

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

LISA KENDRICKS, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 109612
 :
 THE CLEVELAND CLINIC :
 FOUNDATION, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: June 10, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-918465

Appearances:

The Law Office of Michael B. Pasternak and Michael B.
Pasternak, *for appellee.*

Meyers, Roman, Friedberg & Lewis and R. Mark
Gottfried, *for appellant.*

EMANUELLA D. GROVES, J.:

{¶ 1} Appellant, Cleveland Clinic Foundation (“the Clinic”), appeals the trial court’s judgment granting it \$8,221.66 under R.C. 4123.931 arguing that it does

not include the full extent of their subrogation interest. For the reasons that follow, we reverse the trial court's judgment granting the award.

Procedural History and Factual Background

{¶ 2} On October 10, 2016, appellee Lisa Kendricks (“Kendricks”) was an employee of the Clinic. On that date, the Clinic provided limousine service to take Kendricks and another passenger to a work site. Shima Limousine Services, Inc. (“Shima”) provided the limousine service. On the way to the worksite, an accident occurred and Kendricks and another passenger were injured.

{¶ 3} Due to her injuries, Kendricks filed a workers' compensation claim. Kendricks was allowed workers' compensation benefits for the issues of a right-knee strain, left-wrist strain, and cervical strain. Kendricks received \$12,956.40 from the Clinic, who is a self-insured employer for workers' compensation, to cover the cost of medical treatments and indemnity payments for lost wages.

{¶ 4} On February 7, 2018, Kendricks filed a second application for workers' compensation benefits for the additional diagnosis of substantial aggravation of a preexisting condition – osteoarthritis of the right knee. That application was denied. Kendricks appealed that decision to the common pleas court. She later dismissed the case without prejudice with leave to refile.¹

{¶ 5} On August 16, 2018, Kendricks filed a personal injury action against Shima in relation to the accident. The Clinic was added as a party to the action as a

¹ Kendricks has since refiled that case under CV-20-940025.

statutory subrogee. On April 10, 2019, Kendricks filed a motion to voluntarily dismiss the Clinic from the action without prejudice with leave to refile.

{¶ 6} On July 19, 2019, Kendricks filed an action for equitable relief against the Clinic in order to determine the Clinic's subrogation interest. Both the personal injury action and the action against the Clinic were assigned to the same judge.

{¶ 7} On or about August 19, 2019, the personal injury case against Shima was settled for \$60,000 and dismissed.

{¶ 8} On September 26, 2019, in the subrogation action, the trial court ordered the parties to brief the issues of subrogation and distribution of proceeds.

{¶ 9} In January, the trial court held a hearing where the parties focused on future expenses. Kendricks argued there were no future expenses because she dismissed her claim for substantial aggravation of a preexisting condition. Additionally, Kendricks argued that the Clinic had an obligation to set a value on any future medical expenses.

{¶ 10} The Clinic argued that the dismissal of the new case did not foreclose the possibility of future medical expenses because the case was dismissed without prejudice. The Clinic estimated future medical expenses of at least \$25,000, but suggested it could be \$60,000 or higher. The Clinic also argued settlement between Kendricks and Shima did not include their subrogation interest. Finally, the Clinic offered to accept a settlement that excluded future expenses, if Kendricks would forgo any future claims. Kendricks refused to agree to those terms.

{¶ 11} At that time, the matter was marked heard and submitted and a trial date was scheduled for July 27, 2020. On February 21, 2020, the trial court held that the Clinic was entitled to receive \$8,221.66 as a statutory subrogee.

{¶ 12} The Clinic now appeals and assigns the following errors for our review:

Assignment of Error No. 1

The Trial Court erred by determining Appellant's subrogation interest without the presentation of evidence.

Assignment of Error No. 2

The Court erred by denying estimated future payments.

Assignment of Error No. 3

The Court erred by not awarding appellant the full amount of its subrogation interest.

Law and Analysis

{¶ 13} In the first assignment of error, the Clinic argues that the trial court erred in making its decision without an evidentiary hearing.

