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CASE LAW UPDATE

*Court of Appeals Addresses Notice, Third Party
Lien and Prosthetic Device Issues*

Penny Richardson a certified nursing assistant for Maxim Healthcare, was involved in a compensable motor vehicle accident under circumstances which gave rise to a third party claim. She reported the accident to her employer by telephone 20 to 30 minutes after it occurred and was treated in the emergency room for multiple injuries, including what she perceived to be a decrease in the size of breast implants she had obtained five years earlier.

Richardson later sought treatment from a plastic surgeon, who performed a bilateral breast re-augmentation, removing the original implants and replacing them with new ones, a procedure that was paid for by Nationwide, which provided uninsured motorist coverage on the vehicle Richardson was driving at the time of the accident.

Richardson continued to receive treatment for a variety of other medical problems that she attributed to the accident, including right knee pain, bilateral carpal tunnel syndrome, headaches and dental injuries. However, it was not until she received a final settlement check from Nationwide resolving her uninsured motorist claim more than a year after the accident that she filed a workers' compensation claim against her employer.

Among the defenses Maxim Healthcare raised in its response to Richardson's claim was the 30 day written notice requirement found in N.C.G.S. § 97-22. Maxim also questioned the causal relationship between claimant's auto accident and the various physical difficulties she complained about after it occurred. In addition, it asserted a lien under N.C.G.S. § 97-10.2 against the proceeds of her third party settlement with Nationwide. However, the Commission found, over Commissioner Buck Lattimore's dissent, that Richardson's claim was not barred by N.C.G.S. § 97-22, that all of her injuries, as well as her bilateral implant reconstructive surgery, were causally connected to the motor vehicle accident, and that Maxim Healthcare's lien rights were for the superior court to determine, not the Industrial Commission.

Maxim and its insurer appealed to the Court of Appeals, which in a 2-to-1 decision entered on February 5, *Richardson v. Maxim Healthcare/Allegis Group*, affirmed many of the Commission's findings of fact, but reversed and remanded the case back to the Commission for additional findings concerning the notice and lien issues.

In addressing a claimant's statutory duty to provide her employer with written notice of injury within 30 days, the Court held that failure to do so serves as a bar to compensation unless the employee provides "reasonable excuse" for not having given timely notice and establishes that her employer was not prejudiced by the delay. The Court found that the Commission had failed to make adequate findings on both counts and that, even though Maxim Healthcare had actual notice of the accident, the Commission should have made a specific finding as to whether claimant "satisfied her burden of providing a reasonable excuse for not providing defendant-employer with written notice of her accident."

Citing *Booker v. Duke Medical Center* as authority, the Court also ruled that the Commission erred when it found that the "mere existence of actual notice, without more," was sufficient to satisfy the statute's requirements with respect to prejudice. To the contrary, said the Court, the issue of prejudice "must be evaluated in relation to the purpose of the notice requirement," which allows the employer "to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and to facilitate the earliest possible investigation of the circumstances surrounding the injury."

Maxim Healthcare also took exception to the Commission's determination that there was a causal connection between claimant's various physical ailments and her auto accident, but the Court found evidence of record to support each of those findings, except with regard to claimant's left breast implant. The treating plastic surgeon, Dr. David Bowers, testified that the accident "more than likely" caused a leak in the right implant, but he could not state with any degree of medical certainty that the "rippling" claimant was experiencing in the left implant resulted from the accident. Despite that testimony, and even though Dr. Bowers consistently distinguished

between the two implants, stating unequivocally that the rippling on the left side was most likely due not to the accident, but to the original implant being underfilled, the Commission had found the defendants responsible for replacing both implants, under the theory that they should be symmetrical and evenly matched.

The Court held that although breast implants “satisfy the statutory requirement as a compensable prosthetic device that functions as part of the body” under N.C.G.S. § 97-2(6), Dr. Bowers’ testimony established that in this case only the right implant replacement was compensable. In reaching that conclusion, the Court’s majority disagreed with the dissent of Judge Wynn, who argued by analogy to “wrongful injury” cases in the civil justice system that “the goal [should be] to make the plaintiff whole” and felt that the only way to restore claimant to the condition she was in prior to the accident, with symmetrical and evenly matched implants, would be to require the defendants to replace both.

Judge Wynn was also in the minority on the lien issue. The Court’s majority agreed with the defendants that the Commission erred in ruling that “defendants shall be entitled to a credit, if any, as duly awarded by a superior court pursuant to N.C.G.S. § 97-10.2.” Rather, said the Court’s majority, “defendants’ credit does not depend upon an award by the superior court, since N.C.G.S. § 97-10.2(h) clarifies that the lien is automatic.” While under certain circumstances the superior court is granted authority to adjust the amount of the employer’s subrogation lien, “unless and until plaintiff applies to the superior court for a determination of the subrogation amount, defendants are entitled to a lien on all corresponding uninsured motorist benefits received by plaintiff.”

Risk Handling Hint: On the same day that *Richardson* was decided, a different panel of the Court of Appeals issued another opinion addressing the superior court’s authority to adjust liens asserted against the proceeds of third party recoveries. In *In re Estate of Bullock v. C.C. Mangum Company*, the Court held that an employer paying death benefits to wholly dependent, but unrelated, dependents of a deceased employee has a lien on the proceeds of a wrongful death claim prosecuted by the deceased employee’s mother.

