

Workers Compensation CLE
Baltimore County Bar Association
Wednesday, February 20, 2008

Appeals and Third Party Cases

Anne T. Brennan, Esquire
Whiteford, Taylor & Preston, LLP
Matt M. Paavola, Esquire
Matt M. Paavola & Associates
Anna S. Kelly, Esquire
Whiteford, Taylor & Preston, LLP

IM HURT V BADDABING CONSTRUCTION COMPANY
CLAIM NO. W000786

Mr. Hurt, a resident of Baltimore City, is employed with Badda Bing Construction Company as a day laborer. He also uses the company truck to pick up construction materials from suppliers, as needed. Badda Bing Construction Company is located in Baltimore City. On June 18, 2007, Mr. Hurt was to pick up materials from a supply house located off Pulaski Highway near the City/County line. While en route, he stopped for lunch at a "Gentleman's Club." After lunch, entertainment and beverages, he departed the club. While turning the truck east on Route 40, he was struck on the driver's side by another truck, both vehicles were totaled, and both drivers sustained very serious injuries.

Mr. Hurt was taken by ambulance to the Franklin Square Hospital. Although in great pain, he was capable of responding to the triage nurse. He denied any prior medical problems other than diabetes and HBP. Hurt required emergency surgery for a fractured pelvis and left torn rotator cuff. His MRI scans also showed degenerative disc disease in both lumbar and cervical spines with questionable disc herniations. Hurt remained in the hospital for one week and was discharged to the care of Drs. Keepem & Offwork. Dr. Offwork advised his patient that he would require a lumbar discectomy and fusion in the future and that he would have a permanent lifting and driving restriction given the extent of his injuries.

Mr. Hurt promptly obtained legal counsel, Matt Paavola Esquire, to file a worker's compensation claim and to investigate a possible third-party claim against the truck that hit him. The worker's compensation claim was filed, however, it was contested by the insurance company on the basis that the injuries did not arise out of and in the course of employment. Pre-hearing subpoenas also revealed that Mr. Hurt had a long history of back problems, including extensive conservative treatment and diagnostic studies showing long standing degenerative disc disease. At the hearing, defense counsel, Anne Brennan, Esquire, raised the issue of causal relation to the low back. The Claimant testified extensively at the hearing about his injuries. He did not mention any injuries to the left wrist or elbow *per se*, but did mention that he had radiating pain in both upper and lower extremities.

The Commission found the accident compensable and the injuries causally related; however, the award carved out the low back and found that the

injuries to the low back were not related to the June 18, 2007 accident. The Claimant filed an appeal to the Circuit Court for Baltimore City. The Employer/Insurer filed an appeal to the Circuit Court for Baltimore County. The appeals were filed on the same day. Both counsel filed Motions to Dismiss Appeal or Transfer.

1. Which appeal stays?

Meanwhile, Claimant's counsel investigates a possible third-party claim against the truck that broadsided his client. He is advised by the carrier representing the third party that they will accept liability, but have only a \$100,000/\$300,000 policy on the truck. Mr. Paavola, given his vast experience, knows full well that this coverage is insufficient. He, therefore, notifies the automobile liability carrier, which insured the Badda Bing truck, that he intends to pursue a UIM claim against them along with the third-party claim (fortunately, Badda Bing carried a \$1 million UM/UIM limit with the same carrier as the WCC case).

1. Which appeal stays?

THE WORKERS COMPENSATION APPEAL

Anne Brennan immediately files a Motion for Summary Judgment on the compensability issue. She asserts that the underlying facts are not in dispute and that the WCC erred as a matter of law when it found this obvious "frolic and detour" to arise out of and in the course of employment. Claimant asserted that there were material facts in dispute and that the recent opinion of *Bd. of Educ. for Mont. County v Spradlin*, 161 Md. App. 155, 867 A.2d 370 (2005) holds that the non-prevailing party cannot reverse a WCC finding on appeal by way of a summary judgment.

While on appeal, the Claimant also begins to treat for left CTS and left ulnar nerve disorder. The appeal is scheduled for a trial as the Motion for Summary Judgment was denied based on a factual dispute. However, counsel for the Employer and Insurer advises Claimant's counsel that not only is the new treatment for left CTS and left ulnar nerve in a denied status, but that this is not an issue that was decided actually or implicitly before the Commission, and

she will file a motion in limine based on the *Trojan Boat Co. v. Bolton* opinion, 11 Md. App. 665, 276 A.2d 413 (1971).

