[J-47-2022] [MO: Brobson, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CHRISTOPHER ALPINI,	:	No. 2 MAP 2022
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court dated July 19,
	:	2021 at No. 92 CD 2020 Affirming
v.	:	the Order of the Workers'
	:	Compensation Appeal Board dated
	:	January 15, 2020 at No. A18-0913.
WORKERS' COMPENSATION APPEAL	:	
BOARD (TINICUM TOWNSHIP),	:	ARGUED: September 14, 2022
	:	
Appellees	:	

DISSENTING OPINION

JUSTICE WECHT **DECIDED: May 16, 2023**

Tinicum Township is entitled to subrogation against Christopher Alpini's third-party tort recovery up to the amount of any benefits paid to him under the Workers' Compensation Act.[1] Hence, I respectfully dissent.

The question of whether or not the phrase "actions arising out of the maintenance or use of a motor vehicle," as used in Section 1720 of the Motor Vehicle Financial Responsibility Law,[2] encompasses dram shop liability[3] of tavern owners, is not the most important issue implicated by this appeal. The more significant inquiry is whether and to

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[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2710 (hereinafter, "WCA").

[2] 75 Pa.C.S. § 1720 (hereinafter, "MVFRL").

[3] *See* 47 P.S. § 4-493(1).

what extent a public employer paying benefits under the Heart and Lung Act[4] may be entitled to subrogation where the employee's injury involves an automobile. The relevant statutes and cases[5] provide the answer: Public employers are prohibited from subrogation only if they are self-insured for workers' compensation.

I.

The WCA provides for disabled employees to receive only two thirds of their wages,[6] but the HLA provides that certain public safety employees, such as township police officers like Alpini, receive their full salaries while disabled due to a work injury.[7] But employers paying disabled employees their full salaries under the HLA are still subject to the WCA. The HLA mandates that "any workmen's compensation, received or collected by any such employe for such period, shall be turned over to . . . [the] township, and paid into the treasury thereof."[8]

This provision of the HLA gives rise to a key distinction. Where a public employer pays for workers' compensation insurance, but also pays Heart and Lung benefits to an employee, the workers' compensation insurer sends payments to the employee, who then

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[4] Act of June 28, 1935, P.L. 477, *as amended*, 53 P.S. §§ 637-38 (hereinafter, "HLA").

[5] *See Pennsylvania State Police v. W.C.A.B. (Bushta)*, 184 A.3d 958 (Pa. 2018); *Stermel v. W.C.A.B. (City of Philadelphia)*, 103 A.3d 876 (Pa. Cmwlth. 2014).

[6] *See* 77 P.S. § 511(1) (providing that workers' compensation benefits for totally disabled employees are "sixty-six and two-thirds per centum of the wages of the injured employe . . . payable for the duration of total disability").

[7] *See* 53 P.S. § 637(a), (a)(10) (stating that "any policeman . . . of any . . . township . . . who is injured in the performance of his duties" shall be paid by the township "his full rate of salary . . . until the disability arising therefrom has ceased").

[8] 53 P.S. § 637(a).

transfers them to the employer pursuant to the HLA.[9] That is what occurred in this case, since Tinicum Township had a workers' compensation insurer.[10] By contrast, where a public employer is self-insured for workers' compensation, it does not follow this procedure. "Self-insured public employers that pay Heart and Lung benefits do not also make workers' compensation payments because they would simply be returned."[11] For a self-insured public employer, payment of "workers' compensation benefits" in conjunction with Heart and Lung benefits would be a legal fiction, a mere movement of money from one pocket to another.[12]

We next must understand the right to subrogation and its interaction with the MVFRL. It is this interaction that causes much of this case's complexity. Section 319 of the WCA provides:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under [the WCA] by the employer.[13]

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[9] Because the workers' compensation payments amount to two thirds of the employee's compensation, the net effect is that, after reimbursement, the insured public employer ultimately is responsible for paying the employee only one third of his salary under the HLA.

[10] *See* WCJ Opinion, 8/7/2018, at 4, ¶ 9 (noting that Alpini "is being paid full salary benefits by the Township under the Heart and Lung Act," and although he received checks from the Township's workers' compensation insurer, Amerihealth Casualty, he "'signs over' his workers' compensation checks to the Township and does not keep that money").

[11] *Stermel*, 103 A.3d at 877-78 (citing *Wisniewski v. W.C.A.B. (City of Pittsburgh)*, 621 A.2d 1111, 1113 (Pa. Cmwlth. 1993)).

[12] Significantly, the employers in both *Bushta* and *Stermel* were self-insured for workers' compensation. *See Bushta*, 184 A.3d at 962; *Stermel*, 103 A.3d at 880.

[13] 77 P.S. § 671.

Thus, the general rule is that, when an employee is injured by a third party and the employer is paying workers' compensation benefits in connection with that injury, the employer may subrogate against the employee's third-party recovery in order to recoup the amount of the benefits that it has paid. Although the HLA does not contain an express subrogation provision, it likewise has been interpreted as permitting subrogation as a matter of common law.[14]

Under Section 1720 of the MVFRL, however, subrogation was prohibited for many years with respect to "actions arising out of the maintenance or use of a motor vehicle."[15] Concomitantly, under Section 1722, the injured employee was barred from recovering the amount of any workers' compensation benefits as damages in a motor-vehicle-related action against a third party.[16] Because of these provisions of the MVFRL, employers were solely responsible for covering their employees' lost wages through workers' compensation benefits and/or Heart and Lung benefits. Employees injured in work-

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[14] *See City of Philadelphia v. Zampogna*, 177 A.3d 1027, 1030 (Pa. Cmwlth. 2017) ("The Heart and Lung Act does not contain a [provision similar to Section 319 of the WCA], but it has long been understood that the common law authorizes public employers to subrogate their Heart and Lung payments from the employee's third party tort recovery.") (citing *Topelski v. Universal South Side Autos, Inc.*, 180 A.2d 414, 420 (Pa. 1962)).

[15] 75 Pa.C.S. § 1720. With respect to workers' compensation benefits, Section 1720's anti-subrogation mandate is express. *Id.* (providing that, in actions arising from the maintenance or use of a motor vehicle, there "shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits"). Heart and Lung benefits, although not mentioned in Section 1720, were treated the same way by our courts, *i.e.*, no subrogation was permitted where the employee's third-party recovery came from an action arising out of the maintenance or use of a motor vehicle. *See Fulmer v. Pennsylvania State Police*, 647 A.2d 616 (Pa. Cmwlth. 1994).

[16] 75 Pa.C.S. § 1722 ("In any action for damages against a tortfeasor . . . arising out of the maintenance or use of a motor vehicle, a person who is eligible to receive benefits under the coverages set forth in this subchapter, or workers' compensation . . . shall be precluded from recovering the amount of benefits paid or payable under this subchapter, or workers' compensation[.]").

related vehicle collisions could not recover the amount of those benefits from the third-party tortfeasor, and the employer had no entitlement to subrogation to recoup the benefits that it paid. In other words, much of the financial burden of injuries from work-related car crashes fell upon employers and workers' compensation insurers, not upon tortfeasor-drivers and their automobile insurers.

Then, in 1993, the General Assembly passed what is known as "Act 44."[17] Without amending the text of Sections 1720 and 1722 of the MVFRL, for reasons unknown, Section 25(b) of Act 44 included the following language: "The provisions of 75 Pa.C.S. §§ 1720 and 1722 are repealed insofar as they relate to workers' compensation payments or other benefits under the Workers' Compensation Act."[18] The text of Sections 1720 and 1722 remains in its pre-Act 44 form, facially prohibiting subrogation. Confusion reigned. Post-Act 44, it seemed clear enough that, at least as it concerned workers' compensation benefits, "actions arising out of the maintenance or use of a motor vehicle" now are effectively the same as all other actions against third parties, *i.e.*, subrogation is permitted under the general rule of Section 319 of the WCA. But what of Heart and Lung benefits?

This Court answered that question in 2011, in *Oliver v. City of Pittsburgh*.[19] There, we held that, because the plain language of Act 44, § 25(b) referred only to workers' compensation benefits, and not to Heart and Lung benefits, the repeal necessarily applied only to the former.[20] Heart and Lung benefits thus remain within the anti-subrogation provision of the MVFRL, Section 1720. The upshot of these developments is that, in work-related car crash cases, we are now in a curious state in which employers are

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17 Act of July 2, 1993, P.L. 190, No. 44.

18 Act 44, § 25(b).

19 11 A.3d 960 (Pa. 2011).

20 *See id.* at 966.

entitled to subrogate against their employees' third-party recoveries for workers' compensation benefits, but *not* for Heart and Lung benefits. Employees, in turn, are permitted to plead the amount of their workers' compensation benefits as damages in their third-party lawsuits pursuant to Section 1722, but *cannot* recover the amount of their Heart and Lung benefits, per Act 44 and *Oliver.*[21]

The facts of this appeal provide an illustration. Alpini, a Tinicum Township ("the Township") police officer, was injured in a motor vehicle collision while on duty. The Township, through its insurer AmeriHealth Casualty, paid Alpini workers' compensation benefits, but also paid him his full salary under the HLA. Alpini then signed his workers' compensation checks over to the Township, as required by the HLA. Alpini recovered damages in a tort action against the driver who injured him and the taverns that served alcohol to the driver. The Township, on behalf of its insurer, then sought to subrogate against Alpini's third-party recovery (specifically the portion attributable to the tavern owners) in the amount of the lien reported by AmeriHealth's Lead Claims Adjuster, Heather Stover.[22] Ms. Stover averred that, in connection with Alpini's "work injury claim," AmeriHealth asserted a total lien of $364,024.60, consisting of $186,063.41 in wage loss benefits and $177,961.19 in medical benefits.[23]

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[21] We are bound to presume that the statutes, as written, reflect the deliberate intent of the General Assembly. It seems likely nonetheless that, in weaving this web of interactions between the WCA and the MVFRL, the General Assembly simply overlooked the HLA. The result is that courts have been compelled to strain to place these statutes into a workable paradigm. Although this Court in *Oliver* was correct to rely upon the plain language of Act 44, there does not seem to be any compelling reason to distinguish between workers' compensation benefits and Heart and Lung benefits when it comes to subrogation. Yet, here we are, at least until the General Assembly chooses to revise its handiwork.

[22] *See* Certified Record Item 32, Affidavit of Heather Stover.

[23] *Id.*

Was this amount subrogable? As I understand the statutes discussed above, the answer depends upon the type of benefits that the lien represents. If the lien reflects amounts paid to Alpini under the WCA, then the Township is entitled to subrogate against Alpini's third-party recovery *regardless* of whether that recovery is attributable to an action "arising out of the maintenance or use of a motor vehicle" for purposes of Section 1720 of the MVFRL. This is so because Act 44 excised workers' compensation benefits from the anti-subrogation provision of the MVFRL, placing the lien comfortably within the general rule of Section 319 of the WCA, which permits subrogation. On the other hand, if the lien represents Heart and Lung benefits, then the Township may subrogate against Alpini's recovery only if his action against the third-party tortfeasors *did not* arise from "the maintenance or use of a motor vehicle" under Section 1720 of the MVFRL. This is because, per Act 44 and *Oliver*, Heart and Lung benefits remain within the MVFRL's anti-subrogation mandate. And naturally, Alpini was permitted to plead and recover the amount of his lost wages that were covered by workers' compensation under the post-Act 44 version of Section 1722 of the MVFRL, but he could not recover any amount attributable to Heart and Lung benefits if his action arose out of the maintenance or use of a motor vehicle. Simple, right?

Both the Majority and Justice Dougherty assume that we are in the "solely Heart and Lung benefits" scenario, and they thus focus exclusively on the meaning of the phrase "arising out of the maintenance or use of a motor vehicle" for purposes of the MVFRL. Both seem to conclude that this framing is necessitated by our decision in *Bushta*, specifically that opinion's statement that, "for purposes of the MVFRL, Heart and Lung benefits subsume WCA benefits, and thus subrogation of such benefits is barred."[24] But

[24] *Bushta*, 184 A.3d at 968.

this was not the entirety of *Bushta*'s reasoning. A closer look at *Bushta* and its predecessor, the Commonwealth Court's decision in *Stermel*, is revealing.

In *Stermel*, as in the instant case, a police officer was injured in a motor vehicle collision and was entitled to benefits under the HLA. The officer's employer, the City of Philadelphia, was self-insured for workers' compensation.[25] Thus, although the employer issued a Notice of Compensation Payable ("NCP") under the WCA, it did not make workers' compensation payments to the officer because, as noted above, "[s]elf-insured public employers that pay Heart and Lung benefits do not also make workers' compensation payments because they would simply be returned."[26] The employer's NCP specifically stated that it was paying the officer Heart and Lung benefits "in lieu of" workers' compensation.[27] Stressing this "in lieu of" language, the Commonwealth Court concluded that the "NCP, which was issued unilaterally by [the employer] does not transform Heart and Lung benefits into workers' compensation; they are separate."[28] And because it thus construed the entirety of the benefits as Heart and Lung benefits, the court concluded that the employer could not subrogate against the officer's third-party tort recovery pursuant to Section 1720 of the MVFRL, Act 44, and *Oliver*.[29]

Bushta similarly involved a police officer who was injured in a motor vehicle collision while on duty and who was entitled to Heart and Lung benefits. There—as in *Stermel*, but *unlike the instant case*—the employer was self-insured for workers'

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25 *Stermel*, 103 A.3d at 880.

26 *Id.* at 878.

27 *Id.* at 881.

28 *Id.* at 883.

29 *Id.* at 885-86.

compensation.[30] Accordingly, although the employer, the Pennsylvania State Police, issued an NCP indicating the amount to which the officer *would be* entitled under the WCA, it did not actually pay that amount, by reason of its self-insured status. Instead, the employer specified in the NCP that the officer received his full salary under the HLA.[31] The employer argued to this Court that, because workers' compensation benefits were payable, if not actually paid, it should accordingly be entitled to subrogation for the amount of those benefits, notwithstanding that it was actually paying the officer Heart and Lung benefits instead of workers' compensation benefits.

This Court highlighted *Stermel*'s acknowledgment that *self-insured* public employers do not make "workers' compensation payments" in conjunction with Heart and Lung benefits because such payments would simply be returned.[32] We accordingly found "no basis upon which to conclude that a mere acknowledgment in an NCP of a work injury, and the specification of the amount of benefits to which an injured employee would be entitled under the WCA, transforms an injured employee's Heart and Lung benefits into WCA benefits under the MVFRL."[33] We further stressed that the HLA requires an employee to turn over to the employer all workers' compensation benefits "received or collected."[34] "It follows," we reasoned, "that, in cases where the employee does not actually *receive or collect* workers' compensation benefits . . . there is no basis for subrogation."[35]

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30 *Bushta*, 184 A.3d at 962.

31 *Id.* (noting that the NCP contained a notation stating: "Paid Salary continuation. Heart & Lung Benefits by the employer.")

32 *Bushta*, 184 A.3d at 969 (quoting *Stermel*, 103 A.3d at 877-78).

33 *Id.*

34 53 P.S. § 637(a).

35 *Bushta*, 184 A.3d at 966 (emphasis in original).

Thus, although this Court did say that we "agree with the *Stermel* court that, for purposes of the MVFRL, Heart and Lung benefits subsume WCA benefits,"[36] this broad statement must be viewed within the context of the facts of the case, where workers' compensation benefits were not actually paid by a self-insured employer. The same was true in *Stermel*. Here, the critical distinction is that the Township was *not* self-insured for workers' compensation. The Township's insurer sent workers' compensation payments to Alpini, who "received or collected"[37] them, and then turned them over to the Township as required by the HLA. The payment of workers' compensation benefits was not merely a legal fiction as it was in *Stermel* and *Bushta*. Instead, it was a meaningful transfer of funds, by which the Township's insurer incurred a loss.

For this reason, we should not mechanically cite *Bushta* for the notion that "Heart and Lung benefits subsume WCA benefits" and therefore deem the insurer's lien to represent Heart and Lung benefits only, with whatever consequences that bears for the right to subrogation. To do so is to defy the governing statutes. Set aside all else and consider this fact: in this case, workers' compensation benefits were paid by the Township's workers' compensation insurer. Subrogation of the amount of those benefits is permitted under Section 319 of the WCA. And under Act 44, this is true regardless of whether Alpini's third-party tort action arose "out of the maintenance or use of a motor vehicle" for purposes of Section 1720 of the MVFRL. A conclusion that subrogation is impermissible with respect to the workers' compensation benefits is functionally the same as an outright refusal to apply Section 319 of the WCA.

The Majority contends that the workers' compensation benefits paid in this case were legally immaterial. It asserts that "an employee that receives HLA benefits does not

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36 *Id.* at 968.

37 53 P.S. § 637(a); *see Bushta*, 184 A.3d at 966.

also receive workers' compensation benefits regardless of whether the public employer is insured or self-insured."[38] It characterizes the workers' compensation benefits as effectively a legal fiction. But this would come as quite a surprise to the employer's workers' compensation insurer, who makes tangible payments under the WCA and for whom those benefits are very real. According to the Majority, because the HLA requires the injured employee to turn over any workers' compensation payments to the employer, the employee does not ultimately receive the benefits, so this situation is no different than where the employer is self-insured. It is true that, from the employee's perspective, the amount received is the same regardless of whether the payments are denominated as "solely Heart and Lung benefits" or "two-thirds workers' compensation and one-third Heart and Lung benefits." But from the insurer's perspective, the distinction is critical because it is the entity that incurs the loss. The employee is paid by the employer. The employer is paid by the workers' compensation insurer (in a roundabout way). But the workers' compensation insurer is left without anyone to make it whole, despite the fact that Act 44 was intended to allow it to recover its loss, shifting the financial responsibility for the employee's injury onto the third-party tortfeasor. The Majority's approach subverts this purpose of Act 44, imposing the financial burden upon the workers' compensation insurer rather than upon the tortfeasor.

In his concurrence, Justice Dougherty places greater focus upon the amounts that the employee is permitted to recover in the action against the third-party tortfeasor, and he emphasizes *Bushta*'s statement that, as in *Stermel*, the claimant there "was precluded from recovering his lost wages and medical benefits from the tortfeasors under the MVFRL because [his] wages and medical benefits were fully covered by the Heart and

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[38] Maj. Op. at 25 n.13.

Lung Act."[39] But this is little more than a restatement of the facts of *Bushta*, which differ from the instant case in the critical respect that I have highlighted. Indeed, the claimant in *Bushta* was receiving Heart and Lung benefits, *not workers' compensation benefits*, and he therefore was precluded from recovering the amount of those benefits in his tort action because, under Act 44 and *Oliver*, Heart and Lung benefits remain within the anti-subrogation and anti-recovery provisions of the MVFRL, Sections 1720 and 1722. Here, by contrast, there were workers' compensation benefits paid because the Township is not self-insured. And after Act 44, such benefits no longer fall within those provisions of the MVFRL. Thus, Alpini was *not* subject to the same third-party recovery preclusion as the claimant in *Bushta*.

None of this is to say that the situation created by Act 44 is ideal. Far from it. As I discuss below, this is a situation that warrants legislative correction. The difference in the statutory treatment of workers' compensation and Heart and Lung benefits leads to all manner of confusion. Although the framework that I have illustrated above allows for the employee to be made whole no matter the circumstance—whether through workers' compensation or Heart and Lung benefits, and whether the employer is insured or self-insured—in practice it remains difficult for the injured employee to ascertain the amounts that he is entitled to plead as damages in the third-party lawsuit. Attempting to apply Act 44 in good faith, the employee certainly would plead the amount of his workers' compensation benefits pursuant to the post-Act 44 version of Section 1722 of the MVFRL. Act 44 plainly indicates that he may do so. But he presumably would then have to determine whether his action arose out of the maintenance or use of a motor vehicle, whatever that means, in order to determine whether he may plead as damages any

[39] Conc. Op. at 6 (Dougherty, J.) (emphasis omitted) (quoting *Bushta*, 184 A.3d at 968).

additional amounts received solely as Heart and Lung benefits. This is a needlessly complicated exercise.

But the approach advocated by the Majority and Justice Dougherty provides no greater clarity on this point. Under that framework, the employee still must make a threshold determination of whether his action arose out of the maintenance or use of a motor vehicle in order to determine whether he may recover the amount of his Heart and Lung benefits in his lawsuit against the third party. But additionally, under the Majority's and Justice Dougherty's view, the employee who merely follows the instruction of Act 44 and pleads the amount of his workers' compensation benefits as damages actually violates Section 1722 of the MVFRL, because his workers' compensation benefits were not really workers' compensation benefits at all; they were "subsumed" within his Heart and Lung benefits. And if the employee pleads and recovers amounts that were covered by workers' compensation anyway, as Alpini did in this case,[40] then he receives a double recovery—both the employer and the tortfeasor compensate the employee for the same loss. Perhaps we may not be bothered by a circumstance in which the employee reaps such a windfall, but it surely is a concern for the workers' compensation insurer, who through Act 44 was meant to be able to recover such amounts through subrogation.

Returning to that right of subrogation, the regime created by Act 44, *Stermel*, and *Bushta* is further flawed because it has the unfortunate effect of disfavoring those public employers that are self-insured. Employers with workers' compensation insurance are entitled to subrogation, but, under *Bushta* and *Stermel*, self-insured public employers are

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[40] It is undisputed that Alpini pleaded lost wages and medical expenses as damages in his actions against both the driver and the tavern owners, without specifying whether his losses were covered by workers' compensation and/or Heart and Lung benefits. *See* Certified Record Item 35, Alpini's Civil Complaint.

not. Notably, both the Commonwealth Court and the Workers' Compensation Appeal Board ("Board") in *Stermel* recognized this inequity:

> The Board reasoned that if [the employer] had not been self-insured, its workers' compensation carrier would have made payments and Claimant, in turn, would have been required to "turn over" these payments to Employer [pursuant to the HLA]. Stated otherwise, [the employer] would have been reimbursed for two-thirds of the Heart and Lung benefits it paid, and its workers' compensation insurer would be eligible for subrogation against the tortfeasor responsible for [the employee's] injury. The Board concluded that a self-insured public employer's right of subrogation should not be less than that of the insured public employer.[41]

The Commonwealth Court noted that the Board, in permitting subrogation for a self-insured employer, had been "focused on fairness, reasoning that it is unfair and unreasonable to treat a self-insured public employer differently than an insured public employer."[42] The court, however, found that the "Board erred in focusing on the impact on [the employer]."[43] The Commonwealth Court found itself bound by the statutes, not by abstract considerations of fairness. The court opined that the "Board failed to honor the established law that Section 25(b) of Act 44 applies only to workers' compensation benefits."[44] The Commonwealth Court reasoned: "Only the legislature may undertake further refinements and eliminate the distinction between the self-insured public employer and the public employer who purchases an employer's liability policy of insurance."[45, 46]

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41 *Stermel*, 103 A.3d at 882 (citation omitted).

42 *Id.* at 885.

43 *Id.*

44 *Id.*

45 *Id.* at 886.

46 Importantly, this passage of *Stermel* makes clear that the Commonwealth Court recognized that there *is* a distinction between insured and self-insured employers in this context. Thus, when this Court in *Bushta* stated that we "agree with the *Stermel* court (continued…)

In principle, I agree with the concern that the Board expressed in *Stermel*. There is a distinction between insured and self-insured public employers, and it is neither a fair one nor a sensible one. But I agree as well with the Commonwealth Court's reasoning: this problem requires a legislative solution. From Act 44 onwards, the intersection of the WCA, the HLA, and the MVFRL has been a quagmire. And although our courts have expended great efforts in interpreting these statutes and in striving to give effect to the intent of the General Assembly, the outcome has been less than ideal. As I suggested above,[47] the language and history of Act 44, § 25(b) reveal that, put simply, the HLA has fallen through the cracks. This case yet again demonstrates the unfortunate and byzantine consequences of the General Assembly's failure to address Heart and Lung benefits in the MVFRL. It stands alongside its predecessors, *Bushta* and *Stermel*, as a testament to the need for legislative clarification in this area. This is a problem that only the General Assembly can fix.

The Majority fails to recognize that there is a legally significant distinction between insured and self-insured public employers in the first place. It instead views this case as "entirely consistent with" and a "logical extension of" *Bushta* and *Stermel*, without acknowledging the importance of this factual distinction.[48] The Majority's answer to the complex questions raised by this appeal is to declare that, per *Bushta*, workers' compensation benefits simply disappear in the presence of Heart and Lung benefits. I differ with this approach. Under Act 44, Alpini was permitted to plead the amount of his workers' compensation benefits as damages in his tort action. The Township, in turn,

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that, for purposes of the MVFRL, Heart and Lung benefits subsume WCA benefits," we did not fully and accurately characterize *Stermel*. *Bushta*, 184 A.3d at 968.

47 *See supra* n.21.

48 Maj. Op. at 25.

was entitled to subrogation such that its insurer could recover the amount of the workers' compensation payments that it made to Alpini. On that basis, I must respectfully dissent.

II.

Unfortunately, the wrinkles in this case do not end there. On my review of the record, it is less than clear whether AmeriHealth's lien was composed entirely of amounts reflecting workers' compensation benefits, or whether some portion thereof constitutes Heart and Lung benefits. As noted above, Ms. Stover's affidavit, which established the amount of the lien, refers ambiguously to the payments made on Alpini's "work injury claim."[49] The Township presently asserts that the lien consisted only of workers' compensation benefits because "AmeriHealth only insured [the Township's] workers' compensation liability," its policy "did not include the excess benefits paid" under the HLA, and "[t]here is no cognizable argument that AmeriHealth paid something other than workers' compensation benefits."[50] This assertion is questionable.

The parties conducted a deposition of the Township's Manager, David Schreiber, on June 26, 2017.[51] Mr. Schreiber's testimony reveals that the Township was insured for Heart and Lung benefits in addition to workers' compensation benefits, for at least some period of time. And he believed that the Township's HLA insurer was the same as its workers' compensation insurer, *i.e.*, AmeriHealth. Mr. Schreiber testified as follows:

> [Alpini's Counsel]: I understand your previous testimony that there is a separate premium paid for insurance or payment of Heart and Lung benefits to injured police officers?
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> [Schreiber]: I believe so. I can't be a hundred percent certain of that.

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49 *See supra* n.22; Certified Record Item 32, Affidavit of Heather Stover.

50 Township's Br. at 31.

51 Certified Record Item 30, Deposition of David Schreiber.

[Township's Counsel]: For the record, and I can verify this, but townships nowadays, there's a certain period where initially their Heart and Lung will be covered by insurance, by the same insured covering them for workers' compensation. I think the period is two years.

[Schreiber]: Two years. You're absolutely correct.

[Township's Counsel]: I'll have to check on that. I think the same is done, obviously, for Tinicum [Township].

[Schreiber]: That period has expired, and we have been paying Mr. Alpini his Heart and Lung directly.

[Alpini's Counsel]: So, what expired was the period of two years?

[Schreiber]: Yes. There's a specific Heart and Lung coverage in addition to the workers' comp[ensation] coverage.

[Alpini's Counsel]: To make sure I understand this, you're saying for the first two years after a police officer's injury, there is separate premiums [*sic*] paid for insurance that would pay for benefits under the Heart and Lung Act?

[Township's Counsel]: That's correct. That's my understanding. Before I stipulate to that, I'll check with the insurance and the broker to make sure. But I believe the municipality is insured on that for a period of two years, after which the municipality will assume the Heart and Lung payment.

[Schreiber]: I believe you're correct.

[Township's Counsel]: Okay.

[Alpini's Counsel]: During that initial two-year period post-injury, and going past that period, there is a separate premium paid for workers' compensation benefits for the police officer?

[Schreiber]: That's correct.

[Alpini's Counsel]: Is that, as far as you know, and Mr. Frantum [(Township's Counsel)] can correct us if we're wrong, that's what happened in Officer Alpini's case?

[Schreiber]: Well, what happened in Officer Alpini's case is he was collecting Heart and Lung benefits since shortly after his injury.

[Alpini's Counsel]: But as far as you know, at least, the first two years of the Heart and Lung benefits were paid by an insurance company, which you paid premiums for to pay those benefits?

[Schreiber]: I believe so.

[Alpini's Counsel]: Do you know what carrier that was?

[Alpini's Counsel]: Do you know, Mr. Frantum?

[Township's Counsel]: Yeah, again, but let me verify before I stipulate. I believe it was also it [*sic*] was AmeriHealth, and I believe it's a

> reimbursement plan, and maybe Mr. Schreiber can correct me if I'm wrong, where the Township will initially pay out and will be reimbursed with a hundred percent salary that's paid out. Am I correct about that?
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> [Schreiber]: I can't swear to that.
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> [Township's Counsel]: After the deposition I'll verify those facts, and perhaps we can stipulate with Mr. Girton [(Alpini's Counsel)].
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> * * *
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> [Alpini's Counsel]: And to the best of your understanding, Mr. Schreiber, it would be the same insurance company that the Township would pay separate premiums for the Heart and Lung Act and for the workman's [*sic*] compensation?
>
> [Schreiber]: I believe so.
>
> [Alpini's Counsel]: And after two years goes by, the Township assumes the responsibility for paying the entire amount of the Heart and Lung benefits?
>
> [Schreiber]: We have.
>
> [Alpini's Counsel]: And that's what happened in Officer Alpini's case?
>
> [Schreiber]: Correct.[52]

Although Mr. Schreiber did not recollect every detail of the Township's insurance policies, his testimony indicates that the Township was insured for Heart and Lung benefits for a period of two years following Alpini's injury, and that the Township used the same insurer—AmeriHealth—for both workers' compensation benefits and Heart and Lung benefits. Particularly in view of the ambiguity of Ms. Stover's affidavit, it is unclear whether the lien asserted by AmeriHealth reflected only amounts that it paid to Alpini as workers' compensation benefits, or whether it represented workers' compensation benefits plus two years' worth of Heart and Lung benefits.

Because workers' compensation benefits and Heart and Lung benefits are treated differently for purposes of subrogation, further fact-finding is required on this point. Thus, although I would be inclined to affirm the order of the Commonwealth Court on the alternative basis that the Township was entitled to subrogate against Alpini's third-party

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[52] *Id.* at 9-13.

recovery up to the amount of the workers' compensation benefits paid, I would (due to the opacity of certain critical facts) vacate the order below and remand this matter for further factual development of the details of the asserted lien.

Chief Justice Todd joins this dissenting opinion.