

2019 WL 2515533

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UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Superior Court of Delaware.

The ROCK PILE, Employer/Appellant,

v.

John RISCHITELLI, Claimant/Appellee.<sup>1</sup>

C.A. No. N18A-10-005 RRC

|  
Submitted: May 6, 2019

|  
Decided: June 14, 2019

On Appeal from the Industrial Accident Board. **AFFIRMED.**

#### Attorneys and Law Firms

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#### MEMORANDUM OPINION

[COOCH](#), R.J.

#### I. INTRODUCTION

This is The Rock Pile's ("Employer")<sup>2</sup> appeal from a September 27, 2018, decision of the Industrial Accident Board ("Board") which held that Employer was not entitled to apply the amount of John Rischitelli's Underinsured Motorist ("UIM") recovery as a credit against future workers' compensation benefits paid to Mr. Rischitelli's surviving spouse Renee Rischitelli. Mr. Rischitelli was killed in a motor vehicle accident with a third-party tortfeasor. The UIM coverage became available once Renee Rischitelli had exhausted the third-party tortfeasor's policy limits. Employer argues that the Board erred as a matter of law by denying

Employer a credit for UIM benefits, that New Jersey law should apply, and that the Board's decision is not supported by substantial evidence.

After review of the parties' contentions and the record, the Court concludes that the Board's decision was supported by substantial evidence and that the Board otherwise committed no error of law. Accordingly, the decision of the Board is affirmed.

#### II. FACTS AND PROCEDURAL HISTORY<sup>3</sup>

John Rischitelli, the Claimant-Below/Appellee, died in an automobile accident in New Jersey on August 7, 2014, while driving a tractor trailer owned and insured by Employer. In prior proceedings before the IAB, the parties litigated the compensability of a claim brought by Mr. Rischitelli's surviving spouse, Renee Rischitelli, for workers' compensation death benefits pursuant to [19 Del. C. § 2330](#). The Industrial Accident Board issued a decision dated June 12, 2017, holding that Mr. Rischitelli was an employee at the time of the accident, and Mrs. Rischitelli was owed death benefits. Mrs. Rischitelli has been receiving ongoing death benefits at the rate of \$333.35 per week since that time. Mrs. Rischitelli also filed a lawsuit in New Jersey against the third-party tortfeasor in relation to the motor vehicle accident that killed Mr. Rischitelli. That litigation settled in October 2017 with a policy limits recovery from the tortfeasor's insurance coverage in the amount of \$15,000.00.

At the time of the settlement of the New Jersey tort claim, the Employer had paid Mrs. Rischitelli \$55,382.77 in benefits and was continuing to pay the ongoing death benefits. Mrs. Rischitelli pursued an underinsured motorist ("UIM") claim against the carrier insuring the vehicle Mr. Rischitelli was operating at the time of his death. The UIM policy had been paid for by Employer. Mrs. Rischitelli recovered the UIM policy limit of \$300,000. Mrs. Rischitelli conceded that Employer was entitled to proportionate reimbursement of death benefits from the third-party recovery of \$15,000.00 in the amount of \$9,474.74 pursuant to [19 Del. C. § 2363\(e\)](#). Employer later sought a credit against Mrs. Rischitelli's UIM recovery of \$300,000.00 to apply to future death benefits, the issue now before this Court.

<sup>\*2</sup> Employer argued to the Board that when an employer has paid for a UIM policy the employer is entitled to a credit/setoff in the amount of the UIM recovery against any future worker's

compensation payouts. Claimant contended that 19 Del. C. § 2363(e) states that there can be no workers' compensation lien against UIM policies, and the statute had been specifically amended in 1993 to exclude UIM recoveries from the lien provisions of § 2363. Claimant also contended that the Employer's insurance carrier and counsel waived any interest in the UIM policy, on the basis that the Employer's counsel permitted counsel for Claimant to escrow the \$15,000.00 liability insurance payout alone.