2. **Does Spradlin eliminate Motions for Summary Judgment in worker's compensation appeals?**
3. **Does Anne Brennan win the motion in limine preventing any testimony about the left CTS and left ulnar nerve problems?**

THE THIRD-PARTY CASE

Given the extent of the Claimant 'injuries,' his extensive lost wages and future projected medical expenses (neck and back surgeries recommended but not performed), the carrier for the third party offers the \$100,000 policy limits.

The UIM carrier refuses to make an offer. The UIM carrier takes the position that it is entitled to the entire worker's compensation lien, including not only the medicals and TTD to date, but also the cost of any projected surgeries and the future permanency.

4. **What credit is the UM/UIM carrier entitled to in a worker's compensation case?**

Claimant's counsel receives a trial date in his third-party case before his client has filed for or collected PPD in the WCC case and before his client has undergone all the recommended medical treatment. Counsel for the UIM carrier moves to postpone the third-party case on the basis that the Claimant is not at maximum medical improvement, and it is patently unfair to force the UIM carrier to trial before the WCC lien has fully matured.

5. **Is the UIM carrier's Motion to Postpone the Trial granted?**

THE SETTLEMENT CONFERENCE

The UIM carrier receives one short continuance; however, the trial date is scheduled and a mediation ensues. Prior to the mediation, Claimant's counsel asks the WCC carrier for a lien letter. The lien letter advises that the lien to date is \$250,000.

The WCC carrier demands its statutory lien from the proceeds of the third-party settlement. The third-party settlement is \$100,000; therefore, pursuant to Labor & Empl. Article, Section 9-902(e), the Claimant's attorney deducts his fee and expenses and remits the balance to the WCC carrier.

The UIM carrier offers \$750,000 in settlement. Based on the carrier's lien, as stated in the letter, the Claimant accepts this offer. The lien increases between the mediation and the time that the settlement proceeds are to be distributed.

6. Is the carrier entitled to its lien, even though it is more than the amount stated in the lien letter?

Claimant's counsel closely examines the lien and requests a full lien itemization. Included in the lien are expenses for nurse case management, vocational rehabilitation and medical fee guide review.

7. Are these expenses properly considered part of the carrier's 'lien?'

WORKERS' COMP LAW FIRM, LLC

Matt M. Paavola, Managing Attorney
2113 OREMS ROAD
BALTIMORE, MARYLAND 21220-4119

MATT M. PAAVOLA
SAMUEL H. PAAVOLA
EUGENE W. PIERELLI

ADMINISTRATOR
JACQUELYN JOHNSON

(410) 574-8000
1-800-600-6563
(toll free)

"Working for the Injured Worker"
FAX 410-574-6884
VOICE MAIL 410-682-2770
info@MyWorkersCompLawFirm.com
www.MyWorkersCompLawFirm.com

HARFORD COUNTY
9 WEST COURTLAND STREET
BEL AIR, MD 21014
(APPOINTMENT ONLY)
ANNE ARUNDEL COUNTY
1 WILLOW STREET
ANNAPOLIS, MD 21401

February 19, 2008

Anne T. Brennan, Esquire
Whiteford, Taylor & Preston
210 West Pennsylvania Avenue
Towson, Maryland 21204

Re: *I. M. Hurt v. Badda Bing Construction Co.'s
Under-Insured Motorist Carrier*
Claim #: W000786
DOA: 6/18/07

Dear Ms. Brennan:

As you know, I represent I. M. Hurt who sustained serious personal injuries on June 18, 2007, as the result of the negligence of Mr. Other Truckdriver.

The accident which brought about the injuries to Mr. I. M. Hurt occurred when Mr. Hurt was entering the eastbound lane of Route 40 in Baltimore City in a safe and prudent manner. At that same time Mr. Truckdriver struck the drivers side of Mr. Hurt's vehicle. Both vehicles were declared a total loss as a result of the violent, high speed collision. Route 40 is a boulevard at that intersection but, because of the great speed with which Mr. Truckdriver was traveling, he does not enjoy the Boulevard Rule presumption. See *Myers v. Bright*, 327 Md. 395, 609 A.2d 1182 (1992). There is otherwise no proof of contributory negligence on the part of Mr. Hurt. Property damage was very severe, exceeding \$20,000.00.

