

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>KENDALL TURNER</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0452-449
<b>PLEASANT ACRES LLC</b>	)	CS-00-0058-238
Respondent	)	
AND	)	
	)	
<b>INSURANCE COMPANY UNKNOWN</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS</b>	)	
<b>COMPENSATION FUND</b>	)	

**ORDER**

The Kansas Court of Appeals decided *Turner v. Pleasant Acres*,<sup>1</sup> on March 18, 2022, and remanded the matter to the Board. On May 18, 2022, the Board remanded the matter to the Administrative Law Judge (ALJ) with instructions to receive evidence and to make additional findings of fact. On December 21, 2022, the ALJ issued the Order on Remand. The Board assumes jurisdiction pursuant to the instructions contained in the Memorandum Opinion of the Court of Appeals.

Randy S. Stalcup appeared for Claimant. Roy Pleasant, Pro Se (Respondent), appeared on his own behalf. Timothy A. Emerson appeared for the Fund.

**RECORD AND STIPULATIONS**

The Board considered the entire record, consisting of:

1. Transcript of Hearing on Remand held July 6, 2022, including Claimant’s Exhibits 1-6 and the Fund’s Exhibits 1-2;

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<sup>1</sup> See *Turner v. Pleasant Acres LLC*, 62 Kan App. 2d 122, 138-139, 506 P.3d 963 (2022).

2. Transcript of Deposition of Kendall Turner taken August 5, 2022, including Claimant's Exhibit 1 and the Fund's Exhibit 1 (labeled Respondent's Exhibit 1).
3. The pleadings and orders contained in the administrative file.

### ISSUE

What is the amount of the Fund's subrogation lien and future Credit pursuant to K.S.A. 44-504(b)?

### FINDINGS OF FACT

The Board adopts and incorporates the detailed factual findings and procedural overview set forth in the Board's prior Order and the Memorandum Opinion of the Court of Appeals. The Court of Appeals stated:

Consequently, based on the plain and unambiguous language of K.S.A. 44-504, we find that the Fund has a subrogation lien against any duplicative recovery Turner received by way of settlement in his federal lawsuit against the uninsured motorist carrier arising out of the same work-related accident that is the subject of this workers compensation action. We also find that under K.S.A.44-504(b), the Fund is "subrogated to the extent of the compensation and medical aid" awarded in this workers compensation action. Moreover, we find that the Fund's subrogation lien is "against the entire amount of such recovery, excluding any recovery, or portion thereof, determined . . . to be loss of consortium or loss of services to a spouse." K.S.A. 44-504(b).

Under the Circumstance presented, we remand this workers compensation action to the Board for determination of the amount of the Fund's subrogation lien. The Board may receive additional evidence to resolve this question or may remand this matter to the administrative law judge for additional fact-finding. After this determination has been made, the Board is directed to give the Fund credit against the workers compensation award to the extent provided by statute. In this way, the intent of the Kansas Legislature will be preserved in that Turner will receive compensation for the injuries that he suffered as a result of the work-related accident, but not receive a double recovery

Following the issuance of the Memorandum Opinion, the Board issued its Order on Remand on May 18, 2022. Pursuant to the Board's Order on Remand, the ALJ was instructed to receive evidence and to make additional findings of fact regarding the following:

1. What portion of the third party settlement is devoted to past and future medical and disability?
2. How much, if any, of the third party settlement was set aside for loss of consortium or loss of services to a spouse?
3. The date Claimant received recovery from the third party settlement, i.e., date of the settlement and/or the date Claimant received a settlement check.
4. The amount of disability and medical benefits paid by the Fund and the dates they were paid.

The ALJ found all of the \$230,000 Claimant received in his third-party uninsured motorist case against Continental Western was for past and future medical and disability. The ALJ stated:

The Complaint filed by Claimant in his third-party uninsured motorist lawsuit sought damages related to Claimant's injuries and inability to engage in gainful employment as a result of his injuries, including, "pain and suffering, mental anguish, loss of time, loss of enjoyment of life, medical expenses, economic loss, permanent disfigurement, and permanent disability." (Kendall Turner Depo., Aug. 8, 2022, Fund's Ex. 1). Claimant's counsel for the third-party uninsured motorist claim retained an economics professor, Terrence Decker, Ph.D., to give his opinions regarding Claimant's damages sustained as a result of his December 12, 2016, accident. Dr. Decker opined that Claimant's lost wages for the remainder of his anticipated working life would be \$606,205, and the value of Claimant's lost household services would be \$178,416.

Claimant settled his case for a payment of \$230,000, and Claimant did not know how the settlement of his third-party uninsured motorist case was apportioned or what elements of damage were being paid. Additionally, the signed Settlement Agreement and Release executed at the time Claimant settled his third-party uninsured motorist claim does not have an itemization of damages being paid or break down what elements of damages were being paid by the settlement. There is no other evidence in the record regarding how the settlement of Claimant's third-party uninsured motorist claim was apportioned.

