

STATE OF MICHIGAN
COURT OF APPEALS

ANNIE HEARNS, individually and as personal
representative of the Estate of Sidney Hearn, deceased,

Plaintiff-Appellee,

and

TRAVELERS INSURANCE COMPANY,

Intervening Plaintiff-Appellant,

v

NIKOLA UJKAJ,

Defendant.

Before: Danhof, C.J., and Beasley and MacKenzie, JJ.

MacKENZIE, J.

October 2, 1989

No. 97629

Plaintiff's husband died as a result of injuries sustained in a collision with defendant Ujkaj's vehicle. The accident occurred during the course of the decedent's employment. Following the accident, his employer's workers' compensation carrier, Travelers Insurance Company, began paying survivor's loss benefits to plaintiff pursuant to § 321 of the workers' disability compensation act, MCL 418.321; MSA 17.237(321).

Plaintiff, individually and as personal representative of her husband's estate, subsequently brought suit against defendant for wrongful death, negligent entrustment, and loss of consortium. Travelers intervened in the action. Plaintiff and defendant, without the participation of Travelers, eventually agreed to settle the suit for \$45,000. Upon reaching the agreement to settle, plaintiff moved for determination of Travelers' right, under the workers' compensation act, to reimbursement from the settlement proceeds. By way of two orders, the trial court essentially denominated the settlement as compensation for plaintiff's individual loss of consortium claim, and not as compensation for economic losses or an award of damages for the decedent's pain and suffering, and ordered that Travelers had no right to the settlement proceeds. Travelers appeals by delayed application for leave granted.

Travelers, which has paid substantial workers' compensation survivors' benefits to plaintiff, claims entitlement to reimbursement and a credit against future benefits payable to plaintiff to the extent that those benefits exceed the no-fault benefits to which plaintiff is entitled. Travelers' claim for reimbursement is based on MCL 418.827(5); MSA 17.237(827)(5) which provides:

In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall forthwith be paid to the employee or his dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits.

The Legislature's primary purpose in permitting third-party actions was to provide a method whereby the employer could reimburse itself or its insurer for workers' compensation benefits paid to an injured or deceased employee, where the injury or death resulted from the negligence of some other person. Petrosian v Frizell, 25 Mich App 141; 181 NW2d 10 (1970) and Stafford v E W Bliss Co, 86 Mich App 197, 199-200; 272 NW2d 237 (1978).

Where an employee is injured in a motor vehicle accident in the course of his employment, workers' compensation benefits substitute for automobile no-fault benefits to the extent that the workers' compensation benefits duplicate no-fault benefits otherwise payable to the employee. Great American Ins Co v Queen, 410 Mich 73, 96; 300 NW2d 895 (1980). A workers' compensation carrier is not entitled to reimbursement for payments which substitute for no-fault benefits. Great American, *supra*, p 85. To the extent that payment of workers' compensation benefits exceeds the no-fault benefits which are otherwise payable, the workers' compensation carrier is entitled to a lien against an injured employee's third-party recovery for reimbursement of the excess. Bialochowski v Cross Concrete Pumping Co, 428 Mich 219, 230-231; 407 NW2d 355 (1987). Reimbursement may be obtained without regard to whether the third-party recovery is for the same elements of loss compensated by the workers' compensation benefits. Great American, *supra*, pp 89, 97.

MCL 500.3108(1); MSA 24.13108(1) limits survivors' benefits to a three-year period under the no-fault act. Accordingly, workers' compensation benefits payable for the first three years following the decedent's death, to the extent that they do not exceed the weekly amount of survivors' benefits payable under the no-fault act also serve as a substitute for benefits paid under the no-fault act. Any weekly workers' compensation benefits paid beyond that three-year period cannot properly be regarded as a substitute for benefits under the no-fault act. As stated in Great American, *supra*, p 97,

[T]he payment of workers' compensation benefits which do not substitute for no-fault benefits, because they exceed no-fault benefits in amount or duration, gives rise to a right to reimbursement from third-party tort recoveries in the same manner as the payment of workers' compensation benefits for non-motor vehicle related injuries.

In the present case, plaintiff's decedent died on May 1, 1984. Under the analysis employed in Great American, *supra*, workers' compensation benefits payable to the decedent's survivors through May 1, 1987, would thus serve as a substitute for survivors' benefits payable under the no-fault act, to the extent that the weekly workers' compensation benefits do not exceed the weekly rate of survivors' benefits. No claim was made by Travelers for reimbursement of the first three years of such benefits. However, under MCL 418.321; MSA 17.237(321), death benefits under the workers' compensation act are payable for five hundred weeks, at a minimum, and Travelers is entitled to appropriate reimbursement and/or future credit as a result of the third-party recovery.