{¶ 14} Preliminarily, we note workers' compensation subrogation is created by statute and covered under R.C. 4123.931. *State Bur. of Workers' Comp. v. Mal-Sarkar*, 8th Dist. Cuyahoga No. 101642, 2015-Ohio-1025, ¶ 11. Statutory interpretation is a matter of law and therefore, our review of the trial court's decision is de novo. *Bur. of Workers' Comp. v. Verlinger*, 153 Ohio St.3d 492, 2018-Ohio-1481, 108 N.E.3d 70, ¶ 6. "When examining the actual language of a statute, words should be given their common and ordinary meaning unless the legislature has clearly expressed a contrary intention." *Parma v. Burgos*, 2019-Ohio-2445, 139

N.E.3d 553, ¶ 3 (8th Dist.), citing *Youngstown Club v. Porterfield*, 21 Ohio St.2d 83, 86, 255 N.E.2d 262 (1970); R.C. 1.42.

{¶ 15} We begin our discussion of this appeal by noting that under R.C. 4123.931(A), the payment of workers' compensation benefits creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. *Rivers v. Otis Elevator*, 2013-Ohio-3917, 996 N.E.2d 1039, ¶ 32 (8th Dist.). A statutory subrogee includes a self-insured employer. *Id.* R.C. 4123.93(B); *Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 31.

{¶ 16} Under the statutory framework, the “net amount recovered [from Shima] is subject to a statutory subrogee’s right of recovery.” R.C. 4123.931(A), *Jones v. Greyhound Lines, Inc.*, 2012-Ohio-4409, 981 N.E.2d 294, ¶ 9 (10th Dist.). The net amount recovered is defined by statute as “the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery.” R.C. 4123.93(E).

{¶ 17} R.C. 4123.931 provides guidance on how a settlement should be divided between a claimant and a statutory subrogee. *Groch* at ¶ 48. The statute provides an equation that applies whether the parties settle or whether they go to trial. *Id.* at ¶ 63. The parties may agree to a different division of the net amount recovered that they deem fair or if the parties cannot agree, they may file a request with the administrator of workers' compensation for a conference to review, or they

may engage in any binding or nonbinding dispute resolution process. R.C. 4123.931(B). *Id.* at ¶ 85.

{¶ 18} In the instant case, Kendricks and the Clinic could not come to an agreement as to the subrogation amount, however, neither party requested a conference with the administrator of workers' compensation. Courts have found that a claimant and subrogee may utilize alternate methods to determine the allocation of a settlement that do not appear in the statute. *Groch* at ¶ 89; *Jones* at ¶ 25; *McKinley v. Ohio Bur. of Workers' Comp.*, 170 Ohio App.3d 161, 2006-Ohio-5271, 866 N.E.2d 527, ¶ 27 (4th Dist.). In these cases, the courts have found that parties may use a declaratory judgment action to determine the allocation of any settlement or award.

{¶ 19} Kendricks and the Clinic could not come to a consensus on the subrogation amount because they could not agree on the amount of future expenses. The Clinic indicated they would agree that there were no future expenses, if Kendricks would agree to not seek further workers' compensation benefits as a result of the accident. Kendricks was not willing to agree to those terms.

{¶ 20} Without further hearing, the trial court adopted the calculation provided by Kendricks to determine the amount the Clinic was entitled to as subrogee. Utilizing that number, the trial court determined that the Clinic was entitled to \$8,221.66. The trial court determined that the Clinic was not entitled to future estimated expenses.

{¶ 21} R.C. 4123.93 unambiguously defines “subrogation interest” to include the “past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other expenses paid to or on behalf of the claimant by the statutory subrogee * * * .” R.C. 4123.93(D); *State Bur. of Workers’ Comp. v. Mal-Sarkar*, 8th Dist. Cuyahoga No. 101642, 2015-Ohio-1025, ¶ 12. While R.C. 4123.931 does not specifically define future estimated payments, the statute makes clear that the amount of future estimated payments is determined by the parties, by the administrator’s designee, through an alternative dispute resolution process during settlement, or proven to a judge or jury at trial. *Smith v. Jones*, 175 Ohio App.3d 705, 2007-Ohio-6708, 889 N.E.2d 141, ¶ 29 (3d Dist.). Here, the parties did not agree on future estimated expenses, nor was the issue proven to a judge or jury. By adopting Kendricks’s unilateral estimation, the trial court runs afoul of R.C. 4123.93 and 4123.931.

