Circuit Court for Montgomery County
Civil No. 461514-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2455

September Term, 2019

MONTGOMERY COUNTY, MARYLAND

v.

CLARK VAN LEER

Berger,
Beachley,
Zic,

JJ.

Opinion by Berger, J.

Filed: March 2, 2021

This case arises from a workers' compensation claim filed by Clark Van Leer ("Van Leer"), appellant, and a subsequent petition for judicial review filed by Montgomery County, Maryland ("the County"). On October 4, 2019, the Circuit Court for Montgomery County issued an order granting Van Leer's Cross Motion for Summary Judgment and denying the County's Motion for Partial Summary Judgment. Additionally, the trial court remanded the case to the Workers' Compensation Commission ("the Commission") for an amended/redacted Order to be issued reversing, in part, the Commission's December 18, 2018 Order solely related to the issue of a credit to the County for the loss of consortium proceeds. The trial court's Order further provided that no credit would be given to the County for Van Leer's loss of consortium proceeds and affirmed the Commission's award of compensation. The County appealed from the circuit court's order and presents four questions for our review which we have rephrased as follows:[1]

[1] The County's original questions presented are as follows:

1. Did the Workers' Compensation Commission have jurisdiction to evaluate and modify the allocations of proceeds in a third-party claim?

2. Did the trial court err in the calculation for the reduction taken for costs, expenses, and attorney's fees?

3. Did the trial court err in finding the Appellant should not pay the same proportionate amount of attorney's fees as the claimant?

4. Did the trial court err in allowing the claimant to shield loss of consortium without evidence to support the claimant's claims?

I. Whether the Commission had jurisdiction to evaluate and modify the allocations of monetary judgments of a settlement award in an independent, third-party claim.

II. Whether, if preserved, the trial court erred in its calculation for the reductions taken for costs and expenses and in its determination of proportionate payment of attorney's fees pursuant to Md. Code Ann., § 9-902 of the Labor and Employment Article.

III. Whether the trial court erred in finding there was sufficient evidence to support a claim of loss of consortium by Van Leer and his wife.

IV. Whether the trial court properly allowed Van Leer to shield the loss of consortium claim proceeds from recuperation by the County.

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Van Leer was employed as a supervisor at the County's Department of Liquor Control.[2] On December 2, 2014, Van Leer sustained a head injury when he was thrown from a forklift that fell off of a truck in a work-related accident. A third party was operating the truck.[3] As a result of this accident, Van Leer filed a Notice of Employee's Claim with the Commission on or about July 15, 2015. On August 28, 2015, the Commission found that Van Leer sustained an accidental injury arising out of and in the course of his

[2] Since Van Leer's employment, the Department of Liquor Control has now been renamed Montgomery County Alcohol Beverage Services.

[3] At the time of his injuries with the County, Van Leer was also employed by Giant on a part-time basis since approximately December 1985. After his accident with the County, Van Leer was unable to return to work at Giant in any capacity.

employment pursuant to the Workers' Compensation Act (the "Act"). Pursuant to this determination, the Commission awarded Van Leer $998.00 weekly from the date of the accident and continuing throughout the time that Van Leer was temporarily disabled.

On December 1, 2017, Van Leer filed a negligence action in the Circuit Court for Montgomery County against Sunbelt Beverage Company, LLC; Reliable Churchill, LLLP; Sunbelt Holding, Inc.; and Larry Merritt ("Sunbelt Case") for the injuries sustained on December 2, 2014, claiming permanent physical injuries, past and future lost wages (from both the County and Giant), and a joint claim with his wife for loss of consortium.[4] On November 14, 2018, the Sunbelt Case was dismissed after Van Leer settled for $168,000.00. The County was not involved in the Sunbelt Case and was not a party to the Settlement Agreement. The Settlement Agreement in the Sunbelt Case dated November 8, 2018 allocates the $168,000.00 settlement amount to cover: (a) $115,486.00 for Van Leer's bodily injury claim; (b) $42,000.00 for loss of consortium; and (c) $10,514.00 for secondary employment losses.

