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## Worker's Compensation: Subrogation: Does the Insurance Carrier's Right Exist Independent of the Workers' Compensation Statute?

On April 13, 1982, the Oklahoma Court of Appeals decided the case of *Russell v. Bill Hodges Truck Co.*<sup>1</sup> In short, the court held that section 44(a) of Title 85 of the Oklahoma Statutes<sup>2</sup> preempted any other right of subrogation that may have existed at common law for workers' compensation insurance carriers. The purpose of this note is to examine the court of appeal's decision in *Russell* and determine whether this was a correct application of the law in light of prior Oklahoma law.

In *Russell*, a worker was injured on the job when he came into contact with a high-voltage electrical line. Aetna Life and Casualty Company, the workers' compensation insurance carrier, paid the worker \$121,325 as compensation for his injuries and for medical expenses. The worker then sued a third party, Bill Hodges Truck Company, for injuries sustained in the accident. Prior to trial, Bill Hodges Truck Company executed a compromise settlement with the worker and Aetna in the amount of \$750,000. Aetna claimed subrogation for \$121,325, the amount it had paid the worker up to that time. The parties were unable to agree on a division of the settlement fund and the worker applied to the district court for an apportionment pursuant to section 44(a).

The trial court apportioned the \$121,325 half to the worker and half to Aetna under the theory that whenever an injured employee recovers damages from a third party by way of a compromise settlement, it is presumed that the employee recovered less than the full amount of his damages. Aetna

1. 53 OKLA. B.J. 985 (Okla. App. Apr. 13, 1982) (unpub. op.). Although *Russell* is an unpublished opinion and therefore not binding precedent, the case is indicative of the analysis the court may use in the future and as such will be fully examined in light of its persuasive value.

2. 85 OKLA. STAT. § 44(a) (1981) provides:

If a worker entitled to compensation under the Workers' Compensation Act is injured or killed by negligence or wrong of another not in the same employ, such worker shall, before any suit or claim under the Workers' Compensation Act, elect whether to take compensation under the Workers' Compensation Act, or to pursue his remedy against such other. Such election shall be evidenced in such manner as the Administrator may by rule or regulation prescribe. If he elects to take compensation under the Workers' Compensation Act, the cause of action against such other shall be assigned to the insurance carrier liable to the payment of such compensation . . . .

In the event that recovery is effected by compromise settlement, then in that event the expenses, attorney fees and the balance of the recovery may be divided between the employer or insurance company having paid compensation and the employee or his representatives as they may agree. Provided, that in the event they are unable to agree, then the same shall be apportioned by the district court having jurisdiction of the employee's action against such other person, in such manner as is just and reasonable.

appealed, claiming that it was entitled to the full amount of the subrogation claim less a proportionate share of expenses and attorneys' fees.

Aetna relied on *Stinchcomb v. Dodson*,<sup>3</sup> which held that a compensation carrier's subrogation claim could be brought by a subrogated insurer in its own name and independent of the provisions of section 44.<sup>4</sup> The court of appeals recognized the holding in *Stinchcomb*, but found it to be inapplicable to the case at bar. First, the court found that section 44 had been amended several times since the *Stinchcomb* decision and thus held that "today, its provisions are so comprehensive that they preempt any other right of subrogation which may exist at common law or otherwise."<sup>5</sup> Second, the court believed *Stinchcomb* to be an overbroad statement of the law, finding that two later cases, *Aetna Casualty & Surety Co. v. Associates Transports, Inc.*<sup>6</sup> and *Updike Advertising System v. State Industrial Commission*,<sup>7</sup> indicated that the Oklahoma Supreme Court considered compensation insurers' subrogation claims to be creatures of and subject to legislative discretion. Thus, the court in *Russell* rejected Aetna's argument and affirmed the trial court insofar as it prorated Aetna's subrogated claim 50/50 with the injured worker. In order to shed some light on this confused area of the law, an examination of both statutory and case law is required.

### *The Stinchcomb and Staples Cases*

The landmark case in this area is the Oklahoma Supreme Court's decision in *Stinchcomb v. Dodson*.<sup>8</sup> In *Stinchcomb*, Clarence Crain, an employee of

3. 190 Okla. 643, 126 P.2d 257 (1942).

