IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

CASE NO.: 02-1082-CA-G

ALICE F. BROWN,

Plaintiff,

vs.

VELDA FARMS, INC., a subsidiary of SUIZA FOODS CORPORATION, n/k/a, VELDA FARMS, L.L.C.; and, ROBERT MOODY,

Defendants.
_____/

ORDER ON PLAINTIFF'S MOTION FOR DETERMINATION OF LIEN AND EMPLOYER/CARRIER'S MOTION FOR DIRECTED RULING

THIS CAUSE came to be heard on Plaintiff's Motion for Determination of Workers' Compensation Lien, held on May 30, 2006 and July 12, 2006. At the continuation of the hearing on July 12, 2006, following Plaintiff's presentation of Evidence, the lien holder/Employer/Carrier, made an *ore tenus* motion for Directed Ruling. The Court, after having received evidence, considered sworn testimony of witnesses, and having heard argument from counsel for the Plaintiff and counsel for the Plaintiff's Employer's Workers' Compensation Carrier/Servicing Agent, and being otherwise fully advised in the premises, it is hereby:

ORDERED and ADJUDGED that the Court makes the following findings of fact and conclusions of law:

1. The Plaintiff, ALICE BROWN, was injured in a compensable, work-related accident

on June 18, 1999. While working as a dietary aide, the claimant fell over or near a handcart that was being used by Defendant ROBERT MOODY, a deliveryman for Defendant VELDA FARMS, INC.

2. As a result of the work place accident, the Employer/Carrier has paid certain medical and indemnity benefits on the claimant's behalf, pursuant to a policy of Workers' Compensation Insurance.

3. On May 21, 2002, the Plaintiff instituted this third party negligence action against Defendant, VELDA FARMS, INC. for injuries sustained in the subject accident.

4. On July 24, 2002, the Employer/Carrier filed a Notice of Payment of Benefits (Lien) as to any recovery the claimant might obtain in the instant third party negligence suit, pursuant to F.S. §440.39 (1999).

5. On the hearing date of May 30, 2006, the Plaintiff presented evidence in the form of selected deposition testimony from a number of fact witnesses who were in the Employer's kitchen on the date of the incident. Portions of a prior deposition of the Plaintiff were also read. This testimony was presented to suggest an element of comparative negligence on the part of the Plaintiff with regard to the incident in question.

6. The Plaintiff litigated her negligence claim before this Court for approximately four years. Shortly before trial, the Plaintiff entered into a negotiated settlement with Defendant Velda Farms, Inc. for $500,000.00. A copy of the Release, dated January 19, 2006, was admitted as evidence of that agreement.

7. The Employer/Carrier and the Plaintiff stipulated that her net tort recovery, after payment of attorney fees and costs, is $295,086.37. A copy of the Plaintiff's "Closing Statement", dated January 19, 2006 was filed with the court as evidence of said recovery.

8. The Employer/Carrier filed an updated Notice of Compensation and Medical Benefits (Lien) on July 12, 2006, indicated a total of $64,615.82 had been paid in indemnity benefits, and that $752,281.10 had been paid for medical benefits, for a total of $816,896.92.

9. The Plaintiff presented the expert testimony of attorney John Green, Jr. Mr. Green testified that it was his opinion that the claimant was 100% comparatively at fault. Mr. Green attempted to testify as to the full value of the Plaintiff's underlying case. However, Mr. Green's testimony was predicated upon a review of jury verdicts dealing with amputation cases. The Court sustained the objection of the Employer/Carrier as to relevance regarding Mr. Green's attempts to testify upon this foundation, as the Plaintiff has not undergone an amputation. Mr. Green did not testify further thereafter, and no opinion was provided as to the full value of the Plaintiff's case.

10. The Employer/Carrier presented the testimony of attorney David Heath. Mr. Heath testified that the full value of the Plaintiff's underlying negligence claim

11. At the continuation of the Hearing on July 12, 2006, the Employer/Carrier made an *ore tenus* motion for a Directed Ruling. The Employer/Carrier argued that pusuant to F.S. §440.39 (1999), they are entitled to recover (after fees and costs are deducted) 100 percent of what it has paid and future benefits to be paid. The Employer/Carrier argued that the statute states that this amount may be reduced, but that the employee must demonstrate to the court that the claimant did not recover the full value of the damages sustained. As no expert evidence was presented by the Plaintiff in this regard, the Employer/Carrier asserted the lien amount must be 100% and requested a ruling in this regard. The Court reserved ruling at that time.

