

01-0287 Argonaut Insurance Company

v.

Debbi Baker, Individually and as Next Friend of Anthony Baker, an Incapacitated Person, and as Next Friend of M. B., a Minor, and Leighla Baker, and Rocky Baker

WHISLER: May it please the Court. Good morning. My name is Scott Whisler, and I do _____ with the firm of Grau, Ashley and Koen represent Petitioner Argonaut Insurance Company in this lawsuit. Amy Mattux is with Baker Botts. She is representing the Amicus Brief for Reliant Energy. Uh, she represents a, uh an employer with a deductible worker's compensation policy for us on the same issue that we have in court today. Argonaut seeks reversal of the decision of the Dallas Court of Appeals in this case. A decision that is apparently based on an exception to the subrogation rules of the worker's compensation context. An exception in that is our contention does not exist. Uh, its exception is at odds with statutory subrogation scheme as laid out in the statute. It's an exception that's at odds with the terms of the insurance contract between the parties in this case. It's an exception that is at odds with the public policy supporting the subrogation scheme. And it's an exception at odds with the history of this court's rulings in the subrogation context. The holding of the Dallas Court of Appeals is as follows: that an insurer, uh, under a deductible worker's compensation policy that pays benefits under that plan to an injured employee has no right to reimbursement for benefits paid unless, and until, and only to the extent that the insurance benefits that are paid exceed the deductible for the amount of the deductible under the policy. Now that's a sharp, sharp departure from the rule. This Court has for years and the statutes for years have

supported a subrogation scheme that is as follows: that the insurer is subrogated to the rights of the employees for the amount of benefits paid period. That the insurer's (interrupted)

BAKER: Answer this question for me. How does this mechanically work as far as benefits being paid to a covered worker as between the employer and the carrier? It sounds like a simple way is that they have the \$250,000 deductible that the um employer should be paying the benefits up to that and then the carrier steps in after it, but apparently that's not the way it works? .

WHISLER: If this were in a self-insurance context that is the way it all works. But these deductible plans (clearing throat) excuse me, are not in that sense pure self-insurance.

BAKER: Mmhhmm.

WHISLER: The insurer under the contract and under the statute is required to pay the benefits up front.

BAKER: And seek reimbursement of the deductible from the employer?

WHISLER: Yes.

RODRIGUEZ: After. And at what point does the employer make the periodic payments? Do they do that on a monthly basis? A quarterly basis? How does that work?

WHISLER: From the statute it is not clear. It's not clear that I've seen from the regulations. The requirement (interrupted)

RODRIGUEZ: I think there's a requirement in the record that reflects how it worked in this instance.

WHISLER: Not in this, not in this instance. Because there have been no payments. It it's my understanding, yet, that the insurer has not gone back to the employer to seek reimbursement. Because in a sense Argonaut stands here today also in the shoes of Flowers Construction under the contract.

BAKER: Well then that makes for problem at least the argument from the other side that the employer does not have the statutory subrogation right and but the insurance carrier does. And so the insurance carrier appears as an intervenor _____ 100% subrogation and right of totally what they've paid out. Then comes the fuzzy part if they can get \$250,000 from the employer but they get \$302,000 out of the settlement proceeds somebody's ending up with a double recover it sounds like.

WHISLER: If . . . there's clearly a double recovery. Especially when (interrupted)

BAKER: Well then why . . . tell me how we could write a rule that avoids the double recovery (interrupted)

WHISLER: Well the double . . . the double recovery can be avoided. Simply by allowing the worker compensation benefits and recovery process to proceed as it always has with the insurer um the wret . . . the subrogation rights of the insurer being recognized as accruing at the time a claim for benefits is made. And recognizing that the insurer (interrupted)

HANKINSON: But if . . . if . . . if you do not recover the \$250,000 from the employee then the employer is responsible for the \$250,000 self-insured deductible.

WHISLER: Well . . .

HANKINSON: Correct? The insurance company is not going to be out anything here.

WHISLER: I would agree with the second statement. But the premise (interrupted)

HANKINSON: I understand but that's what, uh, we're trying to understand is where the money goes. If you lose this lawsuit then the \$250,000 will come out of the employer's pocket and go to the insurance carrier?

WHISLER: That is correct.

HANKINSON: So the insurance carrier is not at this point in time, or yet, or will not be at any point in time during the course of this litigation out the \$250,000?

WHISLER: As long as the employer is solvent (interrupted)

HANKINSON: So what, what the insurance carrier is trying to do at this point in time is assert subrogation rights that will allow that \$250,000 to be paid out of the employees proceeds of the claim against the third-party rather than out of the employer?

WHISLER: And with, with that (interrupted)

HANKINSON: And as, and, and, and as a result of that this is why your opponents in the lawsuit are claiming that it runs a valid statutory scheme because the statutory scheme prohibits the employer from getting its deductible in anyway from the employee?

WHISLER: That is their argument your Honor.

HANKINSON: And so at bottom this case is a statutory interpretation case?

WHISLER: Well it is a statutory interpretation case (interrupted)

HANKINSON: And that's . . . that's what we have to do in this case is interpret the statute and determine whether or not the statute allows the employer to basically be

relieved of its obligation to pay the deductible as a result of sums that are paid
by the employee?

WHISLER: Well your Honor, we would disagree with the premise of the question.

HANKINSON: Okay.

WHISLER: The question is (interrupted)

HANKINSON: In what way?

WHISLER: Uh, has the Legislature . . . it is a statutory construction question.

HANKINSON: Okay.

WHISLER: The question is, has the Legislature by introducing deductible plans and making them
available, have they changed the way in which subrogation rights accrue to insurers?