The Board issued its written decision on September 27, 2018, in which it agreed with Claimant and thus denied Employer any credit or lien in connection with the UIM recovery. The Board found that the General Assembly made it clear through amendments to Title 19, Chapter 23 that UIM benefits are to be treated differently from other types of non-workers' compensation recoveries by injured workers. The Board noted that “the Supreme Court has recognized [that] the ‘General Assembly has eliminated the ability of a worker's compensation insurer to assert a lien against the UIM payments made pursuant to the employer's UIM policy.’”<sup>4</sup> The Board further rejected Employer's attempt at distinguishing a reimbursement from a credit under 19 Del. C. § 2363(e), stating that “the difference is only one of timing[.]”<sup>5</sup> and that Employer's interpretation “conflicts with the clear intent of the General Assembly, as shown by its statutory amendments specifically designed to permit an injured worker to recover UIM benefits from an employer's policy.”<sup>6</sup> This appeal followed.

### III. THE PARTIES' CONTENTIONS<sup>7</sup>

#### A. Employer's Contentions

First, Employer contends that the Board erred as a matter of law in denying Employer a credit/offset from Mrs. Rischitelli's recovery under the UIM policy. Employer argues that the Board's decision relied upon an allegedly erroneous conclusion that 19 Del. C. § 2363 does not allow employers to derive any benefit from UIM policies purchased by employers themselves. Employer argues that a credit/offset is applicable when the source of the secondary benefits—the UIM Policy—is solely funded by the Employer, allegedly resulting in the Employer funding a double recovery which Employer contends is improper. Employer maintains that a credit is permissible even when a reimbursement is not available.

Second, Employer contends that the Board erred in failing to address the alternative arguments/grounds for relief set forth by Employer. Specifically, Employer argues that New Jersey law should apply, and that New Jersey law allows a credit/setoff from the Claimant's UIM recovery. Employer alleged that Claimant opened the door to the application of New Jersey law by referencing same in settlement discussions in connection with the lien calculation on the recovery from the tortfeasor. Employer contended that this justified the Employer's reliance upon New Jersey law as to the UIM recovery. Employer maintains that the Board's failure to address this additional ground for relief requires a remand to allow the Board to address the issue directly, assuming that this Court does not find the credit to be available under Delaware law. Lastly, Employer contends that the Board's decision is not supported by substantial evidence.

#### B. Claimant's Contentions

\*3 Claimant contends that the Board's decision is properly grounded in the statute and case law, in particular Delaware Supreme Court's 2013 decision in *Simendinger v. National Union Fire Ins. Co.*<sup>8</sup> Claimant argues that *Simendinger* establishes that a workers' compensation carrier's entitlement to a credit or a reimbursement is limited to recovery against the third-party tortfeasor's liability insurer, and that a carrier may not assert a lien of any kind against UIM benefits. Claimant contends that there is no distinction between a reimbursement under 19 Del. C. § 2363(e) and a credit. Claimant contends that both a reimbursement and a credit emanate from the same statutory language and both constitute a lien, the only difference being one of timing. Claimant asserts that a reimbursement is for benefits previously paid by the compensation carrier, and a credit is for benefits not yet paid by the compensation carrier. Claimant further contends that Delaware law controls this Delaware workers' compensation claim between Delaware parties, brought by the carrier in Delaware pursuant to a Delaware insurance policy that was formed under Delaware law, and where the claimants reside in Delaware.

### IV. STANDARD OF REVIEW

In reviewing a decision of the Board, “[t]he function [of this] Court is limited to determining whether substantial evidence supports the Board's decision regarding findings of fact and conclusions of law and is free from legal error.”<sup>9</sup> Substantial evidence is such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion.<sup>10</sup> This Court does not sit as trier of fact, nor should this Court replace its judgment for that of the Board.<sup>11</sup> “The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted.”<sup>12</sup> Further, where the issues raised involve only questions of law, the Court’s review is *de novo*.<sup>13</sup> If the Board’s decision is free from legal error and supported by substantial evidence, this Court must sustain the Board’s decision even if this Court might have decided the case differently if it had come before it in the first instance.<sup>14</sup> “The burden of persuasion is on the party seeking to overturn a decision of the Board to show that the decision was arbitrary and unreasonable.”<sup>15</sup> In this process, “the Court will consider the record in the light most favorable to the prevailing party below.”<sup>16</sup>

