

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

CA06-383

October 11, 2006

J. B. HUNT TRANSPORT, INC. and AIG
CLAIMS SERVICE
APPELLANTS

V.

HAROLD KNIGHT
APPELLEE

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION [F212722]

AFFIRMED AS MODIFIED

Appellants, J.B. Hunt Transport and its workers' compensation insurance carrier, AIG Claims Service (jointly Hunt), appeal the Workers' Compensation Commission's decision to affirm and adopt the administrative law judge's determination that Hunt was not allowed to assert its subrogation right against a third-party settlement because appellee, Harold Knight, was not made whole by the settlement agreement. On appeal, Hunt asserts that the Commission erred in denying its subrogation request and that the award of attorney's fees to appellee on medical and indemnity amounts already paid was in error because Hunt had never controverted the amounts that had been paid. We affirm as modified.

The basic facts of the case are not in dispute. Knight was employed by Hunt as an over-the-road truck driver. On October 26, 2002, Knight's tractor-trailer was hit by a drunk driver, causing damage to his spinal cord. Hunt accepted the injury as compensable and has paid \$45,734 in indemnity benefits and \$119,207 in medical benefits to appellee.

Knight, a resident of West Virginia, hired a West Virginia attorney to represent him in a third-party action against the tortfeasor responsible for causing the accident, and Hunt gave notice of the intent to protect its statutory subrogation interest. As part of the preparation for that lawsuit, an analysis of Knight's financial loss was prepared that estimated Knight's gross awardable damages to be \$1,848,408. On July 20, 2004, without having filed a lawsuit, Knight, his estranged wife, Holly, and their two minor children, Ashley and Adam, entered into a Release and Settlement Agreement for a total of \$3,300,000, which sum included the tortfeasor's policy limits. Knight had also already received \$50,000 in underinsured motorist coverage from his own insurance company. Hunt was not given prior notice of the settlement until approximately one and one-half days before it was completed. The settlement agreement provided periodic payments for Knight and both children, but not for Knight's wife, Holly. After deducting costs and expenses from the settlement amount, Knight unilaterally allocated the settlement as follows: \$1,479,068.98 to Knight; \$236,938.35 to Holly Knight; and \$470,000 for the benefit of his two minor children.

Hunt, before the Workers' Compensation Commission, attempted to assert its right of subrogation pursuant to Arkansas Code Annotated section 11-9-410. Knight argued that Hunt was not entitled to assert its subrogation rights because he had not been made whole, claiming that his losses were estimated to be \$1,848,408, and stating that he had only received \$1,479,068.98 after deducting for costs and expenses and the allocations of the settlement proceeds to his wife and children.

A hearing was conducted before the ALJ on March 23, 2005, in which the ALJ found that Knight had not been made whole; that Hunt was not entitled to subrogation from the third-party settlement; and that Hunt was liable for a controverted attorney's fee on \$164,941, which was the total amount Hunt sought to recover. Hunt now brings this appeal, arguing that the Commission erred in denying its subrogation request and in awarding attorney's fees.

In *Logan County v. McDonald*, 90 Ark. App. 409, 416, ___ S.W.3d ___, ___ (2005), we set forth our well-settled standard of review in workers' compensation cases:

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence, *i.e.*, evidence that a reasonable person might accept as adequate to support a conclusion. *Morales v. Martinez*, 88 Ark. App. 274, ___ S.W.3d ___ (Nov. 10, 2004). The issue is not whether this court might have reached a different result from that reached by the Commission, or whether the evidence would have supported a contrary finding. *Smith v. County Market/Southeast Foods*, 73 Ark. App. 333, 44 S.W.3d 737 (2001). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Id.* The Workers' Compensation Commission is not required to believe the testimony of any witness, but may accept and translate

into findings of fact only those portions of the testimony it deems worthy of belief; once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

The financial analysis estimating Knight's gross awardable damages to be \$1,848,408 was submitted to the ALJ without objection from Hunt. At the hearing, Knight testified that although he was not paralyzed, he was confined to a wheelchair except for being able to walk for short distances using a walker, and that he would be in a wheelchair for the rest of his life. After Knight returned home from rehabilitation in December 2002, he and his wife began to have marital problems in January 2003; Holly Knight filed for divorce in May 2003. The settlement agreement was not reached until July 2004, but it indicated that Knight and Holly Knight were still husband and wife at that time, although they had not lived together for over a year. Knight stated that Holly had retained an attorney to represent her and participate in the settlement negotiations, and that a settlement was worked out between his own lawyer and his wife's separate lawyer as to the distribution of the settlement funds. Knight testified that he understood that his wife and children had parental and spousal consortium rights under West Virginia law and that a certain percentage of the settlement had to be allocated for those rights. He said that he agreed to the amounts that were set aside for his wife and children because it was the law and he did not have a choice in the matter. Knight denied any collusion with his wife in filing for divorce; he said that they separated shortly after the accident and that there was no intention on either party's part to ever get back together. Knight also testified that

Holly had not made any of the money that she had received available to him. Knight further denied that he and his wife were in collusion with regard to the consortium amounts so as to defraud Hunt out of any money. He said that he was informed by his attorney that the amount of the settlement agreement was the maximum he could receive under the insurance policies; that the settlement was what he would get if he went to court; that there was nothing else for him to get; and that the settlement was for him, his wife, and his children. Knight testified that he agreed to the settlement so that he would not have to go to court. Knight said that the money that went to his wife and children resulted from his attorney telling him that that was the amount that the court would order if the case went to court, and it was his position that because of the money that he had to give his wife and children, he had less than the amount estimated by his experts that it would take to make him whole.

Holly Knight testified that she hired a separate lawyer to protect her interests regarding the damages her husband suffered in his accident. However, she said that no money had been paid to her pursuant to a court order, and that all monies paid to her and the children were a result of Knight's generosity.

Sufficiency of the Evidence

Hunt argues that the Commission erred in rejecting its subrogation claim for several reasons, all of which really culminate in a sufficiency-of-the-evidence argument. First, Hunt argues that no lawsuit was ever filed against the third-party tortfeasor in this case. However, in *South Central Arkansas Electric Cooperative v. Buck*, 354 Ark. 11, 18-19,

117 S.W.3d 591, 596 (2003), our supreme court held that the statutory subrogation lien right did not arise “until after an insured has been made whole by a judgment *or settlement* against a third-party tortfeasor.” (Emphasis added.) Thus, there is no requirement that a lawsuit be filed – there can also be a settlement, which is what occurred in this case.

Second, Hunt argues that Knight elected to “share” some of his settlement with his wife and children; however, Knight testified at trial, without objection, that under West Virginia law his wife and children were entitled to a percentage of the settlement. In his decision, the ALJ found that there was sufficient evidence to support a finding that a portion of the settlement agreement was for losses sustained by Holly Knight and the two minor children and that those amounts must first be deducted in order to determine what amount Knight received from the third-party settlement. The ALJ noted that West Virginia law recognizes a consortium claim for spouses and a parental consortium claim for children, and that based upon an agreement between the parties, those claims were determined to be about one-third of the total settlement. The ALJ noted that all sides were represented by counsel; that Knight’s attorney did not receive a fee based upon the total settlement but rather just upon the portion paid to Knight, indicating that the settlement was an “arm’s length” transaction; and that the children’s settlement for loss of parental consortium was approved by a Lewis County, West Virginia, circuit court, further indicating that such payments were not voluntary on Knight’s part.