4. *Id.* at 645, 126 P.2d at 259, 260. Irrespective of the argument that employers and insurance carriers have a right to subrogation independent of section 44, a responsible workers' compensation act should provide for full reimbursement of the employer/carrier if either the employee or the employer/carrier recovers from a third party an amount equal to or greater than the compensation paid by the employer/carrier to the employee. This is the result reached under the express language of the federal workers' compensation statute and the case law construing that statute. Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950 (1982). In *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 600 (1981), the United States Supreme Court noted:

There is no dispute about the parties' respective interests in either (a) a claim asserted by [an employee] against a [third party] within the 6-month period following acceptance of a compensation award, or (b) a claim asserted by the [employer] against the [third party] after the 6-month period has elapsed. In the former situation, the [employee] has exclusive control of the litigation, any recovery in excess of the amount required to pay the cost of litigation and to reimburse the employer for the statutory compensation paid pursuant to the award belongs entirely to the longshoreman. In the latter situation, the [employer] has exclusive control of the litigation; any net recovery—after the compensation award and the litigation costs have been recouped—must be shared 80% by the [employee] and 20% by the employer.

(Emphasis added.)

5. 53 OKLA. B.J. 985, 987 (Okla. App. Apr. 13, 1982) (unpub. op.).

6. 512 P.2d 137 (Okla. 1973).

7. 282 P.2d 759 (Okla. 1955).

8. 190 Okla. 643, 126 P.2d 257 (1942).

the Colonial Baking Company, brought an action against Lee Stinchcomb to recover damages for personal injuries suffered in an automobile collision that plaintiff alleged was caused by Stinchcomb's negligence. The plaintiff filed a claim with the State Industrial Commission and was awarded compensation for the injuries he sustained in the collision. The insurance carrier paid the award and filed its petition in the Crain action, seeking to recover \$2,007 from Stinchcomb, which was the amount paid to Crain by the insurance carrier. The jury returned a verdict for the insurance carrier. On appeal, the defendant argued that upon payment of the Industrial Commission's award to Crain, an assignment of the cause of action was inadvertently executed by Crain to a party other than the insurance carrier. The defendant maintained that such an improper assignment was insufficient to authorize the prosecution of the action by the insurance carrier.

The court found it unnecessary to address this argument. Instead, it held that "independent of any provision in our Workmen's Compensation Law, said insurer was subrogated to the claim of the injured workman as against the defendant tortfeasor whose negligence was responsible for the injuries sustained by the employee, and was thereby entitled to maintain this action in its own name."<sup>9</sup>

In reaching its conclusion, the court relied on a statement in *Staples v. Central Surety & Insurance Corp.*,<sup>10</sup> wherein the Tenth Circuit Court of Appeals stated: "It is a well recognized rule, supported by a great weight of authority, that, where one has been subjected to liability, and has suffered loss thereby, on account of the negligence or wrongful act of another, the one has a right of action against the other for indemnity."<sup>11</sup> In *Staples*, an employee of one Bush was injured by a boiler explosion allegedly caused by the negligence of the Staples Drilling Company. The employee was paid compensation by the employer's insurance carrier. The insurance carrier then brought an action in federal court to recover from Staples the amount paid by it to the injured workman. Staples argued that the insurer could not bring the action in federal court, but the court held that independent of the provisions of section 44, the insurance carrier was authorized to maintain the action under the doctrine of subrogation. Thus, *Stinchcomb* and *Staples* apparently established the rule in Oklahoma that either the insurance carrier or the employer, whichever compensated the injured worker, could maintain an action under the doctrine of subrogation independent of the provisions of the workers' compensation statute.

#### *Other Cases*

Several other cases in Oklahoma also appear to stand for this proposition. In *State Insurance Fund v. Smith*,<sup>12</sup> the court held that an insurance carrier,

9. *Id.* at 645, 126 P.2d at 259.

10. *Id.*, citing 62 F.2d 650 (10th Cir. 1932).

11. 62 F.2d at 653.

12. 184 Okla. 552, 88 P.2d 895 (1939).

upon payment of the Industrial Commission's award to an injured employee, had its remedy against the alleged third party tortfeasor in the manner pointed out in *Staples*.<sup>13</sup>

Decided contemporaneously with *Stinchcomb* was *Parkhill Truck Co. v. Wilson*.<sup>14</sup> While this case did not deal directly with an insurance carrier's independent right to subrogation, the court did make clear that an employee should not receive a double recovery. The court stated: "In no event, with or without election, with or without assignment, with or without the payment of compensation during the time the common law action for negligence is being prosecuted can the injured employee have the benefits of double compensation."<sup>15</sup>

Another case that followed the rule of law laid down in *Stinchcomb* was *DeShazer v. National Biscuit Co.*<sup>16</sup> In *DeShazer* the court held that the respondent employer was entitled "herein under the statute and independent of the statute"<sup>17</sup> to proceed against a third party tortfeasor for any amounts of compensation paid by the employer to an employee negligently injured by the third party.