There's no indication by the in (interrupted)

HANKINSON: Well if they do . . . if they do have a statutory provision however, that
indicates that the employer may not look to the employee for the deductible
and in fact they may very well have done that.

WHISLER: We disagree with that your Honor for this reason: that it is not logical under the . .
. this Court's interpretation and the statutory historical statutory interpretation of the
way subrogation rights accrue to insurers to suggest that the employee is paying this
money because the cases in the statutes have said that the money belonged to the
insurer to the extent of benefits paid and that the employee has no rights (interrupted)

HANKINSON: But again (interrupted)

WHISLER: . . . has no rights to recover.

HANKINSON: But again, this, this depends on where we start. If the question is a statutory interpretation question then we must ascertain what the Legislature meant when it put in the worker's compensation statute the provisions after the _____ (inaudible) self-insured deductibles and in fact what that means and if that governs. You're starting from the standpoint of let's look at what the subrogation law is and make sure that that that that particular aspect of the law is fulfilled here. So the starting point makes a big difference in this case. And your opponent starts with the statute. You start with subrogation law.

WHISLER: Well, I say let's start from the same place, which is, has the Legislature changed the rule? There's no dispute between the parties that the general rule is that an insurer's subrogation rights accrue upon the claim and it equals the amount of benefits paid. So the question is, did the Legislature make an exception where there are deductible claims?

HANKINSON: Mr. Levinger says, "Yes, they did. And they did it with the language in the statute which says, 'That the employer can not look to the employee.' This is money out of the employees pocket. To do this we would run a foul of that statutory scheme." What is your response to that?

WHISLER: My response is that 5.55c and . . . the institution of that rule and promulgation of these deductible policies did not change the language of Labor Code 417.001, 417.002 did not override this Court's rule and understanding of subrogation law in the statutory context. That's what's required. In order to get to it Mr. Levinger wants to go (interrupted)

HANKINSON: What does the exception mean then?

WHISLER: What does the exception mean that as of the Dallas Court of Appeals? Well then, if, if in effect turns the subrogation rules on its head is what it means.

HANKINSON: Well, my question is, how do we give meaning through the provisions, the provisions that the employer cannot look to the employee? How do we give meaning to that provision of the worker's compensation law?

WHISLER: The meaning is by recognizing the evil that the Legislature was aiming to protect the employees from which is employers who are ultimately forced to pay deductibles or other expenses or want to try and pass on other costs to the employees are prohibited from doing so.

HANKINSON: Well, but, that's what I understand Mr. Levinger says is happening in this case. So, again, my question goes back to that language seems pretty clear and its plain language what does it mean if it doesn't mean that the employee cannot be required to pay the employer?

WHISLER: It only makes sense to, to our mind.

HANKINSON: Uh huh.

WHISLER: For Mr. Levinger to make that argument if in fact the rules have changed and the insurers subrogation rights do not accrue upon the payment of benefits.

HANKINSON: Well . . . (interrupted)

ENOCH: Let me ask you about rules changing to argue this, if the employer self-insures for I don't know \$250,000 and then has a policy that covers above \$250,000 can the employer then uh subrogate to the employees, the employer pays for these benefits

now the employer then argue that it's entitled to subrogation from the employee if the employee gets recovery against a third-party (interrupted)

WHISLER: Well (interrupted)

ENOCH: ...the employer is doing the is covering this up to the person \$250,000.

WHISLER: If we're talking of pure self-insurance context I'm not sure how that works. There isn't a, a, an identical provision for instance at 5.55c that goes to self-insurance plans. This is a deductible plan which means that by definition the insurer is fronting the money. The carrier is required to service the claims under the statute. Is required to put out the money. Is then required under the contract to on behalf of the employer and the employee seek recommend from responsible third-parties if possible apply the received monies against the out-lay and then if the insurance company is paid back then some can be credited to the employer's deductible. But that's an important point your Honor, that under the contract the definition of the deductible turns out to be what is left over after the insurance company has gone out and done its contractual job which is to seek recovery from the responsible third-party.

ENOCH: Will there be . . . so what employers ought to do, maybe I don't have this quite right, but what employers ought to do is not do any sort of self-insuring. What they ought to do is get a large deductible. What they really ought to do is a big deductible and then they will always be able to get in a third-party context whether the employee goes out and gets recovery against the third-party then the employer can get their deductible back.

WHISLER: I don't read the Dallas (interrupted)

ENOCH: The deductible is like you say here then they can make sure that they are paid back their deductible in the third-party context and you don't and there's nothing in the statute that that indicates that the Legislature didn't want the employee to have to foot the bill for the deductible.

WHISLER: There's, there's . . . well, I see nothing in the statute to suggest that the Legislature wanted to change the way in which the party went after the responsible third-party. They want there to be incentive for the injured employee as long as the carrier to go after those responsible parties. And then only after that to the employer. The whole idea behind the introduction of these plans is the, is the cost factor. The history of worker's compensation in this state is the expense and the, and the rise and expense of these type of insurance plans which are, which are being mandated to employers is high and it's prohibited.

HANKINSON: Why doesn't this as the Court of Appeals said and as one of the amicus briefs points out resulted in windfall to the employer. Because the employer, the economics behind this are to allow the employer to reduce significantly the cost of insurance. And my understanding in this case that ordinarily the premium would have been somewhere between four and five hundred thousand dollars a year and instead um the company paid somewhere a hundred and some thousand dollars for the premium by taking this kind of plan and doing one of these negotiable self-insured deductibles where they negotiate for a large amount of the deductible. So there has been a, there's a significant economic savings to the employer for this and they have

benefitted by undertaking this responsibility to pay the deductible the first \$250,000. So if, if we approach it from the standpoint that you do that we have to protect the whole economics of it, and aren't we undercutting the scheme that has been in place because in fact we're now asking the employee to foot the bill and in fact the employer now gets the benefit of the reduced premium without having to come out of pocket for the larger deductible which is what they negotiated for.

