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**ARKANSAS COURT OF APPEALS**

DIVISION IV  
No. CV-17-874

PUBLIC EMPLOYEE CLAIMS  
DIVISION

APPELLANT

V.

GARY CLARK AND NORTH  
ARKANSAS LIVESTOCK AUCTION,  
INC.

APPELLEES

**Opinion Delivered** March 28, 2018

APPEAL FROM THE CARROLL  
COUNTY CIRCUIT COURT,  
EASTERN DISTRICT  
[NO. 08ECV-13-38]

HONORABLE SCOTT JACKSON,  
JUDGE

REVERSED AND REMANDED

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**N. MARK KLAPPENBACH, Judge**

The Public Employee Claims Division (PECD) appeals the Carroll County Circuit Court’s order awarding it \$23,345 on its complaint in intervention. PECD argues that it should have been awarded a larger sum pursuant to Arkansas Code Annotated section 11-9-410 (Repl. 2012). We reverse and remand.

In 2010, appellee Gary Clark was seriously injured while working as a veterinary livestock inspector for the Arkansas Livestock and Poultry Commission. Clark was paid workers’-compensation benefits for his injuries. In 2013, Clark filed a negligence suit against North Arkansas Livestock Auction, Inc. (NALA), the entity responsible for the facility where he was working when injured. PECD subsequently moved to intervene in the lawsuit and filed a complaint in intervention. PECD alleged that, as the workers’-compensation-claims

administrator for the Arkansas Livestock and Poultry Commission, it had paid workers'-compensation benefits to Clark and was entitled to an absolute lien against two-thirds of the net proceeds of any settlement or judgment in Clark's favor on his complaint pursuant to Arkansas Code Annotated sections 11-9-410 and 21-5-605.<sup>1</sup> Clark had no objection to the motion to intervene, and intervention was granted.

Clark's case against NALA proceeded toward trial but was ultimately settled for \$325,000. Clark's attorney subsequently deposited \$75,000 into the registry of the court in February 2016. A "post settlement hearing" between Clark and PECED was held in May 2016. In describing the issue before the court, Clark's attorney stated that "at the time we settled this case we deposited into the registry of the court \$75,000, and of course they are trying to establish a lien on that amount. We are trying to establish that he will not be made whole, even by receiving that money."

PECD introduced evidence at the hearing showing that Clark had received more than \$66,000 in benefits for temporary total disability and permanent partial disability and that more than \$154,000 in medical expenses had been paid on his behalf. The PECED employee handling Clark's claim testified that his claim was still open and that PECED continued to pay for medical treatment. Clark agreed that he had received these benefits but noted that he did

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<sup>1</sup>Arkansas Code Annotated section 11-9-410 is a workers'-compensation statute that allows an employer or carrier to recover on its payment of workers'-compensation benefits when an injured employee recovers damages in a tort action against a third party. Arkansas Code Annotated section 21-5-605 establishes PECED as "the unit of state government primarily responsible for the administration of public employee workers' compensation claims in the State of Arkansas." Ark. Code Ann. § 21-5-605(c) (Repl. 2016).

not receive his full wages while off work. Clark testified that he agreed to settle his case against NALA for \$325,000; he said that \$100,000 of this sum went to attorneys' fees, \$10,000 went to costs, \$75,000 was deposited into the registry of the court, and he received the rest. Although Clark had eventually returned to work full time after his injury, he testified that he still suffered from pain and mental anguish.

PECD's trial brief was admitted into evidence without objection. Included in the brief were PECD's calculations showing that \$126,666.67 was available for subrogation under Arkansas Code Annotated section 11-9-410. Because more than \$220,000 had been paid to Clark or on Clark's behalf in his workers'-compensation claim, PECD argued that it was entitled to receive the entire balance available for subrogation. Clark's attorney pointed out that PECD's brief included incorrect amounts for costs of collection and attorneys' fees. The amounts were corrected and initialed by counsel for both sides and acknowledged by the circuit court.

