

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 25

WCC No. 9508-7353

**GLACIER PARK, INC./NATIONAL UNION
FIRE INSURANCE COMPANY**

Employer/Insurer/Petitioners

vs.

BRUCE PARKER

Claimant/Respondent.

ORDER AND JUDGMENT

Summary: Workers' Compensation insurer seeks subrogation based on claimant's third-party recovery from bar's insurer in lawsuit alleging bar negligently served alcohol to a visibly intoxicated person. Claimant settled his workers' compensation claim for \$417,000, present value. His third-party settlement was for \$425,000. Insurer argues the third-party settlement as a matter of law defines the amount necessary to make claimant whole.

Held: Where insurer has stipulated that claimant's total economic losses equal 1.5 million, and he had another 1.5 million in non-economic losses, claimant was not made whole by his workers' compensation and third-party recoveries. WCC does not read Supreme Court cases as creating the rule asserted by insurer. Subrogation claim denied.

Topics:

Subrogation. Insurer seeks subrogation based on claimant's third-party settlement of \$425,000. His workers' compensation settlement was \$417,000, present value, making his total recovery \$842,000. Where the insurer stipulated claimant's economic losses were 1.5 million, and he had another 1.5 million in non-economic losses, claimant has not been made whole and the insurer is not entitled to subrogation. WCC refused to adopt rule that amount of settlement of third-party claim, as a matter of law, defined amount necessary to make claimant whole.

This is a subrogation case. The claimant/respondent herein, Bruce Parker, was severely injured in an automobile accident which occurred in the course and scope of his employment. His injuries have already been determined compensable despite his

intoxicated state at the time of the accident. His workers' compensation claim was settled for \$417,000, present value. In addition, claimant sued the bar which served him the intoxicating beverages and settled that action for \$425,000. The parties agree that the settlement fell far short of his actual damages. However, the insurer/petitioner, National Union Fire Insurance Company, asserts that, as a matter of law, claimant's third-party settlement constituted "full compensation" for his injuries, thereby entitling it to subrogation and repayment in the amount of \$156,667.

Factual Background

This case has been submitted on an agreed statement of facts and exhibits set forth in the Parties' Joint Statement of Stipulated Facts and Exhibits. The pertinent facts are found therein.

The claimant was injured in a one-vehicle rollover accident in Glacier Park on September 2, 1986. He had been drinking at Saint Mary's Lodge and was intoxicated. (Ex. 2.) He suffered a spinal cord injury as the result of a fractured and dislocated ninth vertebra and is paralyzed from the waist down; he has no bowel or bladder control. He also suffered a closed-head injury with resultant deficits in memory, reasoning, attention, problem solving, and comprehension. He suffers bouts of depression and has attempted suicide.

Since his accident, his parents have provided him a home and protection. His attempts to live independently have failed.

At the time of his accident, claimant was employed by Glacier Park, Incorporated, which was insured by National Union. Claimant filed a workers' compensation claim. The claim was denied and he petitioned the Workers' Compensation Court. In a decision issued July 6, 1990, this Court concluded that claimant was in fact acting within the course and scope of his employment at the time of the accident, and was therefore entitled to compensation. *Bruce Parker v. Glacier Park, Inc.*, WCC No. 8905-5341, decided July 6, 1990.

Thereafter, on August 23, 1991, claimant and National Union entered into a full and final compromise settlement of the workers' compensation claim. (Ex. 1.) The settlement provided for an up-front payment of \$190,000, monthly payments of \$1,200 for life, and four periodic payments, made at five-year intervals totaling \$190,000, to a "spendthrift medical trust." (*Id.*)

Meanwhile, on August 30, 1989, claimant sued the Saint Mary's bar (St. Mary R. , Inc.), alleging that it violated a common-law duty "to refrain from furnishing alcohol to a visibly intoxicated person." (Ex. 2 at 2.) The bar denied liability and affirmatively alleged that claimant's injuries were caused by his own negligence. (Ex. 4 at 2.) The action was ultimately settled for \$425,000 cash paid by the bar's insurer. That settlement was well within the bar's \$1,000,000 per occurrence policy limits. The insurer did not dispute coverage, so insurance coverage was not a factor in the settlement.

National Union agrees that the settlement with the bar was for far less than claimant's actual damages. It has stipulated that the "[t]otal economic losses of Bruce Parker equal 1.5 Million Dollars." It has further stipulated, "Non-economic losses also equal 1.5 Million Dollars. Therefore, total damages in Mr. Parker's case equal 3 Million Dollars." (Parties' Joint Statement of Stipulated Facts and Exhibits at 2.) After attorney fees, costs, and payment of a Medicaid lien, the claimant netted \$455,746.78 (present value) from the two settlements, calculated as follows:

Gross amount of settlements	\$842,531.00
Attorney fees	(\$333,012.40)
Litigation costs	(\$22,396.18)
Medicaid lien	(\$31,375.64)
NET RECEIVED BY CLAIMANT	\$455,746.78

Discussion

This case presents the same subrogation issue as *Ness v. Anaconda Minerals Co.*, WCC No. 8906-5395, decided December 29, 1995. At issue is the insurer's, National Union's, subrogation interest in the claimant's settlement with the bar. National Union advances the same argument made by Anaconda in the *Ness* case, to wit, that the third-party settlement, as a matter of law, made claimant whole. Using the third-party settlement as the basis for calculating its subrogation interest, National Union seeks \$156,667 from claimant.

In *Ness* we held that the Workers' Compensation Court has jurisdiction to determine an insurer's subrogation interest. The parties in this case do not dispute the Court's jurisdiction.

The parties also recognize the probable effect of *Ness* in the context of this case. In *Ness* we held that a settlement in a case involving disputed liability does **not as a matter of law** establish the amount of "full compensation for a claimant's loss" or thereby entitle a workers' compensation insurer to subrogation. Claimant urges that we follow *Ness*, arguing that its logic is sound. National Union invites the Court to reconsider *Ness*. It also notes that it wishes to preserve its right to appeal concerning the issues we decided in *Ness*.

Ness was decided less than three months ago. In that decision I surveyed past precedents and concluded that a third-party settlement for less than policy limits does not establish, as a matter of law, the amount necessary to make the claimant whole. *Ness* has been appealed and the matter is now best left to the Supreme Court to sort out.

Applying the *Ness* decision, I find that National Union is not entitled to subrogation. The stipulated facts establish that claimant's actual economic loss is far greater than the net amount he received. When considering non-economic factors, his loss is even greater. As I

read the latest Supreme Court decisions, the "make whole" standard refers to either actual economic losses or to actual economic and non-economic losses, not to the settlement value of the case.

JUDGMENT

Accordingly, judgment is entered as follows:

1. National Union Fire Insurance Company has no subrogation interest in respondent's third- party settlement with St. Mary R. B., Inc.
2. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
3. Any party to this dispute may have 20 days in which to request a rehearing from this ORDER AND JUDGMENT.

DATED in Helena, Montana, this 15th day of March, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Patrick G. Frank

Mr. Thomas J. Murphy

Submitted Date: February 20, 1996