APPEAL NO. 031088
FILED JUNE 23, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 2, 2003. The hearing officer decided that the respondent's (claimant herein) net third party recovery under Section 417.002 was zero. The appellant (self-insured herein) files a request for review, arguing that the entire $2,740.40 paid to the claimant under the personal injury protection (PIP) coverage of her personal automobile insurance policy should be considered as third party recovery to which the self-insured was entitled to subrogation.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The facts of this case are not in dispute. It was undisputed that the claimant suffered a compensable injury, when working as bus driver for the self-insured, when the bus she was driving was struck by another vehicle. The claimant testified, and the self-insured does not dispute, that the driver of the other vehicle was at fault, but was uninsured. Nor is it disputed that the claimant was paid temporary income benefits (TIBs) in the amount of 70% of her preinjury average weekly wage (AWW) during the time she was unable to work due to her compensable injury. The claimant also collected 30% of her AWW during the period she was not able to work from her personal auto insurance company, specifically through the PIP coverage on that policy. The claimant testified that she only sought 30% of her AWW, or $2,780.40 because she was advised by her personal auto insurer that if she collected more than 100% of her AWW that the self-insured would be entitled to subrogation, but that as long as between TIBs and the amount she collected from her own PIP coverage she did not receive more than 100% of her preinjury AWW, the self-insured had no right to subrogation.

While the facts of this case are not in dispute, the law in this area is less than well-settled. First, there is no case cited by the parties that deals specifically with subrogation to PIP benefits. The hearing officer recognizes this when she distinguishes some of the prior cases dealing with uninsured/underinsured (UM) motorist coverage from the present case. The hearing officer also points to the fact that the jurisprudence dealing with subrogation to proceeds from UM coverage is not entirely clear, although she finds the decision in Liberty Mutual v. Kinser, 82 S.W.3d 71 (Tex. App.-San Antonio 2002, no writ) (hereinafter Kinser) persuasive. The self-insured argues on appeal that there should be no distinction between PIP and UM coverage in regard to subrogation and that precedent regarding UM coverage supports its right to subrogation. To support its position that a carrier is entitled to subrogation from a UM policy, the self-insured specifically cites to Employers' Casualty Company v. Dyess, 957 S.W.2d 884 (Tex. App.-Amarillo 1997, writ denied); 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); and the majority opinion in Texas Workers' Compensation Commission Appeal No. 001511, decided August 11, 2000. The claimant at the CCH relied upon Kinser and the dissenting opinion in Appeal No. 001511.

It is obvious that there may be a split of authority among the Texas courts of appeals concerning a carrier's right to subrogate against UM coverage.[1] There is obviously disagreement in Appeal No. 001511, *supra*, concerning this matter. However, the present case turns on a carrier's right to subrogate against PIP, not UM, coverage. While the self-insured argues that there should be no difference between these types of coverages for purpose of workers' compensation subrogation, there are real differences. Recovery from UM coverage is based upon an uninsured (or underinsured) third party being liable for damages. PIP is no fault coverage, which is not based upon the liability of a third party. In the present case the Texas Personal Auto Policy from which the claimant recovered PIP benefits is in evidence, and specifically excludes workers' compensation subrogation, stating as follows on p. 7 of the policy:

> This coverage shall not apply directly or indirectly to benefit:
>
> 1. Any insurer or self-insurer under any workers' compensation, disability or similar law;
>
> 2. Any insurer of property.

The hearing officer recognized this and based her decision, at least in part, on this exclusion. Based upon the differences between UM and PIP coverage, and this policy language, we find no error in the hearing officer's determination in the present case that the claimant's net third party recovery in this case was zero.

[1] Although the dissenting opinion in Appeal No. 001511, *supra*, attempted to reconcile the authority up to that time and is itself consistent with Kinser.

The decision and order of the hearing officer are affirmed.

The self-insured states that the true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

GT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Veronica Lopez-Ruberto
Appeals Judge

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Michael B. McShane
Appeals Panel
Manager/Judge