In its argument, Hunt, while noting that the West Virginia court was required to grant permission to settle the children’s claim for loss of parental consortium, asserts that

loss of parental consortium is not a cause of action recognized in Arkansas and “[a]s this matter is controlled by Arkansas law, the amount given to the children should be considered as a part of [Knight’s] settlement.” However, Hunt cites no authority for the proposition that this matter is controlled by Arkansas law. It was admitted at the oral argument of this case that Hunt never made a choice-of-law argument to the Commission. This court will not address arguments on appeal that were not first made to the Commission. *See Couch v. First State Bank*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Third, in its reply brief, Hunt argues that it had no opportunity to be heard except by the Commission. In support of that argument, Hunt cites *Liberty Mutual Insurance Co. v. Whitaker*, 83 Ark. App. 412, 128 S.W.3d 473 (2003), which sets forth when an employee and a tortfeasor may settle around an employer’s or insurance carrier’s right to a lien on the settlement proceeds. Again, this argument was not made to the Commission, and we decline to address it. *See Couch, supra.* Nevertheless, since that case does not appear to be one where the injured insured was not made whole, as in this case, *Whitaker* would not be applicable. We hold that there is substantial evidence to support the Commission’s determination that Knight was not made whole by the proceeds he received under the settlement agreement and that the portion of the settlement that was allocated to his wife and minor children was proper.

Statutory Lien Protection

As a separate point, Hunt argues that its subrogation lien is statutorily protected. Hunt specifically argues that the “made-whole” doctrine should not apply to workers’

compensation cases; however, our supreme court has held that the “made-whole” doctrine does apply to workers’ compensation cases, *see General Accident Insurance v. Jaynes*, 343 Ark. 143, 33 S.W.3d 161 (2000), and this court cannot overturn supreme court decisions. *See Sweeden v. Farmers Ins. Group*, 71 Ark. App. 381, 30 S.W.3d 783 (2000). In *Jaynes, supra*, our supreme court held that even if an insurer’s subrogation lien right was established by the Arkansas General Assembly, the insurer’s right to subrogation did not arise until the insured was made whole. In the present case, because Knight was not made whole, Hunt’s subrogation right did not arise. Therefore, Hunt’s argument that its lien is statutorily protected fails.

Attorney’s Fees

Hunt next argues that the award of attorney’s fees to Knight upon the finding that Hunt had controverted the amount of benefits paid was in error. Hunt argues that it has never controverted Knight’s entitlement to benefits, and that Arkansas Code Annotated section 11-9-715(a)(2)(B)(ii) (Supp. 2005) only allows attorney fees to be paid on the amount of compensation for indemnity benefits controverted and awarded, not medical benefits.

With respect to Hunt’s argument that it had never controverted Knight’s entitlement to benefits, the ALJ, and the Commission in its adoption of the ALJ’s opinion, relied upon the Commission’s opinion in *McDonald v. Logan County* (F103875), 2004 AWCC 105 (2004), in which the Commission found that the employee had not been made whole by his third-party settlement and that Logan County was liable for a controverted attorney’s

fee based upon the amount it sought for reimbursement out of that settlement. This court affirmed the Commission's decision in *Logan County v. McDonald*, 90 Ark. App. 409, ___ S.W.3d ___ (2005).

In the present case, Hunt claimed that Knight had been made whole and that it was entitled to assert its right of subrogation with regard to the third-party settlement agreement entered into by Knight and the third-party tortfeasor. However, the Commission determined that Knight had not been made whole by the settlement agreement and, therefore, Hunt's right to subrogation never arose. In accordance with the decision in *Logan County, supra*, Hunt was seeking reimbursement out of Knight's settlement of its subrogation claim, and that constitutes a conversion of benefits upon which an attorney's fee can be awarded.

However, we find Hunt's second point to be well taken that Arkansas Code Annotated section 11-9-715(a)(2)(B)(ii) (Supp. 2005) now only allows attorney fees to be paid on indemnity benefits controverted and awarded and not medical benefits. In support, Hunt points out that the employee in *Logan County, supra*, was injured in 2000, when the statute allowed for attorney's fees to be paid on both controverted medical and indemnity benefits; that Arkansas Code Annotated section 11-9-715 was rewritten in 2001 and now provides that attorney fees "shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded"; and that Knight was not injured until 2002. Therefore, the statute makes it clear that attorney's fees can now only be paid on the amount of compensation for indemnity benefits controverted and awarded, and not on

medical benefits. We agree. We therefore modify the attorney's fee award to include only the controverted indemnity benefits of \$45,734.

Affirmed as modified.

CRABTREE, J., agrees.

HART, J., concurs.