Clark argued that PECD could not recover anything because he had not been made whole by the settlement and workers'-compensation payments he had received. PECD contended that its entitlement to a lien was absolute and that the made-whole doctrine did not apply. The court took the matter under advisement and subsequently entered an order finding that PECD was entitled to receive two-thirds of the deposited funds after payment of costs of collection. The court calculated this amount to be \$23,345. PECD appealed from this order, but the appeal was dismissed without prejudice due to the lack of a final order. *Pub. Emp. Claims Div. v. Clark*, 2017 Ark. App. 224, 519 S.W.3d 333. The circuit court

subsequently entered a final order that again awarded PECD the sum of \$23,345.

On appeal, PECD argues that the circuit court's award is contrary to the applicable law and that it is entitled to recover a greater amount. As it did below, PECD relies on Arkansas Code Annotated section 21-5-605(f)(3)(B), which provides that in the event of a public employee's tort action against a third party,

the rights of the public employee, or his or her dependents, the public employer, and the division shall be governed by the provisions of § 11-9-410, provided, the rights of the public employer and the division in and to amounts received from the third party by the injured public employee, or his or her dependents, as a result of either settlement with or judgment against the third party shall be absolute.

PECD argues that this statute gives it an absolute right to a portion of the settlement proceeds received by Clark subject to the provisions of section 11-9-410. Arkansas Code Annotated section 11-9-410 provides that when an injured employee recovers damages against a third party, the employer or employer's carrier is entitled to a lien on two-thirds of the net proceeds for payment of the amount paid by them as workers'-compensation benefits. The statute provides that, before discharging the actual amount of the liability of the employer, reasonable costs of collection shall be deducted from the recovered amount and one-third of the remainder shall go to the injured employee. Ark. Code Ann. § 11-9-410(a)(2).

According to PECD, the proper calculation here should start with the settlement amount of \$325,000 and deduct \$100,000 for attorneys' fees and \$10,000 for costs of collection. The net amount after these deductions is \$215,000. One-third of that amount, \$71,666.66, would be awarded to Clark, and the remaining two-thirds, or \$143,333.34, would be available for subrogation. PECD notes that this order of calculations was used by

the supreme court in *Public Employee Claims Division v. Chitwood*, 324 Ark. 30, 918 S.W.2d 163 (1996). PECD argues that, because more than \$220,000 in workers'-compensation benefits were expended on Clark's claim, PECD is entitled to receive the total balance available for subrogation, \$143,333.34.

Instead of finding that PECD was entitled to up to two-thirds of "the net proceeds recovered in the action" as provided in section 11-9-410, the circuit court found that PECD was entitled to two-thirds of "the deposited funds." Thus, the circuit court calculated PECD's award from \$75,000 as opposed to the entire settlement amount of \$325,000 as set out by PECD in its trial brief. Clark contends that this was proper. He asserts in his brief that, when he reached a settlement with NALA on his negligence claim, his attorneys reached an agreement with PECD that \$75,000 would be deposited into the registry of the court and that any recovery by PECD would be paid from this sum only.

Although the \$75,000 deposit was referenced by Clark at the hearing and in the circuit court's order, the record contains no reference to an agreement by which PECD agreed to limit its recovery to a portion of the \$75,000. In his discussion of the alleged agreement in his brief, Clark makes no reference to the abstract or addendum. PECD is silent on the alleged agreement. As acknowledged by Clark, PECD submitted into evidence its calculations based on the entire amount of the settlement proceeds. Clark noted below that the amounts PECD listed for attorneys' fees and costs needed to be adjusted, but he failed to assert that PECD had agreed to be limited to a portion of the \$75,000. Although the parties and the court acknowledged that only \$75,000 was deposited with the court, there is no

reason on the record before us that PECD's recovery should be limited to an amount calculated from the deposited sum as opposed to the entire settlement of \$325,000 as provided in section 11-9-410. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

GLOVER and HIXSON, JJ., agree.

*Robert H. Montgomery*, Public Employee Claims Division, for appellant.

*Ray Hodnett*, for appellee.