A L A B A M A T R I A L L A W Y E R S A S S O C I A T I O N

INTERVENTION FOR RECOVERY OF MEDICAL BENEFITS IN WRONGFUL DEATH CASES

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"Historically the interpretation of compensation has not included medical payments."

On January 16, 1978, the Alabama Supreme Court, in a five (5) to four (4) vote, denied a Petition for Writ of Certiorari seeking to overturn a decision of the Court of Civil Appeals of July 11, 1997, in the case of ***Municipal Workmen's Compensation Fund, Inc. v. Jolly,*** ____So.2d ____(Ala. Civ. App. 1997) cert. denied, ____ So.2d ____(Ala. 1998). Jolly interprets ***Alabama Code*** § 25-5-11(a), as amended in 1992, to allow a workers' compensation provider the right to subrogation for medical benefits in a wrongful death action, even though the action was brought by the personal representative of the deceased and the only damages sought were, of course, punitive.

In the Court of Civil Appeals opinion, Judge Crawley reasoned that the issue as to whether an insurer is entitled to subrogation from the proceeds of a wrongful death action had already been decided by ***Millers Mutual Insurance Association v. Young***, 601 So.2d 962, 963 (Ala. 1992).

In *Millers Mutual*, the Alabama Supreme Court quoted ***Liberty Mutual Insurance Co. v. Manasco***, 271 Ala. 124, 127, 123 So.2d 527 (196), stating that an employer was entitled to subrogation "irrespective of the type of damages claimed in the complaint in the suit against the third party wrongdoer."

Although the Alabama Supreme Court narrowly declined to question Judge Crawley's analysis, it is clear that the Court of Civil Appeals misinterpreted and misapplied the Supreme Court's ruling in *Millers Mutual*. In *Millers Mutual*, the Alabama Supreme Court allowed the intervention for purposes of subrogation of death benefits, but maintained the Court's previous *Manasco* holding that the reimbursement due the employer was only for payments within the meaning of the term "compensation." See *Millers Mutual Insurance Association v. Young*, supra at 963.

Historically, the interpretation of compensation has not included medical payments. In ***Davidson v. PET, Inc.***, 644 So.2d 896 (Ala. 1994), the Supreme Court quoting ***Powell v. Blue Cross/Blue Shield***, 581 So.2d 772 (Ala. 1990) held "we also note

that, pursuant to the act, only compensation, as opposed to medical payments, is reimbursable." *Id*. at 897.

This echoed the previous finding of the Supreme Court in ***Carol Construction Co. v. Hutcheson***, 347 So.2d 527 (Ala. Civ. App. 1977): "payments by the employer for medical treatment and medicine are not considered compensation."

In *Jolly*, the Municipal Workmen's Compensation Fund, Inc. (the "Fund") correctly argued that the 1992 amendment to § 25-5-11(a) abrogated the longstanding concept concerning the definition of "compensation." However, a close reading of *Ala. Code* § 25-5-11(e), also amended in 1992, reveals that: "…compensation includes medical expenses, as defined in § 25-5-77, if and only if the employer is entitled to subrogation for medical expenses under subsection (a) of this section." (emphasis added).

In adding subsection (e) in direct reference to subsection (a), the Legislature conceived of instances where medical expenses would still not be construed as "compensation." Therefore, a blanket analysis would be inappropriate.

The legislature in both § 25-5-11(a) and § 25-5-11(e) places a check on medical expense recovery by limiting it to situations where subrogable claims exist. Pertinent portions of § 25-5-11(a) and § 25-5-11(e) are as follows:

§ 25-5-11(a) – "For purposes of this amendatory act, the employer shall be entitled to subrogation for medical and vocational benefits expended by the employer on behalf of the employee; however, if a judgment in an action brought pursuant to this section is uncollectible in part, the employer's entitlement to subrogation for such medical and vocational benefits shall be in proportion to the ratio of the amount the judgment collected bears to the total amount of the judgment."

