APPEAL NO. 013070
FILED FEBRUARY 4, 2002

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 November 25, 2001. The hearing officer determined that the recovery of respondent (claimant) from the personal automobile insurance policy, written by (TU), does not give rise to a subrogation interest lien for purposes of Section 417.002(a), and that appellant (carrier) is not entitled to take a credit for workers' compensation benefit payments based on claimant's recovery from the TU underinsured motorist policy. Carrier appealed, asserting that the hearing officer's decision is wrong as a matter of law. Claimant responded, urging affirmance.

DECISION

We reverse and render.

Claimant was injured in a motor vehicle accident (MVA) while in the course and scope of her employment as a sales associate on _____. Claimant testified that she was driving her own vehicle at the time of the MVA, and that she had previously purchased an underinsured motorist policy from TU. At issue is whether or not the $20,000.00 settlement claimant entered into with her own insurance company's underinsured motorist coverage is subject to subrogation pursuant to Section 417.001. The settlement paid for claimant's bodily injuries that were the subject of the workers' compensation claim. On appeal, carrier argued that the hearing officer erred as a matter of law in not following the holdings 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 pet.) (hereinafter Aetna). We agree.

The hearing officer denied subrogation based on Bogart v. Twin City Fire Insurance Co., 473 F.2d 619 (5th Cir. 1973) (hereinafter Bogart), and the fact that the uninsured motorist coverage was purchased by claimant, herself. We have previously held that the proceeds from a claimant's own uninsured motorist policy is subject to subrogation. *See* Texas Workers' Compensation Commission Appeal No. 001511, decided August 11, 2000. In Bogart, the court held that the workers' compensation carrier was not entitled to subrogation rights to claimant's uninsured motorist policy. The court interpreted the words "third person" in the subrogation statute, Tex. Civ. Stat. Ann. Art 8307, Section 6a, to be limited to the actual tort-feasor. That narrow interpretation has been specifically rejected by the courts in Dyess, Aetna, and Texas Workers' Compensation Insurance Fund v. Knight et. al., 2001 Tex. App. LEXIS 6893, decided October 9, 2001. The court in Dyess held that the subrogation right can apply to any parties liable for claimant's injury, regardless of whether that liability arose in tort or contract. In specifically, holding that carrier's right of subrogation extends to claims against an uninsured/underinsured motorist insurance carrier, the court in Aetna stated that the term "third party" should be read

expansively. In the instant case, TU had a contractual obligation to pay claimant for her injuries. Neither Section 417.001 nor 417.002 make any distinction or exception based upon who has paid for the policy.

Having determined that the hearing officer erred, we reverse his determination that claimant's recovery from her personal automobile insurance policy, written by TU, does not give rise to a subrogation interest lien for purposes of Section 417.002(a) and that carrier is not entitled to take credit for workers' compensation benefit payments based on claimant's recovery from the TU underinsured motorist policy. We render a new decision that claimant's recovery from her personal automobile policy, written by TU, does give rise to a subrogation interest lien for purposes of Section 417.002(a) and that carrier is entitled to take credit for workers' compensation payments based on claimant's recovery from the TU underinsured motorist policy.

According to information provided by carrier, the true corporate name of the insurance carrier is **POTOMAC INSURANCE COMPANY OF ILLINOIS** and the name and address of its registered agent for service of process is

C.J. FIELDS
5910 NORTH CENTRAL EXPRESSWAY
DALLAS, TEXAS 75206.

Judy L. S. Barnes
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

DISSENTING OPINION:

The same issue and cases were in dispute in Texas Workers' Compensation Commission Appeal No. 001511, decided August 11, 2000. The majority in that case affirmed the decision of a hearing officer finding that the carrier was entitled to subrogate against the claimant's own uninsured motorists policy. I stated as follows in the dissent in that case:

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 [1989] 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 [1989] 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 [S]ections 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 Aetnacourts 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.

Based upon this same logic, I would affirm the decision of the hearing officer in the present case.

Gary L. Kilgore
Appeals Judge