The trial court allocated the first \$40,000 of any settlement or judgment to non-economic losses. The complaint alleged alternate theories of recovery covering economic and non-economic losses of pain and suffering for decedent and loss of consortium for plaintiff. If the allocation for non-economic loss is regarded as recovery for pain and suffering sustained by the now-deceased employee, Great American clearly indicates that this in no way serves as a bar to the workers' compensation carrier's right to reimbursement and future credit. This was the precise holding of Pelkey v Elsea Realty & Investment Co, 394 Mich 485; 235 NW2d 154 (1975), which the Court in Great American summarized as follows:

In Pelkey, we thus concluded that the insurer was entitled to reimbursement even out of that portion of the tort recovery denominated for pain and suffering.

The Court in Great American, *supra*, p 97, expressly confirmed the continued vitality of the result in Pelkey, *supra*, stating:

The constitutionality of the legislative scheme which allows reimbursement of the workers' compensation carrier for economic benefits from tort recoveries for pain and

suffering was upheld in Pelkey and I adhere to the view expressed in my opinion in Workman that such reimbursement schemes are rational and constitutional. [Great American Ins Co v Queen, supra, at 97.]

To the extent that Logan v Levy Co, 99 Mich App 356; 297 NW2d 664 (1980), relied upon by the trial court herein, may hold differently, it should be emphasized that Logan was decided prior to Great American and has clearly been superseded by the Court's decision in Great American. See also Treadeau v Wausau Area Contractors, Inc, 112 Mich App 130; 316 NW2d 237 (1982), which follows and applies Pelkey, supra.

We conclude that the same result obtains if the trial court's allocation for non-economic loss is regarded as recovery for plaintiff's loss of consortium.

Previous decisions of this Court which deal with an injured employee's third-party claim and spouse's related loss of consortium claim have held that the workers' compensation carrier's right to reimbursement and a future credit do not extend to any portion of a settlement which constitutes the spouse's recovery for loss of consortium. Lone v Esco Elevators, Inc, 78 Mich App 97, 107-108; 259 NW2d 869 (1977) and Treadeau, supra, pp 136-139. See also Fritsch v Magnaflux Corp, 150 Mich App 573; 389 NW2d 94 (1986). These cases have required that a proper allocation between the spouse's recovery for loss of consortium and the other bases for recovery must be made, with any reimbursement and future credit to the workers' compensation insurer limited to the injured worker's portion of the recovery. Significantly, however, Lone, Treadeau, and Fritsch, supra, all involved situations where an employee was non-fatally injured and was the direct recipient of workers' compensation benefits, while the employee's spouse was a stranger to any workers' compensation claim and received no workers' compensation proceeds. Under those circumstances, it is reasonable to exclude a spouse's recovery for loss of consortium from consideration when determining the amount applicable to the workers' compensation carrier's reimbursement and future credit right.

However, here, where the employee's survivors are direct recipients of workers' compensation benefits, in the form of death benefits under MCL 418.321 and MCL 418.331, the rationale for excluding the loss of consortium recovery from consideration in determining the workers' compensation carrier's reimbursement and future credit rights is totally inapplicable. Since the injured employee's widow is the direct recipient of the workers' compensation benefits and not a stranger to that claim, there is no basis for making a distinction between a loss of consortium recovery and any other recovery in the third-party action when determining the amount of reimbursement and/or future credit to which the workers' compensation carrier is entitled. We therefore conclude that the workers' compensation carrier is entitled to reimbursement and/or a future credit out of the entire settlement, including any portion thereof which may have been allocated to the widow's claim for loss of consortium.

We find that the trial court clearly erred in extinguishing Travelers' right to reimbursement and/or future credit. We reverse and remand with instructions to the trial court that the entire judgment entered herein in favor of plaintiff is subject to Travelers' lien governed by MCL 418.827(5); MSA 17.237(5) after deduction of expenses. Reimbursement and future credit should be calculated according to the formula set forth in Franges v General Motors Corp, 404 Mich 590; 274 NW2d 392 (1979).

Reversed and remanded. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Robert J. Danhof
/s/ William R. Beasley