In *Travelers Insurance Co. v. Leedy*,<sup>18</sup> employee Leedy was negligently injured by a third party and received compensation benefits pursuant to an order of the State Industrial Commission. Travelers Insurance Company paid the compensation and sought to intervene in the employee's common law action against the third party predicated upon the same injuries. After holding that the insurance carrier was not barred by the statute of limitations from intervening in the suit, the court dealt with the third party's argument that the employee had not followed the statutory procedure under section 44(a) for pursuing his common law remedy, and thus the insurance carrier could not be subrogated to the amount it had paid under the Act. The court dismissed this argument, holding:

Travelers is subrogated to the extent of the compensation payment. [S]ection 44(a) provides the preliminary and procedural steps prerequisite to the fixing of liability under the Workers Compensation Act for personal injuries caused by the negligence of a third party. The statute is for the protection of the employer and the insurance carrier in their right to subrogation. Leedy did not follow the required procedure. Disregard of the statutory rule will not serve to destroy Travelers' right to subrogation. [Citations omitted.]<sup>19</sup>

The foregoing cases appeared to establish firmly the right of an insurer to

13. *Id.* at 554, 88 P.2d at 897.

14. 190 Okla. 473, 125 P.2d 203 (1942).

15. *Id.* at 476, 125 P.2d at 207.

16. 196 Okla. 458, 165 P.2d 816 (1946).

17. *Id.* at 460, 165 P.2d at 818.

18. 450 P.2d 898 (Okla. 1969).

19. *Id.* at 900.

bring an independent action for subrogation. However, the court of appeals in *Russell v. Bill Hodges Truck Co.*<sup>20</sup> held that there was no right to subrogation independent of the workers' compensation statute. In so holding, the court relied on two cases, *Aetna Casualty & Surety Co. v. Associates Transports, Inc.*<sup>21</sup> and *Updike Advertising System v. State Industrial Commission.*<sup>22</sup> The court's reliance on *Aetna* is particularly confusing and will be examined first.

In *Aetna* the plaintiff's assured sustained personal injuries and property damage when her car was hit by an Associates Transports' truck. The plaintiff paid the assured for the damage to the car and notified Associates that it had paid the loss and was claiming subrogation rights pursuant to its insurance policy. Subsequently, the assured filed suit against Associates for damages arising out of the accident. The parties eventually settled and the assured executed a general release. The settlement was made without notice to the plaintiff and without obtaining a release from the plaintiff. Plaintiff, the insurer, then filed an action against Associates and its insurer to recover the amount it had paid to its assured. The trial court entered judgment for the defendants, the Oklahoma Court of Appeals reversed, and the Oklahoma Supreme Court affirmed the reversal, holding that the "plaintiff, upon paying the loss, became subrogated to the extent of the amount paid, to the assured's right of action against the tortfeasor; plaintiff is entitled to maintain this action in its own name; the release executed by the assured did not defeat the plaintiff's subrogation rights. . . ."<sup>23</sup>

In *Russell* the court of appeals' reliance on the *Aetna* case for the proposition that compensation insurers' subrogation claims are the creatures of and subject to legislative discretion is mystifying because *Aetna* involves neither section 44 nor worker's compensation. In addition, the *Aetna* court, though mentioning both *Stinchcomb* and its polar opposite, *Updike Advertising System v. State Industrial Commission*, in the body of the opinion, appears to follow the rationale of *Stinchcomb* in allowing the insurer to maintain the cause of action in his own name.

As mentioned, the other case relied on by the court of appeals in *Russell* is *Updike*. In that case the employee, while driving his car on company business, was struck and killed instantly by another vehicle. Updike's widow filed a wrongful death action against the driver of the other vehicle and subsequently settled with him for \$10,000. The claimant also was awarded compensation by the State Industrial Commission for \$13,500 against the employer, Updike Advertising System, Inc. Updike Advertising System and the insurance carrier petitioned a review of the reward.

Basically, the petitioners argued that section 44(b),<sup>24</sup> which denies

20. 53 OKLA. B.J. 985 (Okla. App. Apr. 13, 1982) (unpub. op.).

21. 512 P.2d 137 (Okla. 1973).

22. 282 P.2d 759 (Okla. 1955).

23. 512 P.2d 137, 139 (Okla. 1973).