WHISLER: Your Honor I am out of time to give a response.

HANKINSON: Go ahead and answer.

WHISLER: Thank you. (Clears throat) The assumption is correct that the employer has taken on a larger risk by virtue of the deductible. But if not taken on the risk, it's a different risk and a more subtle risk that is being defined by the Dallas Court of Appeals because the risk that they took on is the deductible minus what could be recovered from the responsible third-parties whenever possible.

HANKINSON: Well, this, in this particular instance when you mentioned earlier double recovery, we don't have an, we don't have an employer getting a double recovery here. In fact we have a serious, as I understand it, a seriously injured employee who has um, as I understand it, permanent injuries, permanent serious (inaudible) injuries and in fact his recovery may not have in fact taken care of all of his needs. So we're not in a situation, we're not in that kind of a situation where we've got a double recovery where he's got

insurance proceeds and for the exact same piece (peace?) he's also getting recovery from a third-party.

WHISHLER: I would disagree your Honor, but that's exactly what we have. That the claims there were being made against the responsible third-party are not the underlying case were based on lets say medical damage and the same injuries for which they have received benefits.

HANKINSON: I understand that. I understand that. But, but what what what the briefing indicates and what what I understand from in the record in this case in the case that the amount that what that of the sum with the third-party was affected by the limits on the insurance coverage which was somewhere in the neighborhood of \$800 some thousand dollars. But in fact the damages may have exceed that.

WHISLER: I would . . .my understanding your Honor is that the term double recovery has a slightly different meaning in the worker's compensation context. As one of the important policies behind the subrogation scheme, the idea is that whenever possible the insurer gets paid back first. That's the overriding principle. That's different than in a common law equitable subrogation where the rule is as you suggest that there is no right to subrogation until the injured party has been made whole.

HANKINSON: Right. But but the point is if the context in which you've, we've talked about double recovery in this implies that in fact the employee has recovered more money than would be necessary to compensate him for the injury that he sustained and that's not in fact the case here.

WHISLER: I would submit your Honor that in worker's compensation context double recovery always means that the employees should be able to keep (interrupted)

HANKINSON: Well, you, if we can, we can . . . I, I understand that and, but my point is is that to imply that the employee has gotten more money than was necessary to compensate for his damages may not be accurate in this case.

WHISLER: Well, I, I don't think we . . . I don't know that we have an argument and I don't, on that issue and I don't think that that is the issue in terms of what a double recovery is.

O'NEILL: Mr. Whisler I just have one, one quick question.

WHISLER: Yes your Honor.

O'NEILL: It it seems that there are good policy arguments on either side of this issue. Both parties have put forth I think compelling arguments as to their different interpretations of the statute and that being the case, isn't that just the type of thing we leave to the Legislature to waive these policy concerns and that they did that in enacting 5.55c? I, I, it's hard to get around the plain language of the statute. Reliant, I think, in their amicus briefs says that "really the intent of the statute was not to allow wage withholding for payment of the premium" and, but that's really sort of created out of pro quo. We don't have any legislative history or anything else except the plain language of the statute, is that right?

WHISLER: Well, there there is a legislative context in this where it's clear that the issue that is being addressed, attempted to be addressed by the deductible plans was again the high cost of worker's compensation insurance.

O'NEILL: Well with the premiums. And how do we know that the quid pro quo wasn't then to put the the burden of the deductible on the employer?

WHISLER: Well, I guess it's not clear. I guess that is the argument (interrupted)

O'NEILL: Well is it . . . well again, and my point exactly, it's not clear. And with it not being clear don't we have to just rely on the plain meaning of the statute?

WHISLER: Well, what's not clear is that the Legislature intended to see change that is being suggested by the Dallas opinion that there's no indication anywhere that for this very small area of deductible plans that the Legislature intended to turn the subrogation scheme on its head and put the employees in front of the insurers.

O'NEILL: But what did they intend by it is my question. I hear ya. But why did they do it?

WHISLER: They intended by 5.55c to prohibit to deter those employers who at the end of the day after benefits were paid and if there is no recovery available against third-parties that would satisfy the deductible (interrupted)

O'NEILL: But, but there's nothing in the statute that so limits it. That makes immanent sense to me.

WHISLER: I, I understand.

O'NEILL: But, but there's nothing to limit it. And in fact wasn't a bill proposed to make it that more specific that was then rejected?

WHISLER: I believe that there was some language in committee that never made it out of committee.

O'NEILL: And, and, and, so again we're back to the plain meaning, we can posit possibilities for different reasons for things. But, but really we're stuck with the plain language of the statute.

WHISLER: We're stuck with the plain language of the statute but we're also stuck with the Legislature's understanding of the way the world was when they enacted this law. And the way the world was when they enacted this law is that insurers by the, by virtue of 41701 and 002 when a claim is made their rights accrue.

O'NEILL: Then there (interrupted)

WHISLER: When they did make, they made no change to that.

O'NEILL: Well, and if that was the intent then there would be no reason for 5.55c.

WHISLER: No there's, no there's, there still is a reason. Because there still is the risk that after benefits are paid and after the insurer and the plaintiff go after the responsible third-party and recover money and there isn't enough money to credit it back to cover the deductible the insurer is going to go after the employer for that money. And that's where the pressure to the employee's and the and and the prohibition lies to going back to the employee at that point.

