APPEAL NO. 001511

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 6, 2000. The sole issue had to do with whether the respondent (self-insured) was subrogated to amounts that were received by the appellant (claimant) in a settlement for her injuries with her own uninsured motorist policy. The hearing officer found that the self-insured was subrogated to these proceeds under Section 417.001 and 417.002. The claimant has appealed and argues that subrogation lies only against third parties, not against the policy proceeds for which the claimant is considered a first party. The self-insured responds that the scope of the "third party" against whose liability a subrogation interest lies is not limited in the statute as the claimant suggests.

DECISION

We affirm.

The claimant worked as a crossing guard for the self-insured when she was struck by a vehicle on _____. The self-insured had paid over $78,500.00 in income and medical benefits as a result of her injury.

A settlement was reached with the insurance company of the driver who was at fault ($25,000.00) and the self-insured was paid this settlement. At issue was whether a separate $20,000.00 settlement that the claimant entered into with her own insurance company's uninsured motorist coverage was subject to subrogation. The settlement was paid for the claimant's bodily injuries that were the subject of the workers' compensation claim. The claimant did not notify the self-insured of her settlement negotiations. The claimant argued that a policy she paid for involved no "third parties" but constituted a "first party" recovery.

We do not agree that the hearing officer erred in rejecting this argument. It has already been held that Sections 417.001 and 417.002 do not limit the scope of "third party" to only a third-party tort-feasor. Employers' Casualty Company v. Dyess, 957 S.W.2d 884 (Tex. App.-Amarillo 1997, writ denied) (Dyess case). The rationale employed in this case was likewise applied to the 1989 Act. Texas Workers' Compensation Insurance Facility v. Aetna Casualty and Surety Company, 994 S.W.2d 923 (Tex. App.-Houston [1st Dist.] 1999, no writ history) (Aetna case). As those cases also point out, a purpose of the subrogation statute was to avoid double recovery of damages for the injured worker. We note that the whole concept of "subrogation" means that the carrier essentially stands in the shoes of the injured worker with respect to any recovery to which that worker is entitled, either by tort or by contract, so the fact that an injured worker may be a "first party" with respect to the liable party is a distinction without a difference. In this case, the self-insured "stood in the shoes" of the claimant in her contract with her uninsured motorist policy for payment of damages. The damages for which she reached a settlement were entirely due to her work-related injury.

In our opinion, the reference to "third parties" in the statute refers to the standing that a liable party has with respect to the relationship between the workers' compensation insurance carrier and the injured worker. Thus, as the Dyess case noted, an employer's uninsured motorist insurer is a "third party" for purposes of the statutory right of subrogation. As noted in the Dyess case, the statutory right of subrogation applies to any parties liable for injury, whether through tort or through contract. Dyess, page 891. This is broad enough to encompass the claimant's own uninsured motorist coverage, for which her liability insurer was "a third party" as to the claimant and the self-insured; although the claimant postulates that a carrier could obtain an array of benefits under the hearing officer's decision, we would point out that Section 417.001 applies only to "damages" for an injury or death. Other policies, such as life insurance, whose payment is not contingent upon the existence of "damages," would not appear to be within the ambit of this statute. (Federal law would, of course, control whether social security benefits could be subject to subrogation.)

Finding the hearing officer's decision to be the correct application of the law, we affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

I disagree with the majority that the decisions in Employer's Casualty Company v. Dyess, 957 S.W.2d 884 (Tex. App.-Amarillo 1997, writ denied) (hereinafter Dyess) and Texas Workers' Compensation Insurance Facility v. Aetna Casualty and Surety Company, 994 S.W.2d 923 (Tex. App.-Houston [1st Dist.] 1999, no writ history) (hereinafter Aetna) are controlling in the present case. Both Dyess and Aetna stand for the proposition that a carrier's right to subrogation under the Texas Workers' Compensation Act is not limited to damages collected from third-party tort-feasors. Both Dyess and Aetna clearly hold that the employer's workers' compensation carrier has the right to subrogate against proceeds from an employer's uninsured/underinsured motor vehicle coverage when an employee is injured in a motor vehicle accident. The claimant argues that such a situation is distinguishable from the present case in which she collected from her own

uninsured/underinsured motor vehicle policy. The claimant argues that the distinction is that she is first party beneficiary of her own policy for which she paid premiums, whereas a person collecting under the person's employer's uninsured/underinsured policy is only a third-party beneficiary of such coverage which was paid for by the employer.

