

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2003-CA-000472-WC

MERRICK PRINTING COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. 98-WC-72170

MICHAEL W. VERTREES; SHEILA C.  
LOWTHER, Administrative Law Judge;  
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

EMBERTON, CHIEF JUDGE. The issue presented by this appeal is whether KRS<sup>1</sup> 342.125 permits a previously settled workers' compensation claim to be reopened for the purpose of apportioning settlement proceeds received by the claimant in a third-party tort claim. After the Workers' Compensation Board held that the statute did not, this petition for review followed.

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<sup>1</sup> Kentucky Revised Statutes.

Michael Vertrees sustained a work-related injury to his right shoulder on July 9, 1998, and settled his claim against his employer, Merrick Printing Company, in the lump sum amount of \$47,491.55, representing an 18% disability rating. An arbitrator approved the settlement on February 15, 2000. Prior to the settlement approval, Vertrees underwent surgery to his shoulder and developed a bone infection, and on November 10, 2000, he filed a medical malpractice claim against his surgeon which he settled on July 5, 2002, for a total sum of \$292,854.06. Merrick Printing did not attempt to intervene and assert its subrogation rights in the malpractice action until July 8, 2002. The trial court denied Merrick's motion.

On July 5, 2002, Merrick filed a motion to reopen the workers' compensation claim alleging that under KRS 342.125 the civil settlement constituted "newly discovered evidence" and to deny the motion would permit Vertrees a double recovery. Both the Chief Administrative Law Judge and the Workers' Compensation Board rejected Merrick's contention.

The initial issue is what, if any, impact Merrick's failure to intervene in the civil action prior to the settlement has on its right to seek subrogation. KRS 411.188(2) clearly provides that after notification of potential subrogation rights, the subrogee shall assert its rights by intervention or

loss of any rights with respect to the final award.<sup>2</sup> The statute states it is applicable to all cases for damages and does not exclude employers liable for workers' compensation benefits. KRS 342.700(1), which precludes double recovery by injured workers, does not prevail over the mandate of KRS 411.188(2).

KRS 342.125 specifies certain conditions under which a claim may be reopened and the only possible condition applicable to this case is "newly discovered evidence." The Board properly noted that newly discovered evidence presupposes that the evidence existed at the time the workers' compensation claim was resolved, but could not have been discovered through the exercise of reasonable diligence. At the time the settlement was approved, the civil action was pending which could have resulted in either settlement or trial. Under the circumstances, the settlement cannot be considered newly discovered evidence.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:  
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FERRERI & FOGLE  
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BRIEF FOR APPELLEE MICHAEL W.  
VERTREES:  
Matthew L. White  
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<sup>2</sup> See Zurich American Insurance Company v. Haile, Ky., 882 S.W.2d 681 (1994).