§ 25-5-11(e) – "For purposes of the subrogation provisions of this subsection only, compensation includes medical expenses, as defined in Section 25.5.77, if and only if the employer is entitled to subrogation for medical expenses under subsection (a) of this section.

While it is true that *Millers Mutual* involved a wrongful death claim, the repayment requested was for death benefits. The repayment of death benefits was obviously something foreseeable on the part of the third party Plaintiff. *Millers Mutual* did not contemplate a claim for medical benefits not even raised by the workers' compensation carrier until after the death of the employee, as was done in *Jolly*.

Along with the amendments to § 25-5-11(a) and (e), the Alabama Legislature also amended *Ala. Code* § 25-5-77 by adding subsection (g):

"In a compensable workers' compensation claim, the injured employee shall not be liable for payment of any authorized and compensable medical expenses associated with a workers' compensation claim."

This concept is not new in Alabama. The purpose of the Workers' Compensation Act has long been to "require industry to bear a part of the burden of disability and death resulting from the hazards of industry." See ***Howe v. Southern Construction Co.***,235 Ala. 580, 180 So. 288 (1938).

In ***Kelly v. Shelby County Healthcare Authorities***, 630 So.2d 898 (Ala. Civ. App. 1993), the Alabama Court of Civil Appeals adopted an Attorney General's opinion determining that the employee is not liable for the cost of reasonably necessary medical and surgical treatment resulting from an on-the-job accident. *Id*. at 900. The Court determined the Attorney General's opinion to be a "judicious analysis" of *Alabama Code* § 25-5-77.

With a codification of this concept through the adoption bye the Legislature in 1992 of *Ala. Code* § 25-5-77(g), there can be no doubt that medical bills in a work-related injury are the sole province of the employer. "The general rule is that damages are unrecoverable where the plaintiff has not paid or is not liable for such items." ***Jones v. Crawford***, 361 So.2d 518, 521 (Ala. 1978) (Emphasis added).

Jones allowed the reimbursement by the workers' compensation carrier for medical expenses because the trial court had allowed the employee to introduce evidence of said expenses and obtain judgment based on same. This, too, would set up an instance where it would be foreseeable and equitable on the part of the employee to repay the workers' compensation carrier for monies collected by him/her.

However, it is clear from the adoption of *Ala. Code* § 25-5-77(g) and the amendments to § 25-5-11 that the term "compensation", for purposes of subrogation, was never intended to include medical expenses which the employee or his representative had neither the responsibility for, nor the ability, to collect. An employee can only be responsible to repay that which he is able to collect. See ***Harrell v. PET, Inc.***, 664 So.2d, supra at 206. See also Ala. Code § 25-5-11(a).

Although *Alabama Code* § 25-5-77(g) was not enacted at the time of the Supreme Court's analysis in *Millers Mutual*, it is obvious from its subsequent passage that equating an employee's responsibility for reimbursement of death benefits to a claim for reimbursement of medical benefits in a wrongful death action was a scenario not anticipated by the Alabama Legislature.

This is particularly true where no claim was made on the tortfeasor by the health carrier or the employee for such payments during the employee's lifetime. Allowing an insurance provider to make a claim for medical benefits in such an instance is tantamount to a revival of the personal injury claims of the deceased, disallowed by *Ala. Code* § 6-5-462.

Since a wrongful death claim can provide only a punitive damage recovery, there would never be any recovery or collection of the medical benefits to credit upon the

liability of the employer, as discussed in *Harrell v. PET, Inc.*, 664 So.2d 204, 206 (Ala. Civ. App. 1994). Thus, the collectibility requirement provisions of § 25-5-11(a) needed to activate the medical expense subrogation provisions of § 25-5-11(e), are never reached. Remember that in § 25-5-11(e) compensation includes medical expenses, as they are defined in § 25-5-77, if and only if the employer is entitled to subrogation for medical expenses under subsection (a).

Since the provisions of *Ala. Code* § 6-5-462 mandate that any claims that an employee may have had during his or her lifetime do not survive unless filed prior to death, the employer has, at best, under *Ala. Code* § 25-5-11(d), an additional six (6) months from the last opportunity the employee had to bring a claim. If not done, any subrogable claim should be extinguished by operation of law.