O'NEILL: You would agree that that would be easy to say?

WHISLER: I think that's exactly what they said your Honor.

PHILLIPS: Any other questions.

WHISLER: Thank you.

PHILLIPS: Court's ready to hear arguments from the (inaudible).

UNKNOWN: May it please the Court. Mr. Jeff Levinger will present argument (inaudible).

MADDUX: I have one primary point to make on behalf of the employers who have these sorts of large deductible insurance policy, and that is that in opting for these worker's comp policies with a deductible, the employers did not in any way bargain that they would be responsible for the acts of third-party, tort feasons over whom they have absolutely no control. And the idea that that is what they bargained for is negated both by the expressed language of the contracts that they enter into which are approved and must be approved by the insurance board, um, and also by the legislative scheme. The, um, the legislative scheme as uh as Mr. Whisler indicated had been set in Texas Worker's Compensation law for a long time and there is no intent to change that. And in fact, when the Legislature enacted 5.55c which the entirety of the statute of of that section uh requires these sorts of policies its uh it did not um it did not change the subrogation law it was working against the context of the general rule that uh an employee's right to recovery to a third-party as subrogated to and an employee does not have rights until the subrogation interest is satisfied for the third-party recovery. And the way this works is that under the policy and the statute requires that the policy read this way the carrier is responsible for all benefits that are paid. That includes the deductible amount. And then Labor Code 417002 states that the subrogation interest uh that will that the recovery from the third-party shall be used to reimburse the carrier for the benefits paid. So working against that uh scheme uh there's no indication that subsection f of 5.55c is designed to do anything rather than prevent an employer from doing what it's (interrupted)

HANKINSON: We we have two other provisions of the statute that we have to look to in this context but let me start by asking you if the employees the proceed that the employee receives from the third-party the \$250,000 are not paid to the carrier and in fact the employer is going to paying \$250,000 in this case?

MADDUX: If the if the (interrupted)

HANKINSON: The employer will have to pay the deductible then?

MADDUX: Right. Right.

HANKINSON: Okay. So the insurance carrier is not going to be paying the deductible under any circumstances?

MADDUX: The . . . (interrupted)

HANKINSON: For the amount that is attributable to the deductible.

MADDUX: No. The insurance, the insurance carrier is responsible under the policy uh to uh to go after it and and the way the policies work is that uh the first money that the insurance carrier receives has to go to the carrier for benefits that the carrier has paid and if any of those anything hasn't been paid by the employer the deductible because it is a periodic reimbursement then it goes to the employer.

HANKINSON: So the carrier could be could be passing thru some of the money to I mean the carrier could be passing thru some of the money to the employer?

MADDUX: Correct.

HANKINSON: And if in fact the \$250,000 is not recovered from the proceeds of the lawsuit against the third-party then the employer will be responsible for the entire \$250,000?

MADDUX: Correct.

HANKINSON: Alright. But we have two provisions of the statute that are player one one that we have been talking about about how the employee cannot be held responsible. But the other provision of the statute that does not include the employer who is under one of these plans as a party who has any subrogation right. So in fact if that's the circumstance then how can the carrier proceed to recover that \$250,000 that is in fact the legal responsibility of the employer?

MADDUX: Your Honor I think that that's exactly what the statute says but that that's the way the Legislature has decided it it should work. And the Legislature could have (interrupted)

HANKINSON: No. But what my question is is that there is a provision that says who can assert subrogation rights and who has them. And it does not include an employer under one of these plans.

MADDUX: That's correct. And that that's why Argonaut is the party in this case because it's their responsibility to do it.

HANKINSON: But I understand that. But but doesn't that in some way limit the right of Argonaut to go forward to recover that \$250,000 that in turn would be actually would benefitted the employer?

MADDUX: We respectfully disagree because (interrupted)

HANKINSON: What is the meaning of that then?

MADDUX: The the meaning is that the Legislature has said that the carrier pays all the benefits and that the carrier reimburse for all benefits paid. And has also designated the insurance board to approve all policy language. And under the policy language um
(interrupted)

HANKINSON: But if the policy language is contrary to the statute then the statute is going to prevail.

MADDUX: The statute will prevail if it's contrary but the agency construction is eminently reasonable with this.

HANKINSON: I understand, but we still have to look at the statute.

MADDUX: Of course.

HANKINSON: Okay.

PHILLIPS: Any other questions? Thank you Counsel.

UNKNOWN: May it please the Court Mr. Jeff Levinger will now present argument for the Respondents.

LEVINGER: Thank you your Honor. May it please the Court. I, I think the biggest problem with both the positions we've heard is that they're trying to treat optional deductible insurance policies just like any other kind of worker's compensation insurance. Uh, but in fact optional deductible plans are are very different. Uh they're different as a matter of statutory treatment and they're different as a matter of economics. And I think in this case the employer actually even comes out ahead under the Court of Appeals ruling. And the problem is unless the differences are appreciated uh the injured workers will be forced to bear the cost of worker's compensation insurance

which is always been in permissive. Back to first start with this this first money paid theory that we've heard as to the deductible amount the first money paid theory just doesn't work as a matter of either insurance code, interpretation or even the Labor Code interpretation. I think it's very easy to look at from the standpoint of the three parties in this triangle. From the standpoint of the insurance carrier, section 417 would apply when the insurer needs to be reimbursed for the moneys to pay it out in benefits. But as to the benefits point corresponding to the deductible it does not need to be reimbursed. Now why is that? It's because of Article 5.55cd and I think this kinda goes to Justice Rodriguez' question. The way it works is that even though the uh insurance carrier is suppose to advance the money it actually writes the check for the benefit it is required to get that money on a periodic bases from the policyholder. In fact the language is very explicit under 5.55cd, says "reimbursement by the policyholder shall be made periodically rather than at the time claim costs are incurred." So it's not some let's wait and see what happens with respect to a third-party recovery that the payments uh the reimbursement payments are suppose to be made by the policyholder by the insured employer on a periodic bases. And when that happens there's nothing that the insurance carrier needs to be reimbursed with with respect to that deductible, that \$250,000. That's why the general statutory subrogation provision 417 does not apply with respect to the deductible amount.

