

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-851

Filed: 21 August 2018

Rowan County, No. 16-CVS-2309

TRACY GAUNT, PERSONAL REPRESENTATIVE OF THE ESTATE OF DORIS O'SHIELDS ROBERTSON, Deceased, Petitioner,

v.

GUY M. BEATY & COMPANY, INC., and BERKLEY INSURANCE COMPANY OF THE CAROLINAS, Respondents.

Appeal by respondents from order entered 25 January 2017 by Judge Christopher W. Bragg in Rowan County Superior Court. Heard in the Court of Appeals 6 February 2018.

*Wallace and Graham, P.A., by Michael B. Pross, for petitioner-appellee.*

*Young Moore and Henderson, P.A., by Julia Ellen Dixon and Andrew P. Flynt, for respondents-appellants.*

BERGER, Judge.

Guy M. Beaty & Company, Inc. ("Beaty") and Berkley Insurance Company of the Carolinas (collectively "Respondents") appeal from an order granting a motion for a determination of a workers' compensation lien. Tracy Gaunt ("Petitioner") brought the motion as personal representative of the Estate of Doris O'Shields Robertson ("the

*Opinion of the Court*

Estate”). Respondents argue the trial court declined to consider all third-party settlement proceeds to determine the status of the lien, and erred by eliminating Respondents’ lien against the Estate. We disagree, and affirm the trial court’s order.

Factual and Procedural Background

On February 1, 2011, Larry Aubrey Robertson (“Robertson”) was diagnosed with mesothelioma. All parties stipulated that Robertson’s employment with Beaty from 2000 to 2001 and again in 2006 was a significant contributing factor to the development of mesothelioma. On May 29, 2013, Robertson died as a result of mesothelioma. On July 31, 2013, the North Carolina Industrial Commission (“the Commission”) entered an Opinion and Award as to Robertson’s workers’ compensation claim, I.C. No.: X46063. The Commission determined the mesothelioma to be a compensable and disabling occupational disease arising out of and during the course and scope of Robertson’s employment with Beaty. The Commission ordered payment to Doris O’Shields Robertson (“Decedent”), Robertson’s surviving spouse, of \$381.95 per week from February 1, 2011 to May 29, 2013.

On November 7, 2013, Decedent filed a new claim, I.C. No.: 15-724516, pursuant to N.C. Gen. Stat. § 97-38, seeking death benefits as Robertson’s surviving spouse. On December 1, 2015, Decedent and Respondents voluntarily entered into a Consent Opinion and Award granting Decedent further compensation retroactively since May 29, 2013. The Consent Opinion and Award found Decedent physically

*Opinion of the Court*

disabled and concluded that she was entitled to additional benefits associated with Robertson's death. The Consent Opinion and Award resolved all pending requests and motions between Decedent and Respondents, but maintained all rights and privileges of both parties pursuant to N.C. Gen. Stat. § 97-10.2, including subrogation of future settlements from third-party claims. On December 3, 2015, Decedent passed away, and Petitioner, her granddaughter, was appointed personal representative on behalf of the Estate in this action.

On October 19, 2016, Petitioner filed a Petition for Determination of Workers' Compensation Lien in Rowan County Superior Court, arguing Respondents were no longer entitled to recovery of sums paid to the Estate. On November 14, 2016, Respondents filed a motion to dismiss pursuant to Rule 12(b)(1), (3), and (4) of the North Carolina Rules of Civil Procedure. On January 25, 2017, the trial court granted Petitioner's motion, finding Petitioner's chances for recovery from third-party claims were minimal, and reduced Respondents' lien to zero. Respondents timely appealed.

Analysis

Respondents contend the trial court abused its discretion by declining to consider potential or prospective third-party settlements when evaluating Decedent's net recovery as a Section 97-10.2(j) factor. Respondents also argue that the trial court did not consider other third-party claims related to Robertson's previous workers' compensation filing in conjunction with Petitioner's claims, and thus, did not

*Opinion of the Court*

accurately calculate Petitioner's net recovery. We disagree.

Under Section 97-10.2(f)(1)(c) and (h), an employer possesses a lien upon any sums paid to the employee by third parties to compensate for an injury or death for which said employer has provided workers' compensation benefits. N.C. Gen. Stat. § 97-10.2(f)(1)(c), (h) (2017). Both the employee and employer have the right to bring an action in Superior Court to determine if subrogation of the lien is appropriate, and if so, by what amount. N.C. Gen. Stat. § 97-10.2(j). To calculate the proper sum of the adjustment, Section 97-10.2(j) provides the following procedure for the trial court to follow:

[A]fter an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, *in his discretion*, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer.

*Id.* (emphasis added).

Accordingly, this Court uses an abuse of discretion standard to evaluate whether a trial court has erred in its determination of a Section 97-10.2(j) lien. *In re Biddix*, 138 N.C. App. 500, 504, 530 S.E.2d 70, 71, *disc. review denied*, 352 N.C. 674, 545 S.E.2d 418 (2000); *accord Kingston v. Lyon Constr., Inc.*, 207 N.C. App. 703, 711, 701 S.E.2d 348, 354 (2010). “[T]he trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . [and] in considering a request for

*Opinion of the Court*

disbursement under subsection (j), must enter an order with findings of fact and conclusions of law sufficient to provide for meaningful appellate review.” *Allen v. Rupard*, 100 N.C. App. 490, 495, 397 S.E.2d 330, 333 (1990), *appeal withdrawn*, 328 N.C. 328, 404 S.E.2d 864 (1991).

