IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE SEPTEMBER 1996 SESSION

JANET CARTER,	)	SULLIVAN CHANCERY
	)	
Plaintiff/Appellant	)	NO. 03S01-9602-CH-00013
	)	
v.	)	HON. RICHARD E. LADD
	)	CHANCELLOR
PHOENIX RESTAURANT GROUP	)	
OF TENNESSEE, INC., d/b/a/	)	
WENDY'S and AETNA CASUALTY	)	
AND SURETY COMPANY,	)	
	)	
Defendants/Appellants	)	

For the Appellant:

James H. Hickman, III
P. O. Box 259
Knoxville, TN 37901-0259

For the Appellee:

J. Eddie Lauderback
C. T. Herndon, III
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M E M O R A N D U M O P I N I O N

Members of Panel:

E. Riley Anderson, Justice
John K. Byers, Senior Judge
William H. Inman, Senior Judge

AFFIRMED

INMAN, Senior Judge

This workers' compensation appeal has been referred to the Special Workers'

Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The plaintiff was seriously injured in a traffic crash on September 11, 1991. She settled her tort claim and proceeded to trial of this workers' compensation case which resulted in a finding that the 'special errand' exception was applicable and that as a result of the accident and injuries she was 60 percent partially, permanently disabled and thus entitled to $183.34 per week during 240 weeks, temporary total benefits during 156 weeks, and medical expenses of $83,245.91. In accordance with TENN. CODE ANN. §50-6-112(c), the defendant was credited with $100,000.00, the amount of the tort settlement, which the plaintiff insists was only partially subrogable.

Both parties appeal. The employer insists that because the traffic crash was not job-related, the plaintiff failed to prove her case. The plaintiff insists that because the employer did not recognize the compensability of her claim, and because she was not made whole by the third-party settlement, the full amount thereof should not have been subrogable. The plaintiff further insists that her attorney should have been awarded a fee "out of the third-party settlement fund." She also presents for review the issues of whether a finding of 60 percent permanent partial disability is adequate, and whether certain discretionary costs should have been allowed.

I

The facts are not in material dispute. The plaintiff, age 31, completed the eighth grade. She had worked in restaurants most of her adult life, and on July 1, 1991 was employed by Wendy's as an assistant manager trainee assigned to work at the North Roan location in Johnson City after a six-week stint in Kingsport.

On September 10, 1991, a supervisor came to the North Roan location and announced that on the following day in Kingsport all of the North Roan employees, including the plaintiff, would be given a test which was mandatory. The plaintiff advised her supervisor that September 11 was her day off; the supervisor replied that this did not matter, "that everybody had to be there and would be paid for their time there."

The plaintiff resided in Greene County, about 25 miles from the North Roan restaurant, and about 50 miles from the test site in Kingsport. She obeyed the instructions of her supervisor and traveled to Kingsport where she took the required test. The traffic crash occurred *en route* to her residence following the test. She was not reimbursed for mileage, but was paid for the time required to take the test.

When initially employed, the plaintiff traveled each day to the Kingsport restaurant from her residence in Greeneville. She was not reimbursed for mileage but was paid only after she clocked in. The same arrangement was continued after she was transferred to the North Roan location.

The parties agree with the Chancellor's observation that unless the "special errand" exception is applicable to the facts, the accident was not job-related under current Tennessee law. *Sharp v. Northwestern National Insurance Co.,* 654 S.W.2d 391 (Tenn. 1983); *Woods v. Warren,* 548 S.W.2d 561 (Tenn. 1977); *Lollar v. Wal-Mart,* 767 S.W.2d 143 (Tenn. 1989).

II

The Chancellor found that under the peculiar facts of this case the special errand exception took it outside the general rule that an injury sustained *en route* to or from work is not compensable.

The special errand exception is defined by Larson[1] as follows:

> When an employee, having identifiable time and space limits on his employment, makes an off premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

This reasoning has been followed in a number of jurisdictions. *Patterson v. Whitten,* 328 So.2d 301 (Alabama 1976); *Johns v. State Dep't. of Highways,* 431 P.2d 148 (Alaska 1967); *Cavness v. Ind. Comm.,* 243 P.2d 459 (Arizona 1952); *Frank Lyon Co. v. Oates,* 284 S.W.2d 637 (Arkansas 1955); *Argonaut Ins. Co. v. Ind. Acc. Comm.,* 34 Cal. Rptr. 206 (California 1963); *Lewis Wood Preserving Co. v. Jones,* 140 S.E.2d

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[1]Larson, Workers' Compensation Law, § 16.10 (1985).

113 (Georgia 1964); *Diffendaffer v. Clifton,* 430 P.2d 497 (Idaho 1967); *Indiana Toll Road Comm. v. Bartusch,* 184 N.E.2d 34 (Indiana 1962); *Director of Finance v. Alford,* 311 A.2d 412 (Maryland 1973); *In re: Rupp,* 227 N.E.2d 329 (Mass. 1967); *Ream v. L. E. Myers Co.,* 249 N.W.2d 372 (Michigan 1976); *Jonas v. Lillyblad,* 137 N.W.2d 370 (Minn. 1965); *O'Reilly v. Roberto Homes, Inc.,* 107 A.2d 9 (New Jersey 1954); *Teles v. Westbury S. & S. Concrete Inc.,* 375 N.Y.S.2d 668 (New York 1973); *Thurston Chem. Co. v. Casteel,* 285 P.2d 403 (Oklahoma 1955).