The injuries sustained by Mr. Hurt included fractured pelvis, a torn left rotator cuff, and generalized injury to the neck and back. The lower back injury proved to be quite severe ultimately requiring a lumbar discectomy and in the future will likely require fusion surgery. Mr. Hurt sustained contusions to multiple areas. Shortly after the accident he started suffering radiating pain in both upper and lower extremities. I have already forwarded to you all of the medical reports and hospital records which clearly set out all of the complaints, treatments and limitations, as well as the permanent injury brought about by the accident for Mr. Hurt. I am not setting forth more details in this bad faith demand letter concerning Mr. Hurt because his reports are clear on their face, and because I believe we can manage an amicable resolution of his case.

Page Two
Anne T. Brennan, Esquire
February 19, 2008

Mr. Hurt was hospitalized at Franklin Square Hospital following the accident. His problems were acute. He was removed by ambulance. The trauma was very severe. In fact, Mr. Hurt had to be specially removed from his truck and was hyper-ventilating throughout. He was kept in the hospital on bed rest for one week and urged to obtain prompt followup care from a specialist and his family physician for overall injuries. In fact, I. M. Hurt did get followup care with Dr. Offwork of the medical offices of Drs. Keepem and Offwork in Baltimore. He remains under the careful and watchful eye of Dr. Offwork. He would not let I. M. Hurt even consider returning to work for many months and even now has placed him on a permanent lifting and driving restriction given the extent of his injuries.

Medical specials to date include the following:

Medical Professional Services	\$ 10,000.00
Advance Physical Therapy Center	\$ 30,000.00
Franklin Square Hospital	\$ 40,000.00
Medical Surgical Center	\$ 20,000.00
Medical Offices of Drs. Keepem and Offwork	\$100,000.00
Lost Wages	\$ 75,000.00
Ambulance Service	\$ 2,000.00
Prescriptions	\$ 10,000.00
Travel to and from doctors	<u>\$ 3,000.00</u>
 Total	 \$290,000.00

Mr. Hurt was an experienced and well trained technical driver and supervisor for Badda Bing Construction Co. as of the day of the accident. He was earning \$150,000.00 a year and missed six months worth of work.

As you know, the worker's compensation carrier only pays a portion of the lost wages and under the Maryland Insurance Article, specifically the set-off provision, only the amount paid by the carrier shall be deducted from the amount payable by your client and the subject one million dollar policy limits. See §19-513. It is my understanding that Mr. Other Truckdriver carried \$100,000.00 in policy limits. That has been tendered. I can not settle with them until you consent to our signing a general release, and accepting the tender. Pursuant to §19-509 of the Insurance Article of the Annotated Code of Maryland if you fail to consent within sixty days under the statute we are permitted to move forward. In the alternative, you can agree to be responsible for the first \$100,000.00 so that you can proceed against the tortfeasor's personal assets if you do not want to release him. We have purchased an asset search and are persuaded that that would not be worthwhile. The decision is yours.

Page Three

Anne T. Brennan, Esquire

February 19, 2008

In any event, lost wages paid by the workers' compensation carrier total \$50,000.00 and medical billing totals \$200,000.00. We have independently verified the workers' compensation lien as an even \$250,000.00. Under that calculation, the remaining amount payable comes to \$750,000.00 from your one million dollar policy.

The current list of special damages does not contain future medical billing. That will be significant. It also does not contain the future lost wages as Mr. Hurt's expert has opined that neck and back surgeries are recommended though not yet performed. All these additional forms of Mr. Hurt's damages will be added to our current list of "hard damages" that have already been produced.

It is obvious that the jury range in this case would be somewhere around two million dollars. It is my understanding that Mr. Other Truckdriver carried a liability policy with limits of \$100,000.00 per claimant, and otherwise has no appreciable assets. Your company therefore has available \$900,000.00, less credits, as described above. If this is the case and if there are no other insurance policies available to pay for damages in this case, this letter is to serve as an offer to settle in the amount of policy limits of one million dollars, less an offset of \$250,000.00, less the tortfeasor policy of \$100,000.00. This offer is, of course, subject to adequate proof of the actual coverage involved.

I have reviewed this case in detail and believe strongly that a refusal of our settlement demand would clearly demonstrate bad faith on the part of your company for two reasons.