When entering an order to determine whether a Section 97-10.2(j) lien should be adjusted, the trial court *shall* consider the following factors:

[ (1) ] the anticipated amount of the prospective compensation the employer or workers’ compensation carrier is likely to pay to the employee 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 and reasonable, in determining the appropriate amount of the employer’s lien.

N.C. Gen. Stat. § 97-10.2(j). However, the possibility of third-party future settlements does not “impair the trial court’s consideration of the net recovery . . . or impair its ability to balance the equities in making its determination.” *Kingston*, 207 N.C. App. at 712, 701 S.E.2d at 355.

A party is eligible to receive death benefits

[i]f death results proximately from a compensable injury or occupational disease . . . the employer shall pay . . . weekly payments of compensation equal to [66 2/3%] of the average weekly wages of the deceased employee at the time of the accident . . . to [p]ersons wholly dependent for support upon the earnings of the deceased employee.

N.C. Gen. Stat. § 97-38(1) (2017). Section 97-38 “confers a right to receive death

*Opinion of the Court*

benefits upon beneficiaries of an injured worker whose death results from a compensable injury.” *Brown v. N.C. Dep’t of Pub. Safety*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 802 S.E.2d 776, 780 (*purgandum*<sup>1</sup>), *disc. review denied*, 370 N.C. 379, 807 S.E.2d 566 (2017). “The beneficiary’s right to compensation is an original right enforceable only after the employee’s death.” *Id.* (*purgandum*); *accord Pait v. Southeastern Gen. Hosp.*, 219 N.C. App. 403, 414, 724 S.E.2d 618, 626-27, *disc. review denied*, 366 N.C. 223, 726 S.E.2d 831 (2012); *Wray v. Carolina Cotton & Woolen Mills Co.*, 205 N.C. 782, 784, 172 S.E. 487, 488 (1934). “[A] death benefits claim under the Workers’ Compensation Act is a distinct claim to those beneficiaries upon the death of the injured employee.” *Brown*, \_\_\_ N.C. App. at \_\_\_, 802 S.E.2d at 780 (citation and brackets omitted).

In the case *sub judice*, Respondents appealed an order eliminating their lien on the Estate. The Consent Opinion and Award entered into by Decedent and Respondents explicitly stated “this settlement does not affect any rights or remedies available to either party pursuant to G.S. 97-10.2.” Based on the agreement of the parties, the trial court made the following findings of fact in its order eliminating Respondents’ lien on the Estate:

---

<sup>1</sup> Our shortening of the Latin phrase “*Lex purgandum est.*” This phrase, which roughly translates “that which is superfluous must be removed from the law,” was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

*Opinion of the Court*

[I]n accordance with the first and second factors under N.C. Gen. Stat. § 97-10.2(j), [Petitioner] will receive approximately \$190,975.00, in workers' compensation benefits.

The next factor is the net recovery to [Petitioner]. In terms of the third party recoveries, [Petitioner's] counsel has presented to this court various settlement documents and a summary document listing [Petitioner's] recovery. [Petitioner] has received, in net recovery approximately \$59,419.26 after attorney fees and costs.

...

In addition, many of the third party defendants are in bankruptcy which has either prevented or limited the recovery for Plaintiff. At hearing, counsel for [Petitioner] provided affidavits which demonstrated that certain third party defendants had agreed to pay certain sums but were significantly reduced due to the bankruptcies.

...

There is a need for finality in this litigation. [Petitioner's] workers' compensation claim has been pending for over five years.

As to the third party claims, the likelihood of success would appear to be favorable except for the bankruptcies. As stated, most of the third party claims have settled. [Beaty] has not participated at all in assisting [Petitioner] in recovering sums from the third parties.

It is clear from the order on appeal that the trial court considered each of the factors listed in Section 97-10.2(j) when determining whether to reduce Respondents' lien to zero. The trial court considered all factors attached to Decedent's death benefits claim I.C. No.: 15-724516 pursuant to Section 97-38. We hold the trial court

*Opinion of the Court*

did not abuse its discretion in its order eliminating Respondents' lien, and adequately considered all factors pursuant to N.C. Gen. Stat. § 97-10.2(j).

Further, Respondents' contention that the trial court needed to consider possible third-party settlements attached to Robertson's claim I.C. No.: X46063 is not supported by the plain meaning of the statute. This Court has delineated a death benefits claim arising from an injured worker's death as a distinct claim from the workers' underlying compensation claim. *See Brown*, \_\_\_ N.C. App. at \_\_\_, 802 S.E.2d at 780. Additionally, our Supreme Court has held that right to compensation from a death benefits claim under Section 97-38 is "an original right which [is] enforceable only after [Robertson's] death." *Wray*, 205 N.C. at 784, 172 S.E. at 488; *accord Brown*, \_\_\_ N.C. App. at \_\_\_, 802 S.E.2d at 780; *Pait*, 219 N.C. App. at 414, 724 S.E.2d at 626-27. Accordingly, the trial court was not required to analyze potential and prospective recoveries related to Robertson's separate and distinct claim.

Conclusion

The trial court did not abuse its discretion by declining to consider potential or prospective third-party settlements related to the workers' compensation claims when evaluating Decedent's net recovery as a N.C. Gen. Stat. § 97-10.2(j) factor. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges BRYANT and MURPHY concur.



GAUNT V. GUY M. BEATY & CO., INC.

*Opinion of the Court*

Report per Rule 30(e).