The issue has been addressed in one Tennessee case, *Stephens by Stephens v. Maxima Corp.,* 774 S.W.2d 931 (Tenn. 1989). There, the employee was killed in a traffic crash while *en route* to her residence for a lunch break. The trip was unusual in the sense that the employee ordinarily did not take her lunch break at home; on the occasion of her death she had forgotten to bring a completed questionnaire required by her employer and thus used her lunch break to retrieve it. The Court quoted Larson, but held that the "evidence does not establish that her employer had instructed, directed, required, or even suggested that the employee return home to get the [questionnaire]," and consequently that the special errand exception was inapplicable.

Stephens is readily distinguishable from the case at bar, because the plaintiff admittedly was required and directed to travel to Kingsport and take the prescribed test.

III

The common denominator running throughout those cases wherein the special errand or special mission rule has been applied is the furtherance of the business of the employer at the special inconvenience or hazard of the employee who is performing a special act, assignment, or mission on behalf of the employer.

The plaintiff was required, in a mandatory way, to present herself in Kingsport on September 11, 1991 for an "Operational Procedures Test." The employer paid her usual wages during the hours required for the test, but did not reimburse her travel costs. Much argument is directed to the latter fact; it is essentially that if the plaintiff was not 'on the clock' when injured, the accident was not job-related, meaning, by extrapolation, that had she been injured during the testing period, no question would be raised about the compensability of an accident. But we think this argument begs the

question, because it was necessary for the employee to travel to and from Kingsport at the appointed day and time to take the test, and if her employment status during the testing period is unquestioned it would logically follow that traveling to and from the testing site should also be unquestioned, since the former could not be accomplished without the latter. We think the fact that her travel costs were not reimbursed has no significance under these particular facts.

Our review is *de novo* on the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. TENN. CODE ANN. § 50-6-225(e)(2), and if there is no conflict in the evidence as to any material fact the issue on appeal is one of law with no presumption of correctness. *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87 (Tenn. 1993); *Smith v. Norris,* 403 S.W.2d 307 (Tenn. 1966). We agree with the Chancellor that the peculiar facts of this case bring it within the special errand exception.

IV

The plaintiff argues that the preponderance of the evidence requires a finding that her permanent disability is greater than 60 percent as found by the Chancellor; the employer insists to the contrary.

It is certainly true that the plaintiff was seriously injured. She suffered many fractures, the worst being her left hip on which three discrete operations were performed; she was totally, temporarily disabled for 156 weeks. She walks with a limp, and is either unable to perform many household chores or does so with difficulty.

Two orthopedic specialists testified. Each said that the plaintiff retained a 25 percent impairment as a result of her fractured hip, although conceding that she could perform a job that did not require prolonged standing, walking or climbing. We cannot say that the extrapolated finding of 60 percent disability is against the preponderance of the evidence.

V

The plaintiff next insists that the workers' compensation insurer is not entitled to its subrogation lien until she has been made whole.

TENN. CODE ANN. § 50-6-112 gives the employer or its insurer a subrogation lien against the tort settlement. The plaintiff argues that because the settlement of $100,000.00 [2] did not make her whole in light of her injuries, disability and medical expenses of $83,245.71, the employer's insurer is not entitled to full recovery of the entire $100,000.00 since its total obligation pursuant to the judgment is only $155,848.55. [3] This argument is based upon the assumption that the right of subrogation cannot be enforced "until the whole debt is paid because subrogation is an equitable principle and will never be allowed to the prejudice of the creditor." *Wimberly v. Amer. Cas. Co.,* 584 S.W.2d 200 (Tenn. 1979).

Wimberly dealt with subrogation rights under two fire insurance policies. The case involved the application of general equitable principles the thrust of which required that an insured must be made whole before subrogation rights arise in favor of the insurer, and is inapplicable to the case at bar.

TENN. CODE ANN. § 50-6-112 provides that if a compensable disability is caused by the tortious act of a third party, the employee is entitled to workers' compensation benefits and may prosecute an action for damages against the tortfeasor. [4] In order to prevent a double recovery, a subrogation lien attaches against the employee's net recovery by "judgment, settlement or otherwise" from the third party. Whether the employee "has or has not been made whole" is not relevant, since the statutory scheme plainly provides that the employer shall be subrogated to the net recovery. See, *Beam v. Maryland Casualty Co.,* 477 S.W.2d 510 (Tenn. 1972); *Royal Indemnity Co. v. Schmid,* 474 S.W.2d 647 (Tenn. 1971); *Cross v. Pan-Am World Services,* 749 S.W.2d 29 (Tenn. 1987). Except for her argument that subrogation does not attach until 'she has been made whole,' the plaintiff offers no other resistance to the application and

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[2]Paid by Allstate Insurance Co., the limits of the policy it issued to the adverse driver. The policy limits were tendered to the plaintiff before she employed counsel whose contract with her excluded the first $100,000.00 collected from fee. It proved to be a no-asset claim.

