O/G 11-8-84 O/G.

IN THE SUPREME COURT OF FLORIDA

64,990.

CASE NO: 83-1356

AETNA INSURANCE COMPANY,

Petitioner,

v.

JAMES NORMAN and
NATALIE NORMAN, his wife,

Defendants.

FILED
SID J. WHITE
AUG 13 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

PETITIONER'S INITIAL BRIEF

On Petition For Review Of The Decision Of
The First District Court of Appeal Of Florida,
Case No: 83-1356, Rendered February 7, 1984

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QUESTION PRESENTED

WHETHER THE NET RECOVERY IN A THIRD PARTY PROCEEDING UNDER §440.39(3)(a) SHOULD BE REDUCED BY THE PERCENTAGE OF THE PLAINTIFF'S COMPARATIVE NEGLIGENCE

INTRODUCTION

For the sake of clarity and brevity references to the Record on Appeal will be designated by (R) . References to the transcript of the final hearing will be designated by (TR).

The Petitioner/Appellant/Workmens' Compensation Lienor, AETNA INSURANCE COMPANY, will be referred to as the "Lienor".

The Respondent/Appellee/Plaintiff, JAMES NORMAN, will be referred to as the "Plaintiff".

STATEMENT OF THE CASE

The present appeal is taken from the decision and order of the Third District Court of Appeal dated February 7, 1984 in case number 83-1356. (R 193-196) The Third District Court of Appeal reversed and remanded the final judgment for equitable distribution entered by Circuit Court Judge Mario Goderich on June 6, 1983 in Circuit Court case number 80-22087. (R.190-192)

The Petitioner in this case is limiting the question on appeal to the narrow issue of the propriety of reducing the net recovery by the percentage of the Plaintiff's comparative negligence.

STATEMENT OF THE FACTS

The Petitioner agrees with the factual findings of the Trial Court Judge. (R 190,191) The Plaintiff was injured in a compensable industrial accident on March 3, 1978. (TR 4,5; R 193) As a result of the compensable accident the Lienor paid compensation benefits in the amount of $26,795.17. (TR 24; R 191,193) The Plaintiff settled a third party action based on his work related accident for $75,000.00. (TR 22; R 191,193)

The total amount of attorney's fees and costs incurred by the Plaintiff in securing a $75,000.00 settlement amounted to $36,267.47. (TR 26;R 191, 194) Consequently, the Plaintiff's net recovery was $38,732.53. (TR 26; R 194) The Trial Court found that the Plaintiff was 50% comparatively negligent. (TR 50; R 190)

ARGUMENT

THE NET RECOVERY IN A THIRD PARTY PROCEEDING UNDER §440.39(3)(a) SHOULD NOT BE REDUCED BY THE PERCENTAGE OF THE PLAINTIFF'S COMPARATIVE NEGLIGENCE

The sole issue that the the Lienor seeks to have reviewed is the Third District Court of Appeal's reduction of the Plaintiff's net recovery by the percentage of the Plaintiff's comparative negligence.

The Third District Court of Appeal correctly calculated the amount of the Lienor's lien against the third party net recovery of $38,732.53. That is, the Third District Court of Appeal correctly reduced the $26,795.17 lien by the percentage of the Plaintiff's comparative negligence, fifty percent, resulting in a reduced lien in the amount of $13,397.59. Further, the Third District Court of Appeal properly held that the Lienor may reduce any future workers' compensation benefits by fifty percent as a result of the Plaintiff's comparative negligence.

After having reduced the compensation lien pursuant to §440.39(3)(a) the Third District Court of Appeal then proceeded to make an unwarranted, and in all likelihood, an inadvertent computation. That is, the Third District Court of Appeal reduced the net recovery of $38,732.53 by fifty percent, which figure represented the Plaintiff's comparative negligence, yielding a reduced net recovery of $19,366.26. This double reduction by the Third District Court of Appeal is not within the statutory provisions of §440.39(3)(a) and as such was erroneous as a matter of law.

Florida Statutes 440.39(3)(a) Florida Statutes (1981), states that,

> ... the employer or carrier shall recover from the judgment, after attorney's fees and costs incurred by the employee or dependent in that suit have been deducted, 100% of what it has paid and future benefits to be paid, unless the employee or dependent can demonstrate to the Court that he did not recover the full value of damages sustained because of comparative negligence or because of limits of insurance coverage and collectibility.

The Third District Court of Appeal, rather than following the clear mandates of Florida Statutes 440.39(3)(a) proceeded to reduce the Plaintiff's net recovery by 50% and to reduce the amount of the compensation lien by 50%. This type of double slashing is totally without statutory support.

In Risk Management Services, Inc. v. Scott, 414 So.2d 220, 222, (Fla. 1st DCA 1982) the Court stated "...the insurer shall be reimbursed 100 percent from the employee's recovery subject to a percentage reduction to offset claimant's loss of full recovery, limits of insurance and collectibility." Clearly the reduction referred to in Scott, supra is the reduction of the compensation lien and not a reduction of the net recovery. Again, in Risk Management Services, Inc. v. McCraney, 420 So.2d 374, 375 (Fla. 1st DCA 1982) the Court held that, "The Appellant shall recommence payment of full benefits, if and when the sum of the amounts recovered and retained pursuant to its lien equals McCraney's net recovery on the tort claim." (emphasis supplied) That is, after the compensation lien has been reduced by a percentage of comparative negligence and future benefits are reduced by the same percentage of comparative negligence the lien holder may retain benefits only until the amounts recovered under the lien are equivalent to the Plaintiff's net recovery of the third party action. The Court did not state that the carrier could retain only those benefits up to

the amount of net recovery reduced by the percentage of comparative negligence. In short, not one case in Florida has ever held that for purposes of Florida Statutes 440.39(3)(a) the net recovery should be reduced by the amount of the Plaintiff's comparative negligence. The effect of doing so would be to penalize the compensation lienor by allowing double deduction of benefits.

Perhaps, the most succint holding regarding the issue on appeal is the Fourth District Court of Appeal's Maryland Casualty Insurance Company v. Reeves, 418 So.2d 1257 (4th DCA 1982) decision which held that, "the carrier is entitled to be reimbursed for what it has paid in compensation benefits up to the net amount actually received by the Claimant after payment of his costs and attorney's fees."

CONCLUSION

All the foregoing cases and a straightforward reading of Florida Statutes 440.39(3)(a) indicate that the net recovery is not to be reduced by a percentage corresponding to the percentage of comparative negligence of the Plaintiff. The compensation lien in the amount of $13,397.59 plus 50% of any future workers' compensation benefits is correct. However, the fund out of which these benefits might be satisfied should be in the amount of $38,732.53. In view of the foregoing authorities and argument the Third District Court of Appeal's decision in the instant case should be reversed as to the amount of net recovery out of which the compensation lien might be satisfied. That is, rather than the $19,366.26 cap on the carrier's recoupment of benefits the proper amount should be the entire net recovery unreduced by 50% comparative negligence - $38,732.52.

Respectfully submitted,

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