced the injury which necessitated such payments." Johnson v. Harlan Community Sch. Dist., 427 N.W.2d 460 462 (Iowa 1988). The statutory scheme of section 85.22(1) is intended "to prevent double recovery by the injured worker in compensation in a law action as well as workers' compensation for the same injury." Liberty Mutual Ins. Co. v. Winter, 385 N.W.2d 529, 532 (Iowa 1986).

The statute is designed to encourage employers to pay benefits because of the expectation they may recover those payments from responsible third-parties. Daniels v. Hi-Way Truck Equip., Inc., 505 N.W.2d 485, 489 (Iowa 1993); Johnson v. Harlan Community Sch. Dist., 427 N.W.2d 460, 462 (Iowa 1988)

Under Iowa law, a workers' compensation carrier is required to pay attorney's fees, to the employee's attorney in a third-party action, even if the amount settled for is less than the total of the workers' compensation insurer's lien. Ahlers v. Emcasco Ins. Co., 548 N.W.2d 892, 894 (Iowa 1996).

Petitioner/insurer paid claimant benefits for a work injury under Chapter 85 of the Iowa Code. Iowa Code section 85.22(1) allows for the insurer to be indemnified for amounts paid in workers' compensation benefits.

Respondent/claimant contends that the law in Greenfield v. Cincinnati Ins. Co., 737 N.W.2d 112 (Iowa 2007) precludes petitioner/insurer from reimbursement of any of

claimant's settlement monies regarding the third-party District Court case. This is because paragraph 3 indicates the settlement is for pain and suffering. Claimant/respondent is incorrect.

In Greenfield v. Cincinnati Ins. Co., 737 N.W.2d 112 (Iowa 2007), Rane Greenfield was in a van accident while in the course and scope of her employment. Greenfield filed a workers' compensation claim and settled that claim with the workers' compensation carrier for approximately \$154,000.00. Greenfield also filed a District Court action against the third-party tortfeasor. A jury awarded Greenfield, in part, for medical expenses, lost wages and pain and suffering. The District Court allowed indemnification for the workers' compensation carrier for the award for lost wages. The District Court did not allow indemnity for amounts awarded for pain and suffering. In Greenfield, the Court noted:

The jury's special verdicts with respect to pain and suffering and loss of function, however, are not subject to offset because they are not "duplicative" of "elements of loss" recovered in workers' compensation settlement.

Greenfield at 124.

In Greenfield, an impartial third entity, the jury, awarded claimant, in part, damages for pain and suffering along with damages for lost wages. In this case, claimant's attorney added language to a settlement agreement indicating all settlement monies in the third-party settlement were for pain and suffering. Petitioners were not a party to that settlement agreement.

The record indicates that prior to settlement in the District Court action, claimant's counsel argued claimant had economic losses of approximately \$292,000.00. Claimant's counsel admits that in discovery regarding third-party action, claimant sought damages for loss of wages. Claimant's counsel admits he told the mediator, in the third-party action settlement, lost wages were an element of claimant's damages.

Obviously, what occurred is that prior to settlement in the District Court action claimant's counsel argued claimant had nearly \$300,000.00 in lost wages both before and during settlement. Once the settlement was agreed to, claimant's counsel added language in paragraph 3 of the settlement in an attempt to negate petitioners' right to reimbursement.

Greenfield does not stand for the proposition that claimant's attorney can draft settlement language to prevent a workers' compensation carrier from being indemnified for amounts paid under chapter 85. Assuming for argument's sake, claimant's argument that Greenfield applies to this case is correct, Iowa Code section 85.22 would have no purpose and insurers would have no incentive to pay benefits when a third-party tortfeasor was involved.

For the reasons detailed above, the settlement agreement drafted by claimant's counsel does not negate petitioners' right to indemnification in the third-party action.

Petitioners are due amounts paid in indemnity and medical benefits in the workers' compensation claim from the third-party settlement.

As noted above under Ahlers, claimant's counsel is due payment of his attorney fees.

Given this, claimant's counsel is entitled to \$58,333.33 in attorney's fees (\$175,000.00 x one-third). Petitioners are entitled to reimbursement of the remaining \$116,666.67 in indemnity and medical benefits paid.

ORDER

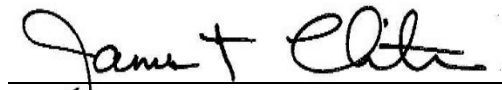
THEREFORE, IT IS ORDERED

That petitioners' insurer and employer shall receive one hundred sixteen thousand six hundred sixty-six and 67/100 dollars (\$116,666.67) in reimbursement for indemnity and medical benefits paid under the workers' compensation claim.

That claimant's counsel shall receive fifty-eight thousand three hundred thirty-three and 33/100 dollars (\$58,333.33) in attorney's fees.

That both parties shall pay their own costs.

Signed and filed this 9th day of August, 2021.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Robert Tucker (via WCES)

Jessica Voelker (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.