[3]Something of an overstatement, since the judgment creditor will remain liable for all of plaintiff's future medical expenses attributable to the injuries sustained in the accident.

[4]This was prohibited prior to 1949. The acceptance of benefits precluded actions against the tortfeasor. Chapter 277 of the Public Acts of 1949 amended the existing statute to allow such actions and to provide for subrogation.

enforcement of TENN. CODE ANN. § 50-6-112. We concur with the Chancellor that the judgment against the employer should be credited with $100,000.00, the net recovery from the tort-feasor.

VI

A related issue is whether the "defendants would be entitled to the full $100,000.00 credit on the plaintiff's third-party case settlement with no allowance for an attorney fee to the plaintiff's attorney in the third party case." [5]

A short answer is simply that the plaintiff incurred no attorney fees in her tort claim, and she effected a "net recovery" of $100,000.00.

In *Summers v. Command Systems, Inc.,* 867 S.W.2d 312 (Tenn. 1993), the employee was injured by a truck owned by the third party, Command Systems, Inc. The employer's workers' compensation insurer paid $35,814.73 in benefits to Summers, who sued the third party for damages for his personal injuries. He was represented by attorney Omer with whom he contracted to pay a contingent fee. The employer and its insurer intervened to assert a subrogation lien as provided by TENN. CODE ANN. § 50-6-112(c)(1). Summers prevailed in the action. He was awarded a judgment for $175,000.00 which was paid into Court. Attorney Omer claimed his contractual fee of one-third of the recovery; the employer and its insurer insisted that the subrogable amount of $35,814.73 should not be subject to Omer's fee. The Supreme Court disagreed:

> Since both the employer and the employee have the right to recover against a third party tortfeasor, each has the right to be represented by its own counsel on such terms as the party and its lawyer shall agree. The employer may engage the employee's lawyer to represent its interest also, on such terms as they, with the consent of the employee, shall agree. Even if the employer is not represented by separate counsel, the employee's lawyer is obligated to protect the employer's interest. In that event, the employee's lawyer shall be entitled to reasonable compensation for services rendered to the employee and the employer. The lawyer shall be compensated according to the terms of the employment contract between the lawyer and the employee, provided the trial court shall find that fee agreement to be reasonable. A contingent fee agreement between the employee and his lawyer will apply to the entire recovery, and the attorney's fee will reduce the employer's portion of the recovery by a pro rata amount. The lawyers who prosecute the tort action are entitled to receive a reasonable fee

[5]We reproduce *in haec verba* the issue propounded by the appellant.

> based on services rendered. Any dispute regarding the amount and apportionment of attorney fees shall be resolved by the trial court.

As we observed earlier, the plaintiff incurred no fees in the settlement of her tort claim. Stated conversely, her attorney *earned no fee* in that settlement, since the plaintiff had been offered the policy limits before she consulted counsel, and her claim against the tortfeasor was dropped after investigation revealed that pursuit of it would be fruitless. The statute mandates subrogation against the "net recovery," meaning the recovery less appropriate fees and expenses. In this case, there were no fees or expenses; none was charged to the plaintiff; none could have been charged to her under the contract, and we are not authorized under *Summers* to award a fee where none was contracted or paid. *Summers* provides that "the lawyer shall be compensated according to the terms of the employment contract between the lawyer and the employee," and, as we have thrice stated, the $100.000.00 was exempted from fee under the contract by deliberate, plain language.

The plaintiff relies upon language in *Summers* that "Even if the employer is not represented by separate counsel, the employee's lawyer is obligated to protect the employer's interests" is support of her argument that her counsel is entitled to a fee from the third party settlement. A short answer to this argument is simply that the plaintiff's counsel did nothing to protect the employer's interest. No recovery was effected against the tortfeasor, and the $100,000.00 was, in effect, paid before counsel was engaged. *Summers* is clearly distinguishable on the facts.

VII

The appellant was allowed substantial discretionary costs pursuant to RULE 54.04(2), TENN. RULES OF CIV. PRO. Even so, she complains of the refusal of the Chancellor to allow her the transcription costs of the discovery depositions of a witness, Burnette, and the plaintiff. These costs were $172.50. We are unable to find an abuse of discretion. *De minimis non curat lex.*

The judgment is affirmed at the cost of the appellant.

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William H. Inman, Senior Judge

CONCUR:

_____
E. Riley Anderson, Chief Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JANET CARTER, Plaintiff/Appellant,	)	SULLIVAN CHANCERY NO. 23677 (L) Below
v.	)	Hon. Richard E. Ladd, Chancellor
PHOENIX RESTAURANT GROUP OF TENNESSEE, d/b/a WENDY'S Defendants/Appellants.	)	No. 03S01-9602-CH-00013

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are assessed to the plaintiff/ appellant.

IT IS SO ORDERED this __ day of ____, 1997.

PER CURIAM

Anderson, J. -Not participating