12. F.S. §440.39 states in pertinent part:

> Upon suit being filed, the employer or the insurance carrier, as the case may be, may file in the suit a notice of payment of compensation and medical benefits to the employee or his or her dependents, which notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of the law ... the employer or carrier shall have deducted from its recover a percentage amount equal to the percentage of the judgment or settlement which is for costs and attorney's fees. Subject to this deduction, the employer or carrier **shall recover** from the judgment or settlement, after costs and attorney's fees incurred by the employee or dependent in that suit have been deducted, 100 percent of what it has paid and future benefits to be paid, except, **if the employee or dependent can demonstrate to the court** that he or she did not recover the full value of damages sustained, the employer or carrier shall recover from the judgment or settlement, after costs and attorney's fees incurred by the employee or dependent in that suit have been deducted, a percentage of what is has paid and future benefits to be paid equal to the percentage that the employee's net recovery is the full value of the employee's damages... (emphasis supplied)

13. I find that the plain language of F.S. §440.39 places a burden on the Plaintiff to show that she did not recover the full damages of her case. *See Arone v. Sherwood*, 561 So.2d 1269, (Fla. 4th DCA 1990); *See also Jones v. ETS of New Orleans, Inc.*, 793 So.2d 912 (Fla. 2001), (holding that the burden of proof remains the same following 1989 amendments to 440.39).

14. A careful review of the Hearing transcript in this matter does not provide the Court with evidence from the Plaintiff as to an amount of the full value of her underlying claim. Plaintiff, absent a showing as to the full value of the damages, has failed to sustain her burden and is therefore unable to reduce the Employer/Carrier's pro rata share of the net tort recovery. Thus, I find that the Employer/Carrier is entitled to 100% of the benefits paid and the future benefits to be paid up to the total net tort recovery. *See Zurich Ins. Co. v. Martin*, 452 So.2d 978 (Fla. 5th DCA 1984); *Division of Risk Management v. Nationwide Ins. Co.*, 504 So.2d 11 (Fla. 1st DCA

1986); *Tohn v. Montgomery Elevator Co.*, 400 So.2d 1061 (Fla. 3rd DCA 1981); *Dept. of Health and Rehabilitative Services v. Culmer*, 402 So.2d 1273 (Fla. 3rd DCA 1981); and *Cooper Transportation, Inc. v. Mincey*, 459 So.2d 339 (Fla. 3rd DCA 1984).

15. While Plaintiff introduced evidence of comparative negligence in this case, the Court cannot consider this absent any testimony to the full value of damages. *See Safeco Ins. Co. v. Sarkisian*, 389 So.2d 1088 (Fla. 4th DCA 1980).

16. Any amount as to the full value contained in Plaintiff's cross-examination of the Employer/Carrier's expert cannot serve as evidence, and the Court sustained the Employer/Carrier's objection in that regard. (Hearing Transcript pp.42-46). *See Hewitt, Coleman & Associates v. Lymas*, 460 So.2d 467 (Fla. 4th DCA 1984).

17. While I do not find as asserted by the Employer/Carrier that the Plaintiff perpetuated a fraud upon this Court in asserting (post-settlement) that she was 100% comparatively negligent, I do find that the Plaintiff's contrary position regarding negligence from the original underlying suit is a wholly inconsistent position which was taken for the sole purpose of reducing the Employer/Carrier's percentage of lien recovery. Plaintiff should not be rewarded for this inconsistent position. *Manfredo v. Employer's Casualty Ins. Co.*, 560 So.2d 1162.

18. Based on the above authority and findings, this Court finds that the Employer/Carrier is entitled to full recovery in the amount of 100% of benefits paid or to be paid up to the total amount of net recovery. Because Plaintiff's net recovery was stipulated at $295,086.37 and the Employer/Carrier has proven benefits paid of $816,896.92, the benefits paid exceed the net tort recovery. Therefore I award the Employer/Carrier $295,086.37, the full amount of the net tort recovery with no offset as to any future medical or indemnity benefits.

DONE and ORDERED in chambers, in Ocala, Marion County, Florida, this 2nd day of October, 2006.

WILLIAM JACK SINGBUSH, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 2nd day of ~~May~~ Oct, 2006, to **MARIANNE R. HOWANITZ, ESQUIRE**, Attorney for Plaintiffs, P.O. Box 700 Ocala, FL 34478-0700, **PHILIP J. CROWLEY, ESQUIRE**, Hinshaw & Culbertson, 100 South Ashley Drive, Suite 830, Tampa, FL 33602, and **W. ROGERS TURNER, ESQUIRE**, 1560 Orange Avenue, Suite 500, Winter Park, FL 32789.

Judicial Assistant