The Settlement Disbursement Sheet further outlines the costs of the litigation totalling $3,345.06 for various litigation and court costs. Based on the amount recovered for each claim, the costs were attributed as: $2,298.05 for bodily injury loss; $210.74 for loss of secondary employment; and $836.27 for loss of consortium. Further, the Settlement Disbursement Sheet provides that attorney's fees were to be paid as follows: $46,194.40

[4] *See Clark Van Leer, et al. v. Sunbelt Beverage Co., et al.*, Civil No. 440837-V, Circuit Court for Montgomery County.

for bodily injury loss; $2,636.00 for loss of consortium; and $0.00 for loss of secondary employment. Under the claim for bodily injury loss, the Settlement Disbursement Sheet notes that the $46,194.40 for attorney's fees is to be deducted from the $115,486.00 recovery for bodily injury. Next, the Settlement Disbursement Sheet divides the costs for this claim ($2,298.05) to be paid 60% by Van Leer and 40% to be deducted from the Workers' Compensation Lien. After all deductions, the amount left to pay the Workers' Compensation Lien totaled $66,993.55 according to the Settlement Disbursement Sheet.

Van Leer later applied for permanent disability. On December 17, 2018, the Commission held a hearing to determine the nature and extent of Van Leer's injuries for the purposes of providing compensation under the Act. The Commission issued an Order on December 18, 2018 awarding Van Leer permanent partial disability in the amount of $749.00 per week for 333 weeks (a total of $249,417.00) subject to an offset for Service-Connected Disability Retirement, effective April 1, 2017, in the monthly amount of $769.86. The Order further granted the County a credit for one-half of the loss of consortium proceeds awarded to Van Leer in the amount of $5,151.63.[5] Van Leer retired effective April 1, 2016. Therefore, Van Leer received $749.00 per week from June 20, 2015 until March 31, 2016, a total amount paid of $31,802.27. In total, the County paid to

[5] Both parties agree that the amount written in the Commission's December 18, 2018 Order is incorrect. Further, both parties agree that the Commission's intent was to provide the County a 50% credit for the loss of consortium proceeds, which would amount to $21,000.00.

Van Leer the amount of $153,972.91. Without expenses, the County paid Van Leer a total of $138,072.32.

On January 15, 2019, the County petitioned for judicial review to the trial court *de novo*. Van Leer also filed a cross-petition for judicial review contending that the award to the County for 50% of the loss of consortium claim was improper. On June 21, 2019, the County filed a motion for partial summary judgment. On July 11, 2019, Van Leer filed an opposition to the County's motion and a cross-motion for summary judgment. The trial court held a motions hearing on August 1, 2019. On October 4, 2019, the trial court entered an Order denying the County's partial motion, granting Van Leer's cross-motion, and remanding the case to the Commission to reverse, in part, the Commission's December 18, 2018 Order related to the Commission's award of a credit for third party loss of consortium proceeds. Additionally, the trial court ordered that the Commission should not issue any lien credit for Van Leer's loss of consortium proceeds, that the remaining balance of the Commission's award of compensation in the December 18, 2018 be affirmed, and that the case be closed with all costs assessed against the County.

The County filed a motion for reconsideration of the trial court's decision on October 15, 2019. Van Leer filed an opposition to the motion on November 1, 2019. On January 8, 2020, the trial court denied the County's motion. The County noted a timely appeal to this Court on February 4, 2020.

DISCUSSION

I. The Commission did not have jurisdiction to evaluate or modify the allocations of proceeds in Van Leer's settlement in the Sunbelt Case because it was an independent third-party action not before the Commission.

The Commission is a "creature of statute" which has "no inherent powers and its authority thus does not reach beyond the warrant provided by the statute." *Holy Cross Hosp. of Silver Spring, Inc. v. Health Servs. Cost Review Comm'n*, 283 Md. 677, 683 (1978); *see also Holman v. Kelly Catering, Inc.*, 334 Md. 480, 487 (1994). Specifically, this Court has held that the Commission "only has those powers conferred upon it by statute." *Greer v. Montgomery Cnty.*, 246 Md. App. 245, 253 (2020). Therefore, for the Commission to be authorized to modify the allocations of proceeds in a third-party settlement, there must be express statutory authority to do so. *See id.*

The County argues that the Commission has jurisdiction to reallocate the proceeds of the third-party settlement in the Sunbelt Case. The County claims that because the Act directs how a settlement related to a workers' compensation injury is disbursed (which requires repayment of a lien to an employer), the Commission has jurisdiction to reallocate the proceeds in a third-party claim to effectuate that outcome. Van Leer argues that the Commission has not been granted any explicit authority by the Legislature to reallocate the third-party settlement award. Van Leer further contends that the appropriate remedy would be to credit the County for any portion of the settlement that would prejudice the County, so long as the County can show such prejudice. We agree with Van Leer.