Claimant argues that he had a common-law marriage at the time that he settled his third-party uninsured motorist case and that a portion of the money he received in the settlement should be apportioned to loss of consortium or loss of services of a spouse. Claimant testified that he has had a common-law marriage with Rhonda Nathena, who he lives with, since late 2007 to early 2008. He testified that he and Ms. Nathena have a present agreement to be married and have held themselves out as husband and wife to several businesses and family members since that time. As noted above, Claimant indicated to both Mr. Hardin and Dr. Zimmerman that he

had a common law spouse at the time that he was examined by them. The Court finds that Claimant was in a common-law marriage with Ms. Nathena at the time of his accident.

Claimant argues that Dr. Decker opined that Claimant has \$784,621 in damages as a result of his accident, of which \$606,205, or 77.3 percent, is for lost wages and \$178,416, or 22.7 percent, is for lost household services, so the Court should find that 77% of Claimant's settlement of the third-party claim was for lost wages and 23% of the settlement was for lost household services. However, Claimant's arguments fail to acknowledge the fact that the Complaint Claimant filed in his uninsured motorist claim against Continental Western did not seek damages for loss of consortium or loss of services to a spouse and rather only sought damages for his physical injuries and inability to engage in gainful employment. The Settlement Agreement and Release Claimant signed did not apportion the elements of damages being paid by the settlement, and there is no evidence that the United States District Court for the District of Kansas where Claimant filed his third-party claim made any apportionment or approved any apportionment of the damages being paid when the case was settled.

The Court finds, based upon the weight of the evidence, that all of the \$230,000 Claimant received in settlement of his third-party uninsured motorist case against Continental Western was devoted to past and future medical and disability, which were the damages he claimed in his lawsuit when he filed his Complaint.<sup>2</sup>

The ALJ further found none of the third-party settlement was set aside for loss of consortium or loss of services to a spouse; Claimant settled his third-party uninsured motorist case against Continental Western on December 17, 2018, and received a lump-sum payment of \$230,000. After deducting attorney fees, costs and expenses, Claimant received \$141,107.60; the Fund paid temporary total disability benefits in the amount of \$45,100.00 consisting of 72.16 weeks at the rate of \$625 per week; the Fund paid permanent total disability benefits in the amount of \$42,149.46, consisting of 67.44 weeks at the rate of \$625 per week; and the Fund paid medical benefits in the amount of \$23,767.63.

Claimant argues the credit should be \$109,076.17. The Fund maintains the Order should be affirmed and they be granted a lien in the amount of \$230,000.

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<sup>2</sup> ALJ Order On Remand (June 6, 2022) at 6.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-504 states:

(a) When the injury or death for which compensation is payable under the workers compensation act was caused under circumstances creating a legal liability against some person other than the employer or any person in the same employ to pay damages, the injured worker or the worker's dependents or personal representatives shall have the right to take compensation under the workers compensation act and pursue a remedy by proper action in a court of competent jurisdiction against such other person.

(b) In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse.<sup>3</sup>

The findings of fact made by the ALJ are affirmed and incorporated herein. Pursuant to the Court of Appeals Memorandum Opinion, the Board is tasked with determining the Fund's subrogation lien. The Board grants the Fund a lien pursuant to K.S.A. 44-504(e) in the amount of \$111,017.09 and a future credit of \$30,090.51.

Claimant received \$230,000 in a lump-sum from Continental Western, for the third party uninsured motorist case. This amount was for past and future medical and disability. It did not include any amount for loss of consortium or loss of services to a spouse. Claimant did not seek damages for loss of consortium or loss of services to a spouse in his third-party claim and did not present any evidence in this matter such damages existed. After attorney fees and expenses, Claimant received \$141,107.60 from the \$230,000. The Fund paid \$45,100 in temporary total temporary disability compensation, \$42,149.46 in permanent total disability compensation and \$23,767.63 in medical benefits paid to date, for a total of \$111,017.09. This is the amount of the Fund's lien for compensation paid. Subtracting the lien amount from the amount Claimant received from the third party case, minus attorney fees and expenses, reveals a future credit to the Fund of \$30,090.51 to be applied against additional compensation payable by the Fund (\$141,107.60 - 111, 017.09 = \$30,090.51).

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<sup>3</sup>K.S.A. 44-504(a), (b).

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board the Fund is granted a subrogation lien in the amount of \$111,017.09 for past compensation paid and a future credit of \$30,090.51 to be applied against additional compensation paid by the Fund.

**IT IS SO ORDERED.**

Dated this day of September, 2023.

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BOARD MEMBER

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

Randy S. Stalcup, Attorney for Claimant  
Roy Pleasant, Pro Se  
Timothy A. Emerson, Attorney for the Fund  
Hon. Ali Marchant, Administrative Law Judge