First, because of the offset in continuing medical bills and lost wages of my client, Mr. Hurt is suffering actual harm and prejudice with further delays. Each day he incurs another dollar of lost wage or medical bill, the offset increases. The more you delay, the greater it reduces your company's UIM liability. It is a quirk of the law that your company enjoys this offset. A judge or jury will likely view your delay as unnecessarily exploiting the benefit of this provision in the Insurance Article which was not intended for facts such as these.

Second, 1st party bad faith is imposed on your client as of October 1, 2007. Under that newly enacted law, your client, in the event that this case actually goes to trial and a decision comes down from the jury in excess of the limits remaining, will not only have to pay the excess amount, but will also have to pay additional damages for the bad faith exhibited for failure to tender remaining limits. That is to say,

"Expenses and litigation costs incurred by the insured in an action under this section or under §27-1001 of the Insurance Article or both, including reasonable attorney's fees; and interest on all actual damages, expenses, and litigation costs incurred by the insured, computed: (i) At the rate allowed under §11-107(a) of the

Page Four
Anne T. Brennan, Esquire
February 19, 2008

and (ii) From the date on which the insured's claim would have been paid if the insurer acted in good faith." *Courts and Judicial Proceedings* §3-1701.

I have enclosed herein two extra copies of this letter for your client, which I am sure you will promptly transmit to your client/carrier's corporate designee, and for the claims representative, to whom I am also sure you will promptly transmit a copy hereof.

I am also sure that you will advise your client to obtain separate counsel so that it may benefit from independent advice in order to protect its interests. Your client is certainly entitled to have full information regarding the extent of their excess exposure in the event of judgment over the amount stated as policy limits, and an explanation regarding why the case was not settled for the remaining policy limits as to the claims of Mr. Hurt.

The above offer to settle is made with a condition that it be accepted by the end of this month. If the offer to settle is not accepted by that date, it will be withdrawn and we will proceed to trial.

Very truly yours,

Matt M. Paavola

MMP/jns

Workers Compensation CLE
Baltimore County Bar Association
Wednesday, February 20, 2008

Appeals and Third Party Cases

Appeals- Applicable Statutes

1) § 9-737: Judicial Review—Authorized

An employer, covered employee, dependent of a covered employee, or any other interested person aggrieved by a decision of the Commission, including the Subsequent Injury Fund and the Uninsured Employers' Fund, may appeal from the decision of the Commission provided the appeal is filed within 30 days after the date of the mailing of the Commission's order by:

(1) filing a petition for judicial review in accordance with Title 7 of the Maryland Rules;

(2) attaching to or including in the petition a certificate of service verifying that on the date of the filing a copy of the petition has been sent by first class mail to the Commission and to each other party of record; and

(3) on the date of the filing, serving copies of the petition by first class mail on the Commission and each other party of record.

a) The three day “mailbox rule” does not extend the time granted by this Rule (petition must be filed within 30 days after the date of the mailing of the Commission’s order). *Chance v. Wash. Metro. Area Transit Auth.*, 173 Md. App. 645, 920 A.2d 536 (2007)

b) The “decision” of the Commission which is subject to judicial review under the statutory language is the final decision or order in a case. *Montgomery County v. Ward*, 331 Md. 521, 629 A.2d 619 (1993)

2) § 9-738: Venue

(a) *Filing with circuit court.* To take an appeal, a person shall file an order of appeal with the circuit court:

(1) that has jurisdiction over that person; or

(2) for the county where the accidental personal injury, compensable hernia, or last injurious exposure to the hazards of the occupational disease occurred.

(b) *Transfer for lack of jurisdiction.* If an appeal is taken to a circuit court that does not have jurisdiction, the court shall transfer the appeal to the proper circuit court on the motion of a party.

(c) *Transfer for inability to obtain fair trial.* If a party to an appeal suggests in writing and under oath that the party cannot obtain a fair trial in the circuit court in which the appeal is pending, the circuit court shall transfer the appeal to another circuit court.

- a) The Court in Baltimore City has no jurisdiction where the accident occurred in the county. *Howell v. Bethlehem-Sparrows Point Shipyard, Inc.*, 190 Md. 704, 59 A.2d 680 (1948)

3) § 9-739: Record, statement in place of record, or stipulation

(a) *Filing with circuit court.* A certified copy of the record of the proceedings of the Commission, including any transcript of testimony, a statement of facts in place of the record, or stipulations shall be filed with the circuit court in accordance with Title 7 of the Maryland Rules.