24. 85 OKLA. STAT. § 44(b) (1951) provides: "There shall be no subrogation to recover money paid by the employer or his insurance carrier for death claims or death benefits under this Act from third (3d) persons . . . ."

employers and insurance carriers' subrogation rights in death benefits cases, was unconstitutional. The Oklahoma Supreme Court rejected this argument and in doing so made some bold statements inconsistent with *Staples*, *Stinchcomb*, and their progeny. In disagreeing with the petitioners' proposition, the court stated:

There would be no subrogation without statutory provision. Such subrogation was provided by the Legislature in the original Workmen's Compensation Act as to the only liability provided therein and that was for loss of earning capacity by reason of injury to specific members of the body or permanent total disability. Without this provision no employer and no insurance carrier would have had subrogation.<sup>25</sup>

In so holding, the court restated a definition of subrogation initially given in *State ex rel. Commissioners of Land Office v. Mobley*<sup>26</sup>:

The doctrine of subrogation is governed and controlled in its operation by principles of equity, rather than by strict legal rules, and one of the conditions of subrogation in all cases, in the absence of specific contract, is that the subrogee discharge the obligation of another for the protection of his own rights.<sup>27</sup>

Under this definition, the court reasoned that an employer could have no subrogation at common law because by paying the death benefits, he did not discharge the obligation of another for the protection of his own right. Instead, the employer was bound to pay the death benefits under the Workers' Compensation Act regardless of whether the death was caused in whole or in part by the wrongful act of another. The court further stated that the provision did not make an arbitrary distinction between personal injury cases and death cases because the employer received benefits when the legislature took away from those who received death benefits the right to sue the employer for wrongful death and also limited the employer's liability under the death benefits provision to \$13,500.<sup>28</sup>

It is important to note two items in regard to the *Updike* decision. First, the majority opinion failed to mention *Stinchcomb* or any other Oklahoma case that previously had dealt with and specifically addressed this issue. Furthermore, the *Leedy* case was decided after *Updike*. Second, although the language of *Updike* is broad, its application to a personal injury case is not wholly persuasive because *Updike* was a death benefits case.

A 1980 Oklahoma case further emphasizes the difference between personal injury and death benefits cases in regard to the employer's and the compensation insurance carrier's common law right to subrogation. In *Earnest, Inc.*

25. 282 P.2d 759, 763 (Okla. 1955).

26. 208 Okla. 342, 255 P.2d 945 (1949).

27. *Updike Adv. Sys. v. State Indus. Comm'n*, 282 P.2d 759 (Okla. 1949), citing 208 Okla. at 345, 255 P.2d at 948.

28. 282 P.2d 759, 763 (Okla. 1955).

*v. LeGrand*,<sup>29</sup> the Oklahoma Supreme Court again confronted the issue of whether, in death benefit claim cases, the employer and the insurance carrier had a right of subrogation against the negligent third party. In holding that they did not, the court found that the language of section 44, although inconsistent,<sup>30</sup> as a whole prohibited such right.

The court also rejected the argument that there was a common law right of subrogation in favor of an employer for payment of death benefits under the Workers' Compensation Act. The court noted that the right to obtain death benefits and to pursue a wrongful death action was purely statutory and did not stem from the common law. The court reasoned: "How, then, can a common law right of subrogation exist in death benefit claims cases when no common law right of action for death existed?"<sup>31</sup> This logic does not apply to personal injury cases because a common law action for personal injury did, indeed, formerly exist. In fact, in *Earnest*, in support of their argument that there was a common law right of subrogation in favor of an employer who has paid death benefits, the petitioners cited *Staples*, *Parkhill*, *Stinchcomb*, *Leedy*, and *Aetna*. The court responded: "A review of these cases clearly shows that in each case the claim in question under the Workmen's Compensation Laws was for personal injury and not death. We think this distinction is extremely material . . . ."<sup>32</sup>

Thus, in refusing to overrule *Updike*, the *Earnest* court implicitly recognized that *Updike*, like *Earnest*, only applies to death benefits cases and that the law regarding personal injury cases is still controlled by *Stinchcomb* and its progeny.<sup>33</sup> A final reason given by the court of appeals in *Russell* for denying the insurance carrier an independent right of subrogation was the several amendments made to section 44 since the *Stinchcomb* decision.<sup>34</sup>

#### *Amendments to Section 44*

Section 44 has been revised three times since its inception in 1915 by amendments in 1951, 1975, and 1977. Until the 1975 amendment, this section

29. 621 P.2d 1148 (Okla. 1980).