O'NEILL: Can you tell me why you say the employer is head ahead in this case? Because I read all the amicus briefs and the other side is saying that if we rule your way that these

optional deductible plans will just go out the window because they will be totally undermined.

LEVINGER: I think that concern is greatly exaggerated Justice O'Neill because let's look at the numbers in this case. Here Flowers bargained for a \$250,000 deductible. In return it got a substantial premium credit. I think the record shows Justice Hankinson said somewhere in the neighborhood of \$420,000. So, if it has to pay out the two fifty but at the same time it's received a premium credit of four twenty it still comes out ahead by \$170,000 (interrupted)

BAKER: Well, can you (interrupted)

LEVINGER: . . . with respect to this one accident.

HECHT: Well but presumably it has other cases that's why you have insurance.

LEVINGER: Right.

HECHT: And somebody is paying \$400,000 for insurance and only getting \$100,000 of relief they're gonna quit buying the insurance. Or go with another provider.

LEVINGER: Yeah that (clears throat) of course the record here doesn't say what else does does uh what it doesn't pay out.

HECHT: Well, but it doesn't make any sense to say uh they made money on this if uh if you're paying more in premiums than you're getting in alleviation of risks you're gonna quit paying the premium.

LEVINGER: Well it's not so much a question of making money Justice Hecht it's it's a question of uh allocating risk. And, and my point is simply they have understood what the risks are going to be at the outset. They bargained for a high deductible, \$250,000,

in exchange for a substantial premium credits here somewhere in the neighborhood of \$470,000. I don't (interrupted)

HECHT: Well, but the, the argument is they didn't understand it was going to be uh at the expense of whatever could be recovered in subrogation. If there were such a if an employee was injured by a third-party.

LEVINGER: Well, but they should have understand, understood that because an employer has no self-insured deductible an employer has no statutory subrogation rights. We need to remember that (interrupted)

HECHT: But if they're telling the truth and they didn't understand it they're gonna be less likely to buy a deductible policies or else they're gonna be less likely to pay that much for them. They might as well buy a full policy.

LEVINGER: Well, I I don't think so because of the nature of the the size of the premiums. Uh, but at the same time if they want statutory subrogation rights under section 417 an employer should become a certified self-insurer. Uh, here they're not a certified self-insurer.

HECHT: Well, that, that argument says that deductibles are not as good a deal as the Legislature thought they would and therefore you ought to take another option that the Legislature provided.

LEVINGER: Well, my, my point is simply if the employer wants statutory subrogation rights he shouldn't become an optional deductible employer because they have no statutory subrogation rights. They may have common law rights of equitable subrogation which is different. But they do not have statutory subrogation rights. They cannot

make a claim to the first money paid. They may have a claim under equitable subrogation where the the presumptuous flip that is the first dollars go to the employee because the employee is the main holder.

HECHT: This seems a little weird because um as as I understand the argument, if this employer had bought a full policy without a deductible, the Plaintiff would get less.

LEVINGER: Uh (interrupted)

HECHT: No question.

LEVINGER: Well that could be true because we'd have section 417 without regard to the to the Article 5.55.

HECHT: So if he buys a deductible then more is then more is paid paid out.

LEVINGER: Well it's just a function of Article 5.55c d and f. Uh, d which says that "the employer has to make periodic reimbursement" and f which says I think unequivocally uh "the employee shall not be made to pay any of the deductible."

HECHT: Well, I'm having trouble understanding a statutory scheme that provides fewer benefits to an injured worker depending as as long as the employer pays more in premiums. If he buys a full policy and there's no deductible so he pays a higher premium he's out the money and the employee's out the money. So wha, I, why would they do that?

LEVINGER: Well, there are not a lot of self-insured there are not a lot of optional deductible plans out there. Uh, they only make that (interrupted)

HECHT: Well, that's not (interrupted)

LEVINGER: . . . less than I think 2% of all policies in this state and even it's even smaller percentage when you look at the large negotiated deductibles. So there really aren't very many of 'em. Um, I can't explain the statutory difference other than just to say that if you don't have the additional features of Article 5.55 in a straightforward uh normal policy with a large premium and no optional deductible.

PHILLIPS: Why is the language of the statute so clear that we should ignore the agencies interpretation?

LEVINGER: Well, I'm not sure there is an agency interpretation Justice Phillips. We, we don't, all we have is an amicus uh I think it was Safeco which submitted a blurb on worker's compensation manual. And and I'm not sure that's an agency interpretation to start with. Uh, but even if it were (interrupted)

UNAUDIBLE

LEVINGER: I'm sorry.

PHILLIPS: What more would it take to be an agency interpretation? (inaudible)

LEVINGER: Well, I I would think so. Something of an Administrative Code. (interrupted) Sorry.

BAKER: Who prepares the manuals?

LEVINGER: It's just unclear. Uh, there's one page attached to an amicus brief (interrupted)

BAKER: (inaudible – mumbling) . . . worker's compensation commission that prepares the manuals so their people would know how to talk to the insurance carriers?