(b) *Cost of record.* Subject to a final allocation of costs by the circuit court at the conclusion of the appeal, the cost of a certified copy of the record of the proceedings of the Commission, including a transcript of testimony, shall be paid:

(1) if the court on its own initiative orders that a copy be filed, by the party that the court specifies in its order; or

(2) unless the court orders otherwise, by the party that requests the copy.

- a) The administrative record from the Commission shall be forwarded to the Circuit Court on appeal. *Hahn Transp., Inc. v. Gabeler*, 156 Md. App. 213, 846 A.2d 462 (2004)

4) § 9-740: Scheduling of Appeal

An appeal from the Commission has precedence over all other cases except criminal cases.

- a) Where appellant did not see fit to appeal a decision of the Commission in a manner prescribed by Maryland Rules 7-201 at seq., he effectively closed the door to a review of the facts surrounding the compensation award. *Cogley v. Schnaper & Koren Constr. Co.*, 14 Md. App. 322, 286 A.2d 819 (1972)

5) § 9-741: Appeal not a Stay

An appeal is not a stay of:

- (1) an order of the Commission requiring payment of compensation; or
- (2) an order or supplemental order of the Commission requiring the provision of medical treatment.

- a) An award of workers' compensation benefits cannot be stayed. *Gleneagles, Inc. v. Hanks*, 156 Md. App. 543, 847 A.2d 520 (2004), *aff'd*, 385 Md. 492, 869 A.2d 852 (2005)
- b) This section does not apply to orders to pay medical bills. *Univ. of Md Med Sys. Corp v Erie Ins.* 89 Md. App. 204, 597 A.2d 1036 (1991)

6) § 9-742: Jurisdiction of Commission pending appeal

(a) *In general.* The Commission retains jurisdiction pending an appeal to consider:

- (1) a request for additional medical treatment and attention; and
- (2) a request for temporary total disability benefits, provided that the covered employee's temporary total disability benefits were granted in the order on appeal, and were terminated by the insurer or self-insurer pending adjudication or resolution of the appeal.

(b)(1) *Supplemental Order.* (1) If the Commission finds that a covered employee needs additional medical attention pending an appeal, the Commission may pass a supplemental order requiring the employer to provide additional medical treatment and attention.

(2) If the Commission finds that a covered employee's temporary total disability benefits were terminated pending adjudication or resolution of the appeal, and that the employee was temporarily totally disabled at the time of termination, the Commission may pass a supplemental order requiring the employer to provide the employee with temporary total disability benefits.

(3) If the Commission's decision to reinstate temporary total disability benefits is reversed or modified on appeal, the insurer or self-insurer shall be entitled to an offset or credit for overpayment of the temporary total disability benefits granted in the supplemental order.

(c) *Review of pending appeal.* A supplemental order passed by the Commission under this section is subject to review on the pending appeal.

(d) *Jurisdiction when penalty appealed.* When an appeal that is pending relates solely to a penalty imposed by the Commission, the Commission retains jurisdiction over all matters in the case other than imposition of the penalty.

(e) *Offsets or credits.* This section may not be construed to prevent the Commission from ordering an offset or credit against an award for temporary total or permanent partial disability benefits for any temporary total disability benefits previously paid to a covered employee, as authorized under any other provision of this title.

- a) Where in a prior order, the Commission received no evidence and made no decision as to whether the Appellee was the insurer of the injured workman, the Commission retained jurisdiction to decide this

point even though an appeal had been filed from its decision on the substantive question as to the liability of the employer. *Trojan Boat Co. v. Bolton*, 11 Md. App. 665, 276 A.2d 413 (1971)

7) § 9-745: Conduct of Appeal Proceedings

(a) *In general.* The proceedings in an appeal shall:

- (1) be informal and summary; and
- (2) provide each party a full opportunity to be heard.

(b) *Presumption and burden of proof.* In each court proceeding under this title:

- (1) the decision of the Commission is presumed to be prima facie correct; and
- (2) the party challenging the decision has the burden of proof.

(c) *Determination by court.* The court shall determine whether the Commission:

- (1) justly considered all of the facts about the accidental personal injury, occupational disease, or compensable hernia;
- (2) exceeded the powers granted to it under this title; or
- (3) misconstrued the law and facts applicable in the case decided.