THE APPELLATE DECISION IN *JOLLY* VIOLATES LONG ESTABLISHED PRINCIPLES OF SUBROGATION LAW

In reversing the decision of the trial court in *Jolly*, Judge Crawley "declined Jolly's invitation to limit the right of subrogation provided by the Legislature in *Ala. Code* § 25-5-11(a) and approved by our Supreme Court in *Millers Mutual*." ***Municipal Workers Fund, Inc. v. Jolly***, supra. (emphasis added).

However, since the Alabama Court of Civil Appeals interprets *Ala. Code* § 25-5-11(a) as a subrogation statute, then the longstanding equitable principles of subrogation, as established by previous case law, unavoidably come into play. Further, the Legislature's use of the equitable term "subrogation" in *Ala. Code* § 25-5-11(a) and (e), as opposed to "reimbursement", clearly evidences intent that traditional subrogation principles be employed.

With that in mind, *Webster's New Collegiate Dictionary* (1977 Ed.) defines subrogate as "to put in the place of another", and subrogation as "substitution of one for another as a creditor so that the new creditor succeeds to the former's rights."

This concept, was followed by the Alabama Supreme Court in ***American Cynamid Co. v. U.S. Fidelity and Guaranty Co.***, 459 So.2d 851, 853 (Ala. 1984):

> ***"When one, under claim of right, discharges an obligation for which another should be held legally liable for payment, then the former stands in the shoes of the obligator and may seek reimbursement against the latter for the damages caused by its allegedly culpable conduct."***(emphasis added).

Even earlier, the Alabama Supreme Court ruled in ***Lloyd Wood Construction Co. v. Conserve, Inc.***, 285 Ala. 409, 232 So.2d 649, 655 (1970) that "as to subrogation rights, a surety does not stand in the shoes of the debtor whose performance he assured; rather he takes the position of the creditor who has been satisfied by the surety."

"The Wrongful Death Act of Alabama does not allow the introduction or consideration of medical expenses."

Obviously, under these established principles of subrogation a workers' compensation carrier is to "stand in the shoes" of the administrator of an estate. Since an administrator cannot request recovery from the tortfeasor of medical expenses expended in the care of the deceased employee under the Wrongful Death Act of § 6-5-410, then a workers' compensation carrier inherits no such rights by "standing in the shoes."

It is, therefore, not so much whether the appellate courts are being asked to "limit the rights of subrogation", as Judge Crawley suggested in *Jolly*, but whether, under subrogation principles, there is any valid basis at all for reimbursement of medical expenses in a death case.

The Alabama Supreme Court ruled in ***Jefferson Standard Life Insurance Co. v. Brunson***, 226 Ala. 16, 145 So. 156 (1932) that:

> "***Subrogation is not a matter of strict right. It is of equitable origin, and dependent in its application upon the facts of each particular case.*** (citations omitted) ***… While no general rule may be laid down as applicable to all cases, yet, to justify its application, it must appear that the enforcement of the doctrine will not only best serve the substantial purposes of justice, but also the true intention of the parties…nor can such an equitable doctrine be invoked to the injury of an innocent third person." Id. at 17.***

The application of subrogation to the repayment of medical expenses in a wrongful death case brought by an administrator, especially where no claim was made by the workers' compensation carrier for benefits before the death of the employee, does not serve the substantial purposes of justice, nor the true intentions of the parties since the Wrongful Death Act of Alabama does not allow the introduction or consideration of medical expenses. The only effect is, as indicated in *Jefferson Standard*, the injury of innocent third persons. Such persons, are, of course, heirs of estates now forced to bear the burden of payment to workers' compensation carriers out of estate recoveries in wrongful death suits where the medical benefits were not even an element of damages.

A bottom line requirement for the application of the doctrine of subrogation is stated by the Alabama Supreme Court in ***Duke v. Kilpatrick***, 231 Ala. 51, 163 So. 640, 641 (1935):

> ***"A person cannot be subrogated to the benefit of an incumberence which he has agreed to pay, which is but another method of expression of the principle that secondary liability for the debt is essential to the assertion of the right of subrogation."*** (*emphasis added*).