LEVINGER: That may be Justice Baker. I, I don't know.

BAKER: The carriers don't prepare them. There's another, something else that bothers me. There's no dispute that that uh Mr. Baker's got \$352,000 worth of benefits paid for by the carrier.

LEVINGER: Right.

BAKER: And that fact was known when the settlement was being discussed. They were already intervenors and the arguments made, well, you can't require the employee to pay the \$250,000 benefits back to the employer because of 55 c d and f right? But how is it that he already knows that he's received \$352,000 of benefits which he's going to settle because there's somebody that's already paid him that money out of whatever settlement they make with the third-party?

LEVINGER: Well, don't presume, don't presume that the settlement from the third-party covered the same items as the benefits received from the (interrupted)

BAKER: Well, but my question is when you have a known liability to a third-party subrogated into a, subrogated entity and you settle the case, are you saying that the \$882,000 did not include any payment for medical benefits previously received or incurred by the Bakers?

LEVINGER: That would buy, that would be my position, given the size of the damages.

BAKER: How could you show that? How can you show that?

LEVINGER: Well, to be sure (interrupted)

BAKER: Or did you show that?

LEVINGER: To be sure there is not a tremendous amount in the record, uh I don't think it matters as a matter of statutory interpretation. Uh (interrupted)

BAKER: Well, but one of the things that's the problem here is everywhere you turn when you've gotta construe these statutes together it looks like somebody's getting paid twice. Uh, if you let the if you're going to keep the whole money without any subrogation then he's received \$352,000 in benefits and another \$882,000 and the arguments made that's a million three and the carrier and the employer is sitting having paid it with no reimbursement. And so that the employee gets paid twice for the same thing and that presumes I guess that the medical benefits or whatever else will proceed is part of the settlement.

LEVINGER: I, I, I think there are probably three answers to your question Justice Baker two of a legal nature and one of a factual nature. But, I, I think one uh answer that's overlooked is that in a case of true double recovery on behalf of the employee uh where the amounts he receives both from the insurance company and third-party exceed the amount of his losses. That can be handled through equitable subrogation. Uh, (interrupted)

HECHT: How, now tell me how that works again?

LEVINGER: Well, equitable common law, equitable subrogation is simply a situation where uh the the payor can get reimbursed but it's subject to the right of the employee to be made whole first from all the sources.

HECHT: Is there any (interrupted)

LEVINGER: So if (interrupted)

HECHT: Is there any authority for that? I mean I would think that there wouldn't be any right of subrogation here at all except that the uh statute creates it.

LEVINGER: Well, there is no right of statutory subrogation at least with respect to the deductible.

But, but I don't see any impediment necessarily to uh the uh assertion of equitable subrogation. There may be defenses to that but it's probably weighed in with the equity (interrupted)

OWEN: By, by the employer or the insurance company?

LEVINGER: Could be either one. And it should be by on behalf of the employer because under 5.55c d the presumption is that the employer uh has already reimbursed that deductible to the insurance carrier. I think another answer to the double recovery is informed by very recent U.S. Supreme Court opinion uh that came down in January of this year. It's called *Great West Life v. Conusa* uh it's 151LX2nd uh 635. If it's not really on point but I think it's instructive there the issue is whether the URISA statute allowed an insurer to come in and and claim uh the benefits of a third-party recovery. And the Supreme Court held that URISA did not allow such rights. It allowed only equitable uh relief. Even though the effective of that ruling was essentially to give a double recovery to the employee the dissent noted that there was a one just in ritual. So I think what we have was a case with the U.S. Supreme Court interpreted a statute irrespective of the fact that maybe one impact was to give the employee a double recovery.

HECHT: Well, but, but that cuts against what you just said. You said the first your first position is we don't have to worry about that because we can deal with it by equitable estoppel. Your second position is there's no such thing.

LEVINGER: Well . . .

HECHT: And we should just live with it. So (chuckles) I don't it looks to me like one and two are in some conflict.

LEVINGER: I don't think they're exactly a conflict your Honor because my second point is more a matter of statutory interpretation. I think the Court of Appeals got it exactly right when they said, "the issue is not who may receive a windfall, but rather who must bear the burden of the deductible" and that's what the Legislature set out. That's what I think is destructive about the *Comusa* case that the (interrupted)

HECHT: But assuming that I agree with that that that would be instructive and that that's what this statute also contemplates. How could you have equitable estoppel?

LEVINGER: Well . . .

HECHT: Or equitable subrogation? Or equitable anything?

LEVINGER: Right. Again, *Comusa* is somewhat instructive on that because it said even though you don't have statutory rights to subrogation there may be other ways that you can uh recoup back the money from the employee.

OWEN: This in . . . this endorsement that deals with the deductible onto the policy uh this is a standard form promulgated by some state agency or not?

LEVINGER: I'm not sure how standard it is your Honor because I noticed a Reliance policy doesn't quite read the same way. Uh (interrupted)

PHILLIPS: But it's approved by an insurance company isn't it?

LEVINGER: It, it should be. But, but I'm, I'm, I'm talking specifically about the language here it talks about how if there's a third-party recovery (interrupted)

OWEN: Right. That's what I'm getting at. In this policy (interrupted)

LEVINGER: It's not . . . it was not standard as between those two different policies that I had seen.

There only just the two in the record. Reliant and uh Argonauts and they don't read the same way. Argonaut says "We Argonaut had your Flowers rights to subrogate." And my answer to that is Flowers has no statutory rights to subrogate.

OWEN: If we advance . . . it says, "If we advance any recovery or payment then in doubt we recover we first apply to uh the excess of the deductible and the remainder would be applied towards the deductible amount paid by you." And so is that language approved by any state authority or not?

LEVINGER: One would think it must be under 5.56 but, but I come back to the general law that says that the statutes control over the language of the contract and if uh if they've been wrong all these years in the face of statute uh then the policy language has to yield the statute and that's what I'm asserting. To the extent that language is inconsistent uh 5.55 (interrupted)

O'NEILL: I'm just trying to get who who approves this. I mean . . .

LEVINGER: I would think presumably that the insurance commission under 5.56. But I simply note that the policies aren't even standard in respect to their own language. Uh, I don't think Argonaut's policy for example extends statutory subrogation rights on behalf of either of the insurance carrier or the employer for that matter.

O'NEILL: Do other states offer these optional deductible plans?

LEVINGER: I've seen a study, your Honor, that some 43 of them do, but they're all fairly recent creations.

O'NEILL: Have they, confronted any of these states with similarly issue?

LEVINGER: Not that I know of. Uh a lot of the states have similar statutes to 5.55 which say that employee should not be made to pay any of the deductible. Yet I've not seen any uh judicial interpretation one way or the other.

ENOCH: Let me ask you in the under the worker's compensation scheme was there a statutory provision that prohibited the employer from deducting from an employee's pay a prorata share of the premiums for the worker's compensation coverage (interrupted)

LEVINGER: There is. Yes.

ENOCH: . . . _____ (inaudible) statute?

LEVINGER: I think it's section 415

ENOCH: And so then they go to a deductible policy. I assume the statute then says you can't charge them for the premiums.? So, was it necessary for the Legislature under at that policy to include a provision to say you can't charge them also for the deductible?

LEVINGER: I think so because (interrupted)

ENOCH: Well but there'd be no charge, but there'd be no charge for a deductible unless there was a claim for an injury right? I mean how does it, how does a deductible get charged to an employee for the fact that the employee has made a claim against the policy that then invokes the liability employer to pay the deductible?

LEVINGER: That, that's when it would trigger. But, but in response to this maybe doesn't exactly answer your question. But in response to the argument here that what 5.55cf simple means is that it can't come out of the employee's wages uh in circumstances where there's either no third-party recovery (interrupted)

ENOCH: Would it make sense . . . you know assuming there is no third-party action and so there's just benefits paid to the employee, the injury. There's no claim of third-party wrong doing here. The employer, I mean, absent that statute that says you can't charge for the deductible, would the employer have been free to simply do a one for one charge (tape ended)

. . . absent this provision that says that the employer cannot charge the employee for the deductible, is there no other provision in the statute that would have prohibited the employer from refusing to pay the insurance on behalf of the employee because the employer would otherwise have been free to charge back against the employee the deductible?

LEVINGER: I, I, I think that's exactly the point of 5.55cf to make sure that employers can't shift uh the cost of paying the deductible that optional deductible onto the employee. That's exactly what it's there for.

OWEN: But there, but there, the statute could also reasonably be read to shift it on to the third-party. If, if you read it literally it's talking about you can't make an employee pay the deductible. But here, you're making it third-party pay the deductible.

LEVINGER: Well the third-party always pays, but, but I think the common (interrupted)

OWEN: Not the employee.

LEVINGER: Well, but it does because the common ordinary usage of the word pay has to mean that if, that if at the end of the day when I get my, when I, the injured employee, get my distribution from the settlement and \$250,000 is taken out of it, I'm being made to pay that deductible.

OWEN: But its, it's actually being paid by the third-party. I mean (interrupted)

LEVINGER: Third, the third-party pays all the damages.

BAKER: Yeah but you've already got the \$250,000 from the carrier. That money's already in your pocket, isn't it? So if you say I, I should, I should get another 250 you've been double paid on those benefits.

LEVINGER: Well, I disagree with that premise your Honor because at least in this case there's no evidence that, that they got their, their past wages and their medical benefits uh paid twice. It, it, it just, it didn't happen. But (interrupted)

BAKER: Well . . . (interrupted)

LEVINGER: I think your argument (interrupted)

BAKER: I would make when the Baker's sued the third-party, usually plaintiffs ask for a recovery of whatever medical benefits have been incurred or amounts been incurred, pretrial, post medical, pain and suffering, etcetera. Isn't that correct? And didn't they ask for the same thing here?

LEVINGER: sure. And when they, and when they get more money out of the third-party then that works as an advance under 417.002b against future payments by Argonaut with respect to both medical benefits and uh lost wages.

BAKER: What's disturbing is with all that known and that kind of a lawsuit pending and the settlements made, then in effect you're saying we're not going to be cognizant of any outstanding obligations for past medical payments to any third-party except in this case a hundred and two thousand dollars over and above but you've already gotten \$250,000.

LEVINGER: Well, I think that (interrupted)

BAKER: Is there something wrong with repaying everybody that you are quote indebted to for previous benefits out of what you settle for except for this statutory scheme that we're bond to work with?

LEVINGER: Well, I think it's the statutory scheme that makes all the difference Justice Baker because under Court of Appeals ruling we have exactly, it sorts out exactly the way it should. Uh the insurer, Argonaut recoups everything. Every benefit it paid out it recoups. Uh, the employee is not made to pay the deductible when it comes out of the settlement distribution. And at the end of the day the the employer uh bears the burden of the deductible that it bargained for. It bargained for a relatively high deductible in exchange for uh a premium credit. And that's exactly the way it sorts out in the Court of Appeals opinion.