In the course of reaching that result, the *Bullock* Court noted that N.C.G.S. § 97-10.2(j) requires the superior court judge to consider the following factors in resolving motions to reduce or eliminate workers’ compensation liens: “[1] the anticipated amount of ... compensation the employer ... is likely to pay ... in the future, [2] the net recovery to plaintiff, [3] the likelihood of the plaintiff prevailing at trial or on appeal, [4] the need for finality in the litigation, and [5] any other factors the court deems just”

Of particular significance to risk managers responsible for protecting liens against third party recoveries is a footnote in the *Bullock* decision in which the Court states that the decision it entered

four years ago in *Ales v. T.A. Loving Company* does not stand for the proposition that in order for the superior court to have jurisdiction over the proceeds of a third party recovery, the petition to determine the subrogation amount has to be filed before the settlement proceeds have been distributed. At the same time, however, the Court observed that “in determining the appropriate amount of the ... lien, the trial court does have discretion under (j) to consider any factors that it deems ‘just and reasonable,’ which could include the timeliness of the petition and whether settlement proceeds have been distributed.”

Order Approving Clincher Set Aside

In August 2001, at the age of 46, Eddie Kyle suffered an admittedly compensable injury to his low back while working as a truck driver for the Holston Group. He underwent a lumbar fusion and was eventually assigned not only a 25 percent rating to the back, but permanent work restrictions which precluded him from returning to work as a truck driver.

The Holston Group was insured by Liberty Mutual, whose claims adjuster entered into settlement negotiations with Kyle, who was unrepresented at the time. During the course of their discussions, the adjuster told Kyle, who had not returned to work in any capacity, about his potential entitlement to temporary partial disability benefits for a maximum of 300 weeks, but the possibility of his receiving total disability benefits was never discussed.

Kyle, who was earning over \$800 a week at the time of his injury, performed a series of calculations on his own regarding the benefits he might be entitled to receive under N.C.G.S. § 97-30 and offered to settle for \$63,000. The Liberty Mutual adjuster countered with an offer of \$60,000, which Kyle accepted. A clincher agreement was executed and submitted for approval to Special Deputy Commissioner Lacy Maddox, who asked the parties to submit an addendum including social security offset language and “documentation of any vocational rehabilitation efforts or a description of plaintiff’s work, educational or vocational training history.”

Defense counsel responded to that request with a memo summarizing claimant’s education and work experience, but the memo was not formally incorporated into the clincher, and Special Deputy Commissioner Maddox approved the parties’ settlement without verifying the information in it or otherwise clarifying claimant’s understanding of his future benefit rights.

After claimant retained counsel to represent him in a social security disability claim, they filed a motion to set aside the clincher agreement and the Commission’s order approving it on the basis that the clincher lacked some of the information required by Rule 502. However, claimant’s motion was denied by the Commission after it found that Liberty Mutual’s adjuster had not improperly induced the settlement by providing claimant with inaccurate information.

Claimant appealed to the Court of Appeals, which, on February 19 in *Kyle v. Holston Group*, reversed the Commission and held that the parties’ violation of Rule 502(2)(h) made it impermissible for the Commission to approve the clincher. The Court noted that Rule 502 provides, in cases where the employee is unrepresented and has not returned to work earning the same or greater wages than he was earning at the time of the injury, that “no compromise agreement will be approved unless it contains ... language ... [summarizing] the employee’s age, educational level, past vocational training, [and] past work experience....”

The Court rejected defendants’ contention that it was sufficient for the special deputy commissioner to have requested and received in memo form the required biographical and vocational information prior to approving the clincher because the rule “clearly and unambiguously” states that the agreement must actually contain the language in question. Had the Commission intended a memorandum from defense counsel to suffice, it could have drafted Rule 502 accordingly.

The Court also held that the parties’ clincher agreement should have been set aside because the Commission “failed to undertake a full investigation to determine if the Agreement was fair and just, as required by N.C.G.S. § 97-17” and the Supreme Court’s holding in *Vernon v. Steven L. Mabe Builders*. It noted that claimant was not only unrepresented at the time of the settlement, but unaware that he was entitled to receive the most favorable remedy available to him, including the possibility of “ongoing total disability benefits during the vocational rehabilitation process even beyond 300 weeks, or permanent total disability compensation ... if he were never able to return to suitable employment.” Therefore, while “it is not incumbent upon an insurance adjuster to explain the law to an unwitting claimant, the Industrial Commission must stand by to assure fair dealing in any voluntary settlement ... and must scrutinize carefully a settlement agreement that provides for a claimant to accept the lesser of two remedies for which he may qualify.”

Risk Handling Hint: The Court’s opinion in *Kyle* went on to note that under Rule 502, it would have been proper for the Commission to have approved the parties’ settlement without the missing vocational and biographical information, if claimant had certified in the clincher agreement that he was not claiming total wage loss due to his injury. However, even with that certification, the Commission is still required to conduct a full investigation to determine whether the agreement is “fair and just.” Thus, the Court’s decision in *Kyle* is a useful reminder to risk managers of the difficulty they and their counsel face when negotiating with *pro se* claimants.

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