In the Act, the Maryland Legislature provided the Commission with "jurisdiction to hear only those claims brought by a 'covered employee' as that term is employed in the Workers' Compensation Act." *Pro-Football, Inc. v. McCants*, 428 Md. 270, 280 (2012); *see* Md. Code (1991, 2016 Repl. Vol., 2020 Suppl.), § 9-709 through § 9-711 of the Labor and Employment Article ("L&E"). A "covered employee" is "[a]n individual, including a minor . . . in the service of an employer under an express or implied contract of apprenticeship or hire." Md. Code (1991, 2016 Repl. Vol.), § 9-202 of L&E. Therefore, by definition, only Van Leer is a covered employee in this case, not any of the defendants in the Sunbelt Case, nor Mrs. Van Leer. *See id.*

The Court of Appeals has discussed the possibility that a settlement between a covered employee and a tortfeasor could prejudice an employer's subrogation interest. *Franch v. Ankney*, 341 Md. 350, 360–61 (1996). Critically, the Court held that the mere existence of an unauthorized settlement did not automatically constitute prejudice. *Id.* The employer, not the employee, has the burden of showing that it has been prejudiced by the settlement. *Id.* If the employer can make such a showing, then the remedy is to provide the employer a credit for the amount prejudiced. *Id.* There is no mention that the remedy would be for the Commission to reallocate the settlement terms of a third-party suit, as suggested by the County. *Id.*; *see also Cent. GMC, Inc. v. Lagana*, 120 Md. App. 195, 205 (1998) ("[I]n cases when material prejudice to an employer because of an employee's unauthorized settlement with a third party is shown, the employer is entitled to a credit for the amount of the prejudice.").

The County also relies on this Court's holding in *Saadeh v. Saadeh, Inc.*, 150 Md. App. 305 (2003) to support its position that the Commission is authorized to reallocate the funds in an independent settlement agreement. In *Saadeh*, we held that an "insurer is entitled to participate in the decision to settle a third-party claim asserted by an employee." *Id.* at 314. Here, the County chose not to participate in the Sunbelt case. In fact, the Act provides that *only* the employer (the County) may sue a third-party tortfeasor for the first two months after the Commission awards compensation. Md. Code (1991, 2016 Repl. Vol., 2020 Suppl.), § 9-902(c) of L&E. After two months passed with no action by the County, Van Leer filed suit against the third-party driver of the truck involved in his accident. Once Van Leer sued the third parties, the County retained "a subrogation interest in the reimbursement of the workers' compensation funds it paid." *Podgurski v. OneBeacon Ins. Co.*, 374 Md. 133, 140 (2003).

Saadeh reiterated that if an employer can "establish that it has been prejudiced by the settlement," it is entitled to a credit in the amount of such prejudice. *Saadeh, supra*, 150 Md. App. at 315–16 (internal citations omitted). The appropriate remedy, as provided by this Court, is to "decreas[e] the amount the employee is entitled to recover in his compensation claim by a sum equal to the impairment." *Id.* at 305. There is no indication that the Commission is authorized to reallocate the disbursement of funds agreed upon in a third-party settlement. Accordingly, we hold that the trial court was correct in its determination that the Commission had no jurisdiction to reallocate the allocations of the settlement award in the Sunbelt Case.

II. The County failed to preserve the issues related to the proper deduction of expenses and proportionate payment of attorney's fees before the Commission by neither raising the arguments nor producing evidence to allow the Commission to decide such issues.

Van Leer contends that the County's arguments relating to an error in the calculation of deductions for fees and expenses and of proportionate payment of attorney's fees are not reviewable by this Court because they were not preserved.[6] When a party seeks to have a Commission decision reviewed in the circuit court, the party may choose whether to seek the appeal on the record or *de novo*. *See* Md. Rule 7-202(c). "Before *de novo* fact-finding may be engaged in at the circuit court level, however, there is a threshold requirement that must be satisfied." *Bd. of Educ. for Montgomery Cnty. v. Spradlin*, 161 Md. App. 155, 177 (2005). Critically, "[a]ny factual question that is to be the subject of *de novo* re[-]litigation must first have been a factual issue that was actually decided by the Commission." *Id.*

The Court of Appeals has held that an issue of fact must be raised first before the Commission to be considered on appeal. *Cabell Concrete Block Co. v. Yarborough*, 192 Md. 360, 369 (1949). The Court noted that "there must have been at least evidence before the Commission which would give it the opportunity to pass upon the question." *Id.*