{¶ 22} While courts have noted that subrogation under R.C. 4123.931 does not create a present collectable interest in estimated future expenses, the statute allows the claimant to put the portion of the settlement that represents future payments into an account. *See Fry v. Surf City, Inc.*, 137 Ohio Misc.2d 6, 2006-Ohio-3092, 851 N.E.2d 573, ¶ 15 (C.P.); *McKinley v. Ohio Bur. of Workers’ Comp.*, 170 Ohio App.3d 161, 2006-Ohio-5271, 866 N.E.2d 527, ¶ 21-22 (4th Dist.).

{¶ 23} R.C. 4123.931(E)(1) states in pertinent part:

After * * * the means for dividing [the net amount recovered] has been determined * * *, a claimant may establish an interest-bearing trust account for the full amount of the subrogation interest that represents

estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, reduced to present value, from which the claimant shall make reimbursement payments to the statutory subrogee for the future payments of compensation, medical benefits, rehabilitation costs, or death benefits.

{¶ 24} If the claimant chooses not to create a trust account, she must pay the statutory subrogee the full amount of the subrogation interest that represents estimated future payments on or before thirty days after receiving the settlement funds. R.C. 4123.931(F), *Jones* at ¶ 13. Even in that instance, evidence needs to be presented to determine that amount.

{¶ 25} We agree with the well-reasoned opinion of our colleagues in the Third District Court of Appeals that if the parties do not agree to an allocation of the settlement, an evidentiary hearing is required. *Smith* at ¶ 29. In this case, Kendricks requested a jury trial and, unless waived, that is the method for the determination of facts in this case. Civ.R. 39(A). “Ohio case law is clear that once any party makes a proper jury demand, the demand applies to the entire action and all parties, regardless of which party made the demand, and can be waived only as provided by Civ.R. 39(A).” *Jovanovski v. Kotefeski*, 9th Dist. Lorain Nos. 07CA009203 and 07CA009223, 2008-Ohio-4773, ¶ 14.

{¶ 26} In addition to determining future estimated expenses, an evidentiary hearing is necessary to address whether the settlement included the Clinic’s subrogation interest. The Clinic argues that they were entitled to the full amount of their subrogation interest because their interest was not included in the settlement.

{¶ 27} R.C. 4123.931 allows a subrogee to claim the full amount of their subrogation interest under certain circumstances. R.C. 4123.931(G) provides, in pertinent part:

No settlement, compromise judgment, award, or other recovery in any action or claim by a claimant shall be final unless the claimant provides the statutory subrogee * * * with prior notice and a reasonable opportunity to assert its subrogation rights. If a statutory subrogee * * * [is] not given notice, or if a settlement or compromise excludes any amount paid by the statutory subrogee, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest.

{¶ 28} However, whether R.C. 4123.931(G) applies must be determined by the trier of fact.

Pursuant to R.C. 4123.931(G), a court is not required to ensure that a dollar amount paid by the statutory subrogee is specifically included in the settlement; rather, courts are required to determine whether such a settlement specifically *excludes* the amount paid by the statutory subrogee.

Ohio Bur. of Workers' Comp. v. McKinley, 7th Dist. Columbiana No. 12 CO 41, 2014-Ohio-1397.

{¶ 29} As there was no testimony on these issues below, a trial is necessary to determine the Clinic's subrogation interest.

{¶ 30} Accordingly, we sustain the Clinic's first assignment of error.

{¶ 31} Based on our resolution of the Clinic's first assignment of error, the second and third assignments of error are moot.

{¶ 32} Judgment reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EMANUELLA D. GROVES, JUDGE

SEAN C. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR