



**In the Missouri Court of Appeals
Eastern District
DIVISION TWO
OPINION**

JOSEPH BANKS,)	No. ED91699
)	
Respondent,)	
)	Appeal from the Labor and Industrial
)	Relations Commission
)	
vs.)	Cause No. 00-153572
)	
SARAH STEELMAN, TREASURER OF)	
THE STATE OF MISSOURI,)	
CUSTODIAN OF THE SECOND INJURY)	
FUND)	Filed: March 17, 2009
)	
Appellants.)	
)	

The Second Injury Fund (hereinafter, “the Fund”) appeals from the judgment of the Labor and Industrial Relations Commission (hereinafter, “the Commission”), affirming the decision of the Administrative Law Judge (hereinafter, “the ALJ”) which awarded Joseph B. Banks (hereinafter, “Claimant”) permanent total disability benefits. The Fund was not awarded a subrogation interest in Claimant’s third party recovery. We reverse and remand.

On September 13, 2000, Claimant was driving and was struck by another vehicle. Claimant’s neck and both shoulders were injured in this accident, and he underwent surgery on his neck and right shoulder. Due to the physical injuries from this accident, Claimant testified he was no longer able to perform his work duties. Claimant settled his workers’ compensation claim against the employer/insurer on January 29, 2007, for twenty-three and nine tenths percent

of the body as a whole referable to the cervical spine, twenty-five percent of the right shoulder, and fifteen percent of the left shoulder.

Claimant filed a claim against the other driver's insurance company and settled that case for the policy limits of \$100,000. After deducting his attorney's fees and costs, there is a balance of \$54,903.68, remaining in Claimant's attorney's escrow or trust account.

On January 7, 2008, the ALJ issued an award in favor of Claimant, finding the Fund liable for permanent total disability benefits. The ALJ did not award the Fund a subrogation interest in the third party net recovery. The Commission affirmed the decision of the ALJ and incorporated the ALJ's findings in its final award dated July 9, 2008. The Fund appeals.

Upon review of the Commission's decision, this Court may modify, reverse, or remand for rehearing when: (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to support the award. Section 287.495.1 RSMo (2000). "Whether the award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record." Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. banc 2003). We review decisions of the Commission that are interpretations or applications of the law for correctness without deference to the Commission's judgment. Soos v. Mallinckrodt Chemical Co., 19 S.W.3d 683, 685 (Mo. App. E.D. 2000).

In its sole point on appeal, the Fund claims the Commission erred by failing to address its subrogation interest. The Fund argues that pursuant to Cole v. Morris, 409 S.W.2d 668 (Mo. 1966), it is entitled to a subrogation interest because Claimant received a recovery from a third party. We agree.

In Cole, the Missouri Supreme Court held that the Fund was entitled to a credit on an award of permanent total disability benefits awarded to the claimant in the amount of a portion of the recovery by the claimant from a third party. Cole, 409 at 671. The Court found the Fund has a right of subrogation based upon the common law right of subrogation rather than the statutory language of the workers' compensation law. Id. at 669-71. This right emanates from the general rule that "any person who, pursuant to a legal obligation to do so, has paid for an injury resulting from the wrong of another may be subrogated to the rights of the injured person against the wrongdoer." Id. at 670. The Court further reasoned:

The [Fund] has been required to pay compensation under the terms of the statute to an employee injured by a third party tort-feasor and that loss should fall ultimately upon the wrongdoer responsible for it. If the Fund is deprived of the right of subrogation, it would result in the unjust enrichment of the employee, who could retain both compensation and damages, thereby violating a basic tenet of the common law that there may not be a double satisfaction for the same wrong.

Id. at 671. Thus, Cole "holds that a constructive trust is warranted even though the person who was unjustly enriched did nothing wrong in a legal sense." Brown v. Brown, 107 S.W.3d 919, 927 (Mo. banc 2003)(Wolff, J., concurring in part and dissenting in part).

This Court is bound constitutionally to follow the most recent controlling decision of the Missouri Supreme Court. Custer v. Hartford Ins. Co., 174 S.W.3d 602, 609 (Mo. App. W.D. 2005), Mo. Const. art. V., section 2. Hence, we are constrained to follow Cole and find the Commission erred in failing to award the Fund a subrogation interest in Claimant's third party recovery. Cole puts forth instructions for determining the amount of recovery that should be paid and credited to the Fund. Cole, 409 S.W.2d at 671. The Court explained:

[T]hat the amount of the recovery remaining, after payment of [a claimant's] expenses of making the recovery, shall be paid, retained and credited as follows: [a claimant] shall forthwith pay or reimburse the Fund for all compensation paid him [sic] by the Fund; the balance shall be retained by [the claimant] and be treated as an

advance payment by the Fund on account of any future installments of compensation.

Id.

The Fund's point on appeal is granted. Accordingly, the cause is reversed and remanded to the Commission for entry of its order in accordance with this opinion.

GEORGE W. DRAPER III, Judge

Roy L. Richter, P.J. concurs and Lawrence E. Mooney, J., concurring opinion



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CONCURRING OPINION

I concur in the majority opinion, but write separately to question how the Commission can exercise equitable powers to award a subrogation interest to the Fund.

“Subrogation is founded on principles of justice and equity, and its operation is governed by principles of equity.” Cole v. Morris, 409 S.W.2d 668, 670 (Mo. 1966) (quoting 83 C.J.S. *Subrogation* sec. 2a). In Cole, the Supreme Court found that the workers’ compensation statutes did not give the Fund the subrogation rights claimed. Id. at 669-70. Nevertheless, the Court held that the Fund was subrogated to the rights of the employee under the common law and directed the cause returned to the Commission for entry of an order in accordance with the Court’s opinion. Id. at 671-72.

The Commission is an administrative agency, not a court. Bliss v. Lungstras Dyeing & Cleaning Co., 130 S.W.2d 198, 201 (Mo. App. St.L. 1939). As an administrative tribunal, the Commission exercises only that authority invested by legislative enactment. Farmer v. Barlow Truck Lines, Inc., 979 S.W.2d 169, 170 (Mo. banc 1998). It has the power to ascertain and determine certain questions of fact and to apply the provisions of the workers' compensation law. Oren v. Swift & Co., 51 S.W.2d 59, 61 (Mo. 1932). The workers' compensation law, however, does not vest the Commission with judicial power in the sense in which the Constitution uses that term, and the Commission lacks the power to authoritatively expound any principle of law or equity. Id.; Bliss, 130 S.W.2d at 201. Here, as in Cole, the right of subrogation the Fund asserts derives from the common law, not legislation. If the Fund wishes to assert its subrogation rights, its proper remedy would seem to be a suit in equity in the circuit court.

LAWRENCE E. MOONEY, JUDGE