[6] Van Leer relies on recent decisions in *Montgomery County. v. Cochran*, 471 Md. 186 (2020) and *Montgomery County v. Rios*, 244 Md. App. 629 (2020), *cert. denied sub nom. Montgomery County v. Rios*, 468 Md. 233 (2020). In these recent cases, this Court and the Court of Appeals held that issues must be raised before the Commission to be preserved for appellate review. *Cochran*, *supra*, 471 Md. at 233–34; *Rios*, *supra*, 244 Md. App. at 643. Critically, both *Cochran* and *Rios* involved appeals "on the record." *Cochran*, *supra*, 471 Md. at 208; *Rios*, *supra*, 244 Md. App. at 631. Here, the County sought a *de novo* review pursuant to Maryland Rule 7-202(c). Accordingly, the reasoning of *Cochran* and *Rios* is not applicable to this case.

Van Leer contends that the issues of expenses and the proportionate payment of attorney's fees were not raised before the Commission in any way, and, therefore, the issues were not preserved for judicial review. The County argues that the Settlement Disbursement Sheet presented to the Commission was sufficient to preserve these issues. We agree with Van Leer.

Although a formal issue does not need to be presented to the Commission to preserve it for review, there must be an opportunity for the Commission to decide the question. *See id.* Here, the Commission was not given the opportunity to address the questions of expense deductions and the proportionate payment of attorney's fees. The Settlement Disbursement Sheet presented to the Commission merely set forth the amounts to be paid by each party and the expenses to be deducted. No argument was presented to the Commission that the allocated amounts were somehow incorrect. Indeed, there is no evidence that the Commission considered the issues now presented to us on appeal.[7] Accordingly, we hold that the issues of expense deduction and proportionate payment of

[7] At oral argument, the County relied on this Court's holding in *Trojan Boat Co. v. Bolton,* 11 Md. App. 665, 671–72 (1971) to support its contention that the issues were somehow preserved. In *Bolton*, we held that "implicit decisions" by the Commission are preserved for review on appeal. *Id.* An implicit decision is one which the Commission encountered and solved, but did so without mention of it in the record. *Id.* at 671. The implicit decision, however, must be a "logical" one from the explicit decision. *Id.* Here, the Settlement Disbursement Sheet alone did not provide sufficient evidence for the Commission to logically consider and rule on the issues that were not presented to the Commission.

attorney's fees were not preserved before the Commission, and therefore, are not subject to further judicial review.

III. The trial court did not err in finding that a loss of consortium claim was properly allowed before the Commission because sufficient evidence was presented to the Commission justifying a claim for loss of consortium.

The County contends that there is no factual basis to shield $42,000.00 of the settlement because Van Leer failed to produce any evidence to prove a loss of consortium. Van Leer argues that the Commission's decision finding evidence of loss of consortium is prima facie correct and the burden was on the County to produce evidence in the trial court to overturn this decision.[8] We agree with Van Leer.

There is a presumption of factual correctness of Commission decisions outlined in the Workers' Compensation Act. *See* Md. Code (1991, 2016 Repl. Vol.), § 9-745(b)(2) of L&E. L&E § 9-745(b)(2) provides in pertinent part:

> (b) In each court proceeding under this title:
>
> (1) the decision of the Commission is presumed to be *prima facie* correct; and

[8] Van Leer also contends that the issue of loss of consortium was not preserved before the Commission. By filing its *de novo* appeal, instead of an on the record appeal, the County was not bound to only arguments explicitly made before the Commission. *Spradlin*, *supra*, 161 Md. App. at 184. Rather, as noted above, the County is only bound to the issues presented to the Commission which provided the Commission the opportunity to rule on an issue. *See supra* Section II. There must have been enough evidence before the Commission for it to rule on an issue, and therefore, eligible for appellate review. *Spradlin*, *supra*, 161 Md. App. at 177–78. Here, the issue of loss of consortium and shielding of such proceeds was clearly before the Commission. Indeed, the Commission heard testimony regarding loss of consortium and the County's attorney specifically preserved the issue on appeal. Therefore, the Commission had the opportunity to rule upon the issue of loss of consortium and it is, therefore, entitled to review on appeal from a *de novo* review pursuant to Maryland Rule 7-202(c). *Id.*

> (2) the party challenging the decision has the burden of proof.