(d) *Request for jury trial.* On a motion of any party filed with the clerk of the court in accordance with the practice in civil cases, the court shall submit to a jury any question of fact involved in the case.

(e) *Disposition.* (1) If the court determines that the Commission acted within its powers and correctly construed the law and facts, the court shall confirm the decision of the Commission.

(2) If the court determines that the Commission did not act within its powers or did not correctly construe the law and facts, the court shall reverse or modify the decision or remand the case to the Commission for further proceedings.

- a) Special appeals court properly reversed the trial court's summary judgment grant in favor of the county that found the claimant was required to prove medical causation in a case where the claimant was injured when his police cruiser was struck by a drunk driver and the claimant admitted he had a pre-existing back injury; since the workers' compensation commission had already ruled in the claimant's favor, the claimant was not required to prove anything before the trial court pursuant to (b)(2). *Baltimore County v. Kelly*, 391 Md. 64, 891 A.2d 1103 (2006)
- b) Generally, a circuit court, upon an appeal from the Commission, is jurisdictionally limited to a review of the issues raised and decided by the Commission explicitly or implicitly, and to such relevant matters

on which there was evidence before the Commission. *Altman v. Safeway Stores, Inc.*, 52 Md. App. 564, 451 A.2d 156 (1982), *aff'd*, 296 Md. 486, 463 A.2d 829 (1983)

- c) Section 9-745 allows a party on appeal to proceed with either an appeal "on the record" or an appeal de novo by jury or by a judge sitting as a jury. Summary judgment may be granted in a de novo WCC appeal, however, the prevailing party is not vulnerable to summary judgment simply because it has failed to rebut the appellant's evidence. *Bd of Educ. V Spradlin*, 161 Md. App. 155, 867 A. 2d 370 (2005).

8) § 9-748 Interest on Compensation

When, on appeal, compensation is awarded by an affirmance, modification, or reversal of an order of the Commission, the covered employee is entitled to interest on the compensation awarded at 6% a year on each installment of compensation not paid as it:

- (1) becomes payable under the award of the Commission; or
- (2) would have become payable if the Commission had awarded the same amount of compensation when it passed the order from which the appeal is taken.

9) § 9-749 Frivolous appeal proceedings

If a court determines that the ground for an appeal is not a reasonable ground, the court shall assess against the appellant the whole cost of appeal, including reasonable attorney's fees.

- a) The legislative scheme of subtitle 7 does not contemplate that an attorney's fees imposed as a sanction could not be stayed or could not be the subject of recovery. *GMC v. Koscielski*, 80 Md. App. 453, 564 A.2d 114 (1989)

10) § 9-750 Appeal to Court of Special Appeals

A party may appeal from a decision of the circuit court to the Court of Special Appeals as provided for other civil cases.

- a) It is the ultimate decision or order of the Commission effectively disposing of the case, not each individual finding, which is the basis for judicial review. *Great Am. Ins. Co. v. Havenner*, 33 Md. App. 326, 364 A.2d 95 (1976)

COMAR
14.09.06.05
Appeal

- A. An appeal from a decision made under this chapter shall be made in accordance with Maryland Rules 7-201--7-210.
- B. When the issue appealed is the award of attorney's fees, the appellant's attorney shall forward a copy of the petition for judicial review to the Attorney General assigned to represent the Commission

Liability of Third Parties- Applicable Statutes

1) § 9-901 Choice of Proceeding against third party or employer

When a person other than an employer is liable for the injury or death of a covered employee for which compensation is payable under this title, the covered employee or, in case of death, the personal representative or dependents of the covered employee may:

- (1) file a claim for compensation against the employer under this title; or
- (2) bring an action for damages against the person liable for the injury or death or, in case of joint tort feasons, against each joint tort feason.
 - a) Where an employee covered by the workers' compensation law is injured and the injury was caused under circumstances creating a legal liability in a third party, the employee may proceed against the employer under this article, against the third party for damages, or against both in case of joint tortfeasors. The employer, if compensation is awarded, may enforce the liability of the third party for his benefit but any excess received must be paid to the injured employee. *Baltimore Transit Co. v. Worth*, 188 Md. 119, 52 A.2d 249 (1947)
 - b) Workers' compensation claimant was not barred from seeking benefits under election of remedies principles unless the third party with whom the claimant settled without the insurer's permission was the only alleged tort-feason from whom the claimant could have recovered. *Saadeh v. Saadeh, Inc.*, 150 Md. App. 305, 819 A.2d 1158 (2003)

2) § 9-902 Action against third party after award or payment of compensation

(a) *Action by self-insured employer, insurer, or fund.* If a claim is filed and compensation is awarded or paid under this title, a self-insured employer, an insurer, the Subsequent Injury Fund, or the Uninsured Employers' Fund may bring an action for damages against the third party who is liable for the injury or death of the covered employee.