The worker's compensation carrier always had the responsibility to make the payment in *Jolly*, pursuant to *Ala. Code* § 25-5-77(g). Also, since the tortfeasor in a third

party claim cannot be liable for the debt of the medical expense due to the nature of the Alabama Wrongful Death Act, there is an absence of secondary liability. Therefore, *Ala. Code* § 25-5-11, even as amended, can create no right to reimbursement because there can be no valid application of the doctrine of subrogation.

THE ALABAMA COURT OF CIVIL APPEALS HAD ALREADY INTERPRETED STATUTORILY MANDATED SUBROGATION

Subrogation required by statute was addressed by the Alabama Court of Civil Appeals in ***Smith v. Alabama Medicaid Agency***, 461 So.2d 817 (Ala. Civ. App. 1984). In that case, Alabama Medicaid's right of subrogation was evaluated.[1] The Alabama Court of Civil Appeals ruled:

> ***"When there is no special legislative intent or definition, statutory terms are to viewed in light of their usual and ordinary meaning with consideration to the purpose and context of the statute where hey are found. …weight will be given to the practical effect that a proposed construction will have."***

In *Smith*, ordinary meaning was given to the word "subrogation".[2] Thus, equitable principles were applied to determine Medicaid's right of recovery , and such equitable principles would depend on the facts of each case. See *Id.* at 820. The Court in Smith determined that subrogation was not a matter of strict right.

Even in light of a statutory requirement of subrogation in *Smith*, the Court noted subrogation "*is an equitable principle that is dependent upon the particular facts of the case."* *Id.* at 819. Also, *Smith* determined that the theory behind the principle of subrogation was to "seek to prevent the unjust enrichment of one party at the expense of another through contribution." *Id*.

CONCLUSION

In construing the Workers' Compensation Act, our appellate courts should give effect to legislative purpose and policy. See ***Woodward Iron Co. v. Horton***, 267 Ala. 449, 103 So.2d 717 (Ala. 1958). Additionally, our appellate courts should not extend the operation of the Workers' Compensation Act beyond the limits such as are clearly defined by the Legislature. See ***Sloss Sheffield Steel & Iron Co. v. Jones***, 220 Ala. 10, 123 So.201 (1929).

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[1] The 1992 amendment of Ala. Code § 25-5-11(a), just as the Medicaid reimbursement statute addressed in *Smith*, specifically contains the term "subrogation," concerning entitlement to reimbursement for medical and vocational benefits. Thus, the principles of *Smith*, rather those those of ***Millers Mutual Insurance Association v. Young***, 601 So.2d (Ala. 1992) are applicable.

[2] As noted by Judge Holmes in response to Medicaid's contention that the reimbursement statute entitled it to 1005 refund: "This contention totally ignores the phrase "shall be subrogated." See ***Smith v. Alabama Medicaid Agency, supra*** at 819.

As can be seen by legislative amendments of 1992 as compared to the decision of the Court of Civil Appeals and the denial of the Petition of Writ of Certiorari in the case of ***The Municipal Workmen's Compensation Fund, Inc. v. Edna Jolly***, et. al., So.2d, (Ala. Civ. App. 1997), cert. denied ____ So.2d (Ala. 1998), our appellate courts have, in effect, legislated an unnatural abrogation of longstanding subrogation principles.

The Wrongful Death Act of Alabama (*Ala. Code* § 6-5-410) was never intended to be a catchall cause of action for claims that could have been made during the lifetime of an injured employee. The Alabama Legislature never enlarged the Wrongful Death Statute, and used the term "subrogation", rather than "reimbursement" in its 1992 amendments to *Ala. Code* §§ 25-5-11(a) and (e). Nevertheless, with the advent of *Jolly*, it appears that limitations on the type of damages that can be recovered in wrongful death actions remain upon the plaintiff, but not upon the insurance carrier intervenor.

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