## V. DISCUSSION

### A. Delaware law applies.

The balance of factors here weighs heavily in favor of the application of Delaware law. The balance is so skewed that it would be a purely academic exercise to remand this case for the Board to restate the analysis. When undertaking a choice of law analysis, Delaware courts follow the “most significant relationship” test as articulated in the [Restatement \(Second\) of Conflict of Laws, Section 145\(1\)](#) of the Restatement provides that the law of the state with the most significant relationship to the occurrence and the parties under the principles stated in Restatement § 6 is the governing law.<sup>17</sup> Section 6(2) provides that the following seven factors are relevant in conducting a choice of law inquiry:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- \*4 (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.<sup>18</sup>

[Section 145\(2\)](#) also instructs that when applying the § 6 factors, courts should take into account the following four contacts: “(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.”<sup>19</sup> Finally, § 146 provides that the law of the state where the injury occurred generally applies “unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties.”<sup>20</sup>

In this case, Delaware has such a significant relationship to, and interest in, the parties and the issues that it outweighs the considerations of New Jersey’s interests in the matter. Mrs. Rischitelli is a Delaware resident, and Employer is a Delaware company that purchased insurance to cover its Delaware employees, including Mr. Rischitelli. The insurance policy was issued in Delaware under Delaware law, and the parties’ relationship is one of employment primarily within Delaware.<sup>21</sup> The only connections to New Jersey are the site of the accident and the third-party tortfeasor liability action that has been resolved. Furthermore, the proper amount of the proportionate reimbursement from the third-party recovery was determined under Delaware law. Given the limited connection to New Jersey at the current stage of this case, and the more numerous connections to Delaware, Delaware law should apply. Remand with an instruction for the Board to reconduct this simple analysis would merely be an academic exercise because the Board ultimately and correctly applied Delaware law.

*B. The Board correctly determined that 19 Del. C. § 2363(e) prohibits an employer from seeking a credit against UIM benefits.*

The Board correctly determined that Delaware law prohibits Employer from asserting a credit against UIM benefits. [Title 19 Section 2363](#) sets forth the law regarding the right of an employer and an insurer to reimbursement from any recovery an injured employee receives from a third-party tortfeasor. The general intent of [§ 2363\(e\)](#) is to prevent a “double recovery” by an employee for any one injury.<sup>22</sup> [Section 2363\(e\)](#) provides:

In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or the employee's dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery[.]<sup>23</sup>

\*5 After the employer has been reimbursed for any amounts previously paid to the injured employee, the remainder of the injured employee's third-party recovery is then "treated as an advance payment by the employer on account of any future payments of compensation benefits."<sup>24</sup> The Board determined that any advance payment on account of future payments amounted to "a credit for the employer against future worker's compensation benefits."<sup>25</sup>

Employer contends that the general rule of § 2363(e) should apply to Mrs. Rischitelli's UIM recovery, and that the funds should be treated as a credit, or, in the language of the statute, as an "advance" payment. This argument is unavailing for several reasons. First and foremost, the plain language of § 2363(e) contradicts Employer's assertions. The right to reimbursement "shall be had *only* from the third-party insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage available for the injured party[.]"<sup>26</sup> Any attempt by Employer to seek reimbursement of benefits already paid from UIM benefits is therefore impermissible. Contrary to Employer's arguments, this is true even though Employer alone purchased the UIM coverage.

In *Adams v. Delmarva Power and Light Co.*, the Delaware Supreme Court held that an employer is not permitted to offset workers' compensation benefits when an employee receives additional benefits paid by an insurance policy purchased by the employee.<sup>27</sup> In *Simendinger v. National Union Fire Insurance Co.*, the Delaware Supreme Court extended the *Adams* holding to apply to UIM benefits purchased solely by the employer. The *Simendinger* Court stated that, prior to 1993, § 2363(e) provided a right of reimbursement from UIM benefits received by an employee if the policy was purchased solely by the employer. However, in 1993 the General Assembly amended § 2363(e). Applying the language of 1993 Amendment, the *Simendinger* Court

explicitly held that "the General Assembly has eliminated the ability of an employer's workmen's compensation carrier to assert a priority lien against an injured employee's right to payment pursuant to the employer's uninsured motorist coverage."<sup>28</sup> The *Simendinger* Court explained that § 2363(e) did not distinguish between UIM coverage purchased by an employee versus UIM coverage solely paid for by the employer.<sup>29</sup> As such, an employer cannot assert a lien against any UIM policy for reimbursement.