I do believe that there is a basis for distinguishing between first- and third-party beneficiaries for the purposes of subrogation under the Texas Workers' Compensation Act. As the Dyess court recognizes, a workers' compensation carrier does not have a right of subrogation against a claimant's life insurance policies when the claimant's beneficiaries file a workers' compensation death claim. Dyess at 891. Nor does a workers' compensation carrier have a subrogation interest in a disability policy or in Social Security disability benefits even when the basis of a person's collecting these benefits is disability resulting from an injury on the job. By their terms, the right to subrogation found in sections 417.001 and 417.002 deal with a right to subrogation from third parties. A policy of insurance purchased to protect one from the general hazards of life (or death) is simply not part of the benefits collected from a third party as a result of a work-related injury. The claimant, by purchasing uninsured/underinsured coverage, was protecting herself in the event of any accident she might have in which the negligence of an uninsured or underinsured motorist caused her injuries. To me this is more analogous to a person purchasing life insurance or disability insurance which would protect them in the event of death or disability due to any reason, not simply due to an injury on the job. The fact that a person would collect these benefits, whether or not the event triggering the payment of these benefits took place on the job or off the job, seems to me to be the basis for the fact that collecting these benefits, as well as the benefits provided by workers' compensation, is not double recovery. If a worker had built up a personal savings account to protect against the hazards of life and had this savings available to help carry the worker through the financial strain of an on-the-job injury, it would not be double recovery for the worker to also collect the workers' compensation benefits for which the worker's employer had paid a premium. I do not think it is double recovery for a worker who has paid for additional insurance protection in the event of being injured in a motor vehicle accident to collect such benefits. To the degree that Dyess and Aetna are based upon preventing double recovery, they are distinguishable from the present case. In both Dyess and Aetna, the employer paid for the uninsured/underinsured motorist coverage and the claimants in those cases would have only been able to collect on the uninsured/underinsured policies had they been hurt on the job. In the present case, the claimant's uninsured/underinsured policy covered her whether or not she was on the job. In this respect, her policy was more analogous to a life insurance or general disability policy than to the uninsured/underinsured coverage under consideration in Dyess and Aetna.

Also, I would note that in Bogart v. Twin City Fire Insurance Company, 473 F.2d 619 (5th Cir. 1973) (hereinafter Bogart) the court found that the workers' compensation insurance carrier was not entitled to subrogation from the claimant's own uninsured/underinsured motor vehicle policy. The rationale of Bogart was that the subrogation provision of the Texas workers' compensation law only applied to third-party tort-feasors. While both the Dyess and Aenta courts explicitly declined to follow the

rationale of Bogart, which would have dictated the opposite result in those cases, Bogart remains the only reported decision, of which I am aware, directly dealing with the subrogation rights of a workers' compensation carrier claiming subrogation to the proceeds of a claimant's own uninsured/underinsured policy. Allowing subrogation against the employer's motor vehicle policy but not the claimant's own policy has the happy result of reconciling the results of Bogart, Dyess, and Aetna. This is exactly what I would do. I would, therefore, reverse the hearing officer's decision and render a decision that the self-insured in the present case is not entitled to subrogation. I think this would not result in double recovery for the claimant, but would preclude a windfall for the self-insured by preventing it from acquiring benefits bought and paid for by the claimant.

Gary L. Kilgore
Appeals Judge