30. When 85 OKLA. STAT. § 44(a) (1978) was amended, the words "or killed" were added in the provision providing for subrogation for the insurance carrier. However, this directly conflicts with section 44(b), which denies the insurance carrier subrogation in death benefits cases.

31. 621 P.2d 1148, 1153 (Okla. 1980).

32. *Id.* at 1152.

33. The holding in *Updike* was also followed in *New State Ice Co. v. Morris*, 285 P.2d 855 (Okla. 1955) and *Meadow Gold Dairy Prod. Co. v. Conly*, 288 P.2d 1115 (Okla. 1955). However, both cases were also death benefit cases and their application to personal injury cases is questionable. Indeed, in *Meadow Gold* the Oklahoma Supreme Court recognized the limited application of *Updike* by stating:

An argument identical, for all practical purposes, with the above was dealt with in the recent case of *Updike Advertising System v. State Industrial Commission* [citation omitted], decided since petitioners' brief was filed. It was therein rejected. In doing so, it was pointed out that, *as to the type of recovery, which the Death Benefit Amendment of the Workmen's Compensation Act provides*, there is no right to subrogation either at common law or by statute . . . .

(Emphasis added). 288 P.2d at 1116.

34. 53 OKLA. B.J. 985, 987 (Okla. App. Apr. 13, 1982) (unpub. op.).

remained consistent regarding: (1) the requirement that a worker elect whether to take compensation under the Act or to pursue his remedy against the third party; (2) the requirement of an assignment of the cause of action to the insurance carrier if the worker elects to take compensation; (3) the mandate that the insurance carrier contribute only the deficiency not recovered against the wrongdoer; and (4) the requirement of written approval by the Workmen's Compensation Court of any compromise of the worker's claim involving the subrogation rights of the insurance carrier. The 1975 and 1977 versions of section 44, which are nearly identical, retained all of these protections of the insurance carrier, but added the requirements that the insurance carrier should pay its portion of the expenses incurred in obtaining recovery for the worker and itself, and that the balance of the recovery should be apportioned between the insurance carrier and the worker in the same ratio that the amount of compensation paid bears to the total recovered. No language in either the 1975 or 1977 amendments changes the nature of the recovery or the elements of payment included therein that an insurance carrier is entitled to recover by way of subrogation. It is important to note that *Earnest* was decided after the 1977 amendment of section 44. The court of appeals in *Russell* emphasized the fact that section 44 had been amended several times since the supreme court's decision in *Stinchcomb*; nonetheless, the *Earnest* court again implicitly recognized *Staples* and *Stinchcomb* as the law regarding insurance carriers' subrogation rights in personal injury cases.

#### Conclusion

The Oklahoma Court of Appeals in *Russell* erred by holding that section 44 of Title 85 of the Oklahoma Statutes preempts all other rights of subrogation that may have existed at common law or otherwise for the benefit of insurance carriers and employers. A review of the law in Oklahoma on this question, although somewhat muddled, tends to point in favor of allowing employers and insurance carriers the right to maintain an action for subrogation independent of the Workers' Compensation Act against a third party tortfeasor in personal injury cases.

The leading case of *Stinchcomb v. Dodson*<sup>35</sup> answered this issue squarely in favor of the insurance carrier's and the employer's right to subrogation. Several cases since then have adopted the holding in *Stinchcomb*. Although the holding in *Updike Advertising System, Inc. v. State Industrial Commission*<sup>36</sup> is squarely at odds with the holding in *Stinchcomb*, it is important to realize that *Updike* was a death benefits case and its rationale is not applicable to a personal injury case. This important distinction between death benefits and personal injury cases was further emphasized in the 1980 Oklahoma Supreme Court case of *Earnest, Inc. v. LeGrand*.<sup>37</sup> In *Earnest*, the court recognized that subrogation could not have existed at common law

35. 190 Okla. 643, 126 P.2d 257 (1942).

36. 282 P.2d 759 (Okla. 1955).

37. 621 P.2d 1148 (Okla. 1980).

in death cases because there was no common law action for death, and thus, refused to overrule *Updike*. However, the supreme court did recognize the holdings of *Staples*, *Stinchcomb*, and their progeny as applied to personal injury cases and thus implicitly limited the holding of *Updike* and *Earnest* to death benefits cases. Because *Russell* was a worker's compensation case dealing with personal injury, it is submitted that the insurance carrier did have a right to subrogation independent of the provisions of the Workers' Compensation Act.

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