(b) *Recovery of damages exceeding compensation and other payments.* If the self-insured employer, insurer, Subsequent Injury Fund, or Uninsured Employers' Fund recovers damages exceeding the amount of compensation paid or awarded and the amount of payments for medical services, funeral expenses, or any other purpose under Subtitle 6 of this title, the self-insured employer, insurer, Subsequent Injury Fund, or Uninsured Employers' Fund shall:

- (1) deduct from the excess amount its costs and expenses for the action; and
- (2) pay the balance of the excess amount to the covered employee or, in case of death, the dependents of the covered employee.

(c) *Action by covered employee or dependants.* If the self-insured employer, insurer, Subsequent Injury Fund, or Uninsured Employers' Fund does not bring an action against the third party within 2 months after the Commission makes an award, the covered employee or, in case of death, the dependents of the covered employee may bring an action for damages against the third party.

(d) *Limitations period.* The period of limitations for the right of action of a covered employee or the dependents of the covered employee against the third party does not begin to run until 2 months after the first award of compensation made to the covered employee or the dependents under this title.

(e) *Distribution of damages.* If the covered employee or the dependents of the covered employee recover damages, the covered employee or dependents:

- (1) first, may deduct the costs and expenses of the covered employee or dependents for the action;
- (2) next, shall reimburse the self-insured employer, insurer, Subsequent Injury Fund, or Uninsured Employers' Fund for:
 - (i) the compensation already paid or awarded; and
 - (ii) any amounts paid for medical services, funeral expenses, or any other purpose under Subtitle 6 of this title; and
- (3) finally, may keep the balance of the damages recovered.

(f) *Court costs and attorney's fees.* In an action brought by a covered employee or the dependents of the covered employee under subsection (c) of this section, the covered employee or the dependents of the covered employee, the self-insured employer, the insurer, the Subsequent Injury Fund, and the Uninsured Employers' Fund shall pay court costs and attorney's fees in the proportion that the amount received by each bears to the whole amount paid in settlement of any claim or satisfaction of any judgment obtained in the case.

- a) An employer is not entitled to obtain full reimbursement from a third party tortfeasor for amounts paid to its employee by order of the Workers' Compensation Commission absent specific proof that the injuries for which compensation was paid were the result of the tortfeasor's negligence. *Strong v. Prince George's County*, 77 Md. App. 177, 549 A.2d 1142 (1988), *cert. denied*, 315 Md. 308, 554 A.2d 393 (1989)
- b) This section expressly confers right of subrogation on insurance carrier to sue and recover from a negligent third person. *Unsatisfied Claim & Jud. Fund Bd. v. Salvo*, 231 Md. 262, 189 A.2d 638 (1963)

3) § 9-903 Effect of receipt of Amount in Action

(a) *In general.* Except as provided in subsection (b) of this section, if a covered employee or the dependents of a covered employee receive an amount in an action:

- (1) the amount is in place of any award that otherwise could be made under this title; and
- (2) the case is finally closed and settled.

(b) *Exception.* If the amount of damages received by the covered employee or the dependents of the covered employee is less than the amount that the covered employee or dependents would otherwise be entitled to receive under this title, the covered employee or dependents may reopen the claim for compensation to recover the difference between:

- (1) the amount of damages received by the covered employee or dependents; and
- (2) the full amount of compensation that otherwise would be payable under this title.

- a) When §§ 9-902 and 9-903 of this subtitle were read together, the legislative intent was clear that an employer and insurer were reimbursed fully for benefits and medical services provided to a workers' compensation claimant who also recovered against a third party tort-feasor, and the claimant could keep the balance; the reimbursement requirement precluded "double dipping" by the claimant and preserved his right to reopen his case after his recovery against a third party was depleted. *Podgurski v. OneBeacon Ins. Co.*, 374 Md. 133, 821 A.2d 400 (2003)

1776754