Employer argues that it is not seeking a lien or reimbursement, which § 2363 and *Simendinger* explicitly disallow as explained above. Instead, Employer argues it merely seeks a credit which, Employer contends, *Simendinger* did not address and is thus implicitly permitted. Employer argues that a credit is wholly different from a reimbursement. Employer's contention is merely a distinction without a difference, and if adopted would circumvent the General Assembly's will by preventing Claimant from recovering both UIM payments and workers' compensation payments together. A reimbursement applies to workers' compensation benefits already received, whereas a credit applies to benefits that will be received. Continuing logically, a lien against past benefits is a reimbursement, whereas a lien against future benefits is a credit. The difference is merely a matter of timing. *Simendinger* held that there can be no lien against UIM benefits. *Simendinger* explicitly prohibits Employer from recouping workers' compensation benefits already paid with a lien against UIM benefits. To allow Employer to recoup workers' compensation benefits that will be paid in the future with a lien/credit against UIM benefits would be an "unreasonable" consequence.<sup>30</sup>

\*6 Employer is correct that Delaware law generally disfavors double recovery in personal injury scenarios.<sup>31</sup> However, the General Assembly has made it clear that UIM benefits are an exception to that general rule. This exception is not just evident within § 2363(e) as was described in *Simendinger*. In response to the Superior Court's decision in *Simpson v. State*, in which an injured worker could not avail herself of an employer's UIM policy because of the exclusivity provision contained in 19 Del. C. § 2304,<sup>32</sup> the General Assembly quickly amended § 2304 to specifically exempt UIM policies from the exclusivity provision.<sup>33</sup> The General Assembly took action to ensure that UIM benefits would be available to injured employees in conjunction with workers' compensation benefits. However, Employer argues that the § 2304 legislative history reveals that the General

Assembly somehow intended the opposite throughout the whole of Title 19. This argument is unpersuasive.

Employer's assertion that the non-exclusivity amendment to § 2304 was only meant for “state employees[.]” based on the stated purpose within the legislative history of the bill, is contradicted by the fact that the applicable version of the statute applies to “every employer and employee[.]”<sup>34</sup> Section 2304 makes no distinction between state employees and non-state employees. Second, Employer's argument that “there is nothing within the legislative history that suggests an interest in preventing employers from pursuing credits against UIM benefits” is belied by the existence of § 2363(e). Section 2363(e) does more than simply suggest that employers may not seek a credit against UIM. Section 2363(e) establishes that an employer may not seek a lien against UIM benefits, especially given the holding in *Simendinger*; and a credit is merely a lien against future benefits.

Employer in effect asks this Court to usurp the plain language of the statutes and precedential case law because the General Assembly at one point considered “concerns ... about the [then-proposed amendment to § 2304] language in term of

issues with opening worker's compensation exclusivity and allowing employees to collect duplicate benefits for one injury.”<sup>35</sup> Employer seeks this Court to prevent recovery in the instant case because the General Assembly previously had mere concerns about “duplicate benefits” (in a separate statute than the one truly at issue in this case).<sup>36</sup> This ignores the fact that despite these concerns the General Assembly enacted § 2304 with plain language that permits recovery of both workers' compensation benefits and UIM benefits together. The plain language of § 2363(e) is also clear. Reimbursement and advance payment are not permitted against UIM benefits.

## VI. CONCLUSION

For the foregoing reasons, the decision of the Industrial Accident Board is **AFFIRMED**.