Based on this language, the County has the burden of proof in challenging the Commission's decision that there was sufficient evidence for loss of consortium. *See id.* The Court of Appeals has noted that the presumption of correctness is not absolute. *Balt. Cnty v. Kelly*, 391 Md. 64, 76–77 (2006). In *Kelly*, the Court held that "if no facts are established before the Commission sufficient to support its decision," then there is no "burden of factual proof on the person attacking it, for the decision of the Commission cannot itself be accepted as the equivalent of facts which do not exist." *Id.* (internal citations omitted). Critically, the Court also provided that when there are "deduction[s] of permissible but diverse inferences," the solution is presumed to be correct and the burden of proof stands. *Id.* But, when reviewing the correctness of the findings of fact of the Commission,

> [i]f there was [] evidence of the fact in the record before the agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, the court has no power to substitute its assessment of credibility for that made by the agency, and by doing so, reject the fact.

Comm'r, Balt. City Police Dep't v. Cason, 34 Md. App. 487, 508 (1977); *see also Uninsured Emps.' Fund v. Pennel*, 133 Md. App. 279, 288 (2000).

Here, the Commission drew reasonable inferences from the evidence before it. For instance, the Settlement Disbursement Sheet was submitted as evidence identifying that $42,000.00 was allocated for loss of consortium. Additionally, there was evidence of Van

Leer's injuries and the Commission was entitled to draw inferences from that, including that of an inference that the Van Leers suffered a loss of consortium and impact on the marital relationship. We are not to determine "whether we might have reached a different conclusion on the evidence." *Mercedes-Benz v. Garten*, 94 Md. App. 547, 556 (1993). Rather, we must give Van Leer, the prevailing party, the benefit of all favorable inferences fairly deductible from the evidence. *Id.* Therefore, we hold that the trial court did not err in finding there was sufficient evidence before the Commission to allow for the shielding of $42,000.00 of the settlement as an award for loss of consortium.

IV. The trial court did not err in allowing Van Leer to shield the proceeds related to the loss of consortium claim from recuperation by the County because the County has no right to subrogate an award related to a claim that it did not pay for.

Loss of consortium is a claim due to the "'loss of society, affection, assistance, and conjugal fellowship. It includes the impairment of sexual relations.'" *Owens-Illinois, Inc. v. Cook*, 386 Md. 468, 487 (2005) (quoting *Deems v. W. Md. Ry. Co.*, 247 Md. 95, 100 (1967)). The interests of a marital relationship are so interdependent that "injury to them is essentially incapable of separate evaluation between the husband and wife." *Deems*, *supra*, 247 Md. at 109. It can only be asserted in a joint claim by husband and wife for joint injury to the marital relationship. *Id.* at 115.

When a third-party action is brought against a third-party tortfeasor by the injured employee, "[t]he employer and insurer are reimbursed fully for the benefits and medical services provided and the third-party claimant may keep the balance." *Chesapeake Haven Land Corp. v. Litzenberg*, 141 Md. App. 411, 420 (2001). This requirement precludes

"double dipping" by the employee. *Id.* When calculating the credit to be applied and given to the employer or insurer, it should be calculated from "that portion of the third-party recovery attributable to benefits paid or payable by the employer/insurer." *Id.*

In our view, any proceeds granted for payment of a claim of loss of consortium to the Van Leers should be shielded from the County's Workers' Compensation Lien. As the Court of Appeals held in *Deems*, the issues faced by a marriage resulting in a claim for loss of consortium are so intertwined it is impossible to attribute any amount specifically to one spouse alone. *Deems, supra*, 247 Md. at 109. We cannot divvy up the award of $42,000.00 for loss of consortium and attribute an amount to Van Leer individually, even assuming *arguendo* his hypothetical individual recovery would be recoverable by the County. *See id.* Mrs. Van Leer is not a covered employee and therefore her recovery is not subject to subrogation by the County. *See Brocker Mfg. & Supply Co., Inc. v. Mashburn*, 17 Md. App. 327, 340–41 (1973).

Additionally, while the Workers' Compensation Act provides a right of subrogation to an employer, "there must be some act performed or committed by, for, or against the subrogee that gives rise to the right to subrogate." *Id.* at 340. Here, the County paid Van Leer for lost wages from his County employment, disability, and medical expenses. None of the payments made to Van Leer related to the loss of consortium with his wife. Accordingly, the trial court did not err in permitting Van Leer to shield the full recovery of $42,000.00 from subrogation by the County.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.