**IT IS SO ORDERED.**

### All Citations

Not Reported in Atl. Rptr., 2019 WL 2515533

### Footnotes

- 1 John Rischitelli died on August 7, 2014, in an automobile accident. Renee Rischitelli, as his surviving spouse, brought the underlying action. Although the IAB kept John Rischitelli's name in the case caption, Renee Rischitelli is actual the Claimant/Appellee. The Court will use the IAB's case caption for consistency.
- 2 The exact name of the business entity is unclear from the record.
- 3 The facts and procedural history are derived from the parties' joint stipulation of facts. See Parties' Stipulated Statement of Facts and Parties' Contentions at 1–4, *The Rock Pile v. Rischitelli*, N18A-10-005 RRC, D.I. 16 (May 6, 2019).
- 4 Board Decision at 6, *Rischitelli v. The Rock Pile*, IAB Hearing No. 1444274 (Sept. 27, 2018) (citing *Simendinger*, 74 A.3d at 610).
- 5 *Id.*
- 6 *Id.* at 7.
- 7 The Parties' Contentions are derived from the parties' joint stipulation. See Parties' Stipulated Statement of Facts and Parties' Contentions, at 5-6.
- 8 *Simendinger v. National Union Fire Ins. Co.*, 74 A.3d 609 (Del. 2013).
- 9 *Holowka v. New Castle Cty. Bd. of Adjustment*, 2003 WL 21001026, at \*3 (Del. Super. Ct. Apr. 15, 2003) (citing 29 *Del. C.* § 10142).
- 10 *Forrey v. Sussex Cty. Bd. of Adjustment*, 2017 WL 2480754, at \*3 (Del. Super. Ct. June 7, 2017).
- 11 *Holowka*, 2003 WL 21001026, at \*4.
- 12 29 *Del. C.* § 10142(d).
- 13 See *Kelley v. Purdue Farms*, 123 A.3d 150, 153 (Del. Super. Ct. 2015).
- 14 *Id.*
- 15 *Forrey*, 2017 WL 2480754, at \*3 (quoting *Mellow v. Bd. of Adjustment of New Castle Cty.*, 565 A.2d 947, 955 (Del. Super. Ct. 1988)).
- 16 *Holowka*, 2003 WL 21001026, at \*4 (quoting *Gen. Motors Corp. v. Guy*, 1991 WL 190491, at \*3 (Del. Super. Ct. Aug. 16, 1991)) (internal brackets omitted).

- 17 Restatement (Second) of Conflict of Laws § 145(1) (1971).  
18 *Id.* at § 6(2).  
19 *Id.* at § 145(2).  
20 *Id.* at § 146.  
21 See Tr. of Evidentiary Hearing at 19, Appellant's Opening Br. Ex. A.  
22 *Moore v. General Foods*, 459 A.2d 126, 127 (Del. 1983); see *Duphily v. Delaware Electric Cooperative, Inc.* 662 A.2d 821, 834 (Del. 1995) (“[T]he law prevents double recovery by the employee and permits the employer or its insurer to recoup its compensation payments.”).  
23 19 Del. C. § 2363(e) (emphasis added).  
24 *Id.*  
25 Board's Decision at 3, *John Rischitelli v. The Rock Pile*, IAB Hearing No. 1444274 (Sept. 27, 2018).  
26 19 Del. C. § 2363(e) (emphasis added).  
27 See *Adams v. Delmaiwa Power & Light Co.*, 575 A.2d 1103, 1107 (Del. 1990).  
28 *Simendinger*, 74 A.3d at 610 (quoting *Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10, n.10 (Del. 1995)).  
29 *Id.* at 612.  
30 *Coastal Barge Corp. v. Coastal Zone Industrial Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985) (“Ambiguity may also arise from the fact that giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature.”); see *Keeler v. Harford Mutual Ins. Co.*, 672 A.2d 1012, 1014 (Del. 1996) (citing *Cannon v. Container Corp. of Am.*, 282 A.2d 614, 616 (Del. 1971)) (referencing the “distribution of any balance to the employee, to be credited against any future benefits[.]”).  
31 See Appellant's Opening Br. at 11.  
32 See *Simpson v. State*, 2016 WL 425010, at \*4 (Del. Super. Ct. Jan. 28, 2016) (finding that the phrase “exclusion of all rights and remedies” in 19 Del. C. § 2304 prohibited the plaintiff from gaining access to her employer's UM/UIM policy).  
33 See 19 Del. C. § 2034 (Compensation as exclusive remedy) (“... except as to uninsured motorist benefits, underinsured motorist benefits, and personal injury protection benefits”).  
34 19 Del. C. § 2304 (“every employer and employee, adult and minor, shall be bound by this chapter”).  
35 Appellee's Answ. Br. at 15.  
36 *Id.*