HANKINSON: Mr. Levinger when you started your argument if you could, you said that the optional deduction claims are different first as a matter of statute and you mentioned to points. First of all the no need for reimbursement from the carrier because the payments are periodic. And second of all that the employer has no subrogation rights for the deductible. What other features make an optional deductible plan different by statute in the more traditional scheme?

LEVINGER: I think two main ones Justice Hankinson, be 5.55cd the periodic reimbursement and then 5.55cf uh you may not look to the employee to reimburse the uh deductible.

And then of course the fact that under 4 section 417 of the Labor Code uh an optional deductible employer is not included in the definition of the word insurance carrier.

PHILLIPS: Any other questions?

LEVINGER: Thank you.

ENOCH: Mr. Whisler, do you agree that absent the provision that says in _____ cannot seek reimburse the deductible of an employee that the employer under these policies would have the right to uh _____ against the employee uh liability for payment of the medical rec medical bills and all that up to the level of the deductible. I, I deducted the 250,000. Employee goes into the hospital that's a hundred thousand dollars in damages. Comes out and makes a claim for insurance coverage and as in this provision under the statutory scheme the employer would be free to recoup all that medical from the employee.

WHISLER: Absent the prohibition?

ENOCH: Absent this specific prohibition that oh the employer could have gone against the employee to recoup all this money. And I'm not talking about any third-party action. It's strictly out by comp insurance for my employees, I owe a \$250,000 deductible and as this specific provision (inaudible) there's nothing else in the compensation statute so we get the employer from going against the employee and taking back every dollar of benefit.

WHISLER: Well, Mr. Levinger answered the question there is a statute 415 which is a similar prohibition against going back per premiums and cost in the front end. But with the creation of a deductible plan there's a new opportunity for uh bad employers to put

pressure on injured employees to recoup those the expenses the deductible. So in answer to your question I think it filled the need. There was a need created by the deductible plans to protect the employees from employers who might try that thing.

ENOCH: No. The deductible, the deductible was a different element that was not specifically covered by the statute and this was designed to cover that particular element.

WHISLER: Yes your Honor. There, there was a risk there that they foresaw as they were negotiating through the creation of this statute and the creation of these plans. They said this is a good idea. But there is gonna be the opportunity at the end of the day the employer is going to have to come up with some money. We don't want them applying pressure to the employees and especially the injured the employees to recoup that money. That's gonna be the deal. Is that at the end of the day if they can't get it from a responsible third-party then they are gonna have to pay it. So it, it was filling a specific need.

OWEN: But it all, it also applies to I assume situations where the employer itself is negligent and there is no third-party claim there at that deductible.?

WHISLER: That is correct. That is correct. What (interrupted)

O'NEILL: So you're saying that's the way we can read the two statutes together to prevent an _____ result. Is that, that 5.55c was only intended to apply in when there's no third-party claim available?

WHISLER: When there's no third-party claim it or when the recovery from the third-party is no sufficient to cover ultimately the employer's responsibility for repayment of the deductible amount.

BAKER: Well how do you answer their argument that under the subrogation scheme under this kind of policy that the employer is not defined as an entity that can seek subrogation as a um carrier could and does?

WHISLER: Well our answer is that the way that the Legislature created this system to work and the way that the policies are put the contracts are put together, interpreted, approved by the insurance department is such that the benefits payment program works the same way as all the other policies. There was no c change that the insurance company is responsible for the up-front payment of that those expenses.

HANKINSON: Miss, Mr. Whisler you keep saying that but we're obviously struggling with the fact that we have some specific language and statute that we have to deal with if we were to rule your way. And we have a provision statute in which this type of an employer is not listed as a person w/ subrogation rights. So I mean as a matter of statutory construction with the plain language and tact statute I mean I think we're just asking you for help in terms of how, how do we deal with that?

WHISLER: Sure. Well and the, and the, and the answer that your (interrupted)

HANKINSON: But you're off over here talking about all these other things but we have in front us plain language of the statute. We've got three provisions that that we have to look at that seem to cut against you based on the plain language. So I think the reason why we keep going back each of us keeps going back to that question that we're asking you how, how would we deal with the act of plain language of the statute?

WHISLER: I think the plain language of the statute is that and the answer is that 417 did not change. There was no change to those statutes that the rights that the Legislature gave to insurers did not change by the introductory of the deductible plan. That insurers were entitled to expect that they were going to offer a even subrogation scheme the same way the always have. They were going to pay out benefits and they were going to have a right to assert uh claims I guess responsible third-parties to the extent that they had paid out benefits.

BAKER: Plus the right to exert a claim against the employer for the deductible amount because what they paid out exceeds that.

WHISLER: If the recover is insufficient.

HANKINSON: Well and, and, and Mr. Levinger points out that (interrupted)

BAKER: No, but even if it's sufficient. Isn't it right that here Argonaut should be or has been repaid the \$250,000 deductible?

WHISLER: Well, our argument what the trial court did was grant us recovery uh the full amount of the lien – 362,000. Two hundred and fifty thousand of that represents the deductible amount so because we were able to recover all the benefits that were paid out then there would be no recourse against the employer because the responsible third-party has been responsible has responded in damages and covered all of that.

HANKINSON: But you . . . argued explained to us though that the way that this particular scheme works is that the deductible is not paid on a per quem basis but periodic payments are made. So in fact while you've uh been paying out benefits at the same time Argonaut's been receiving periodic claimants

payments from Flowers so in fact under the way that's being worked which is a little bit different the carrier's not out anything at this point in terms of needing to go recover benefits that it has paid because it's already been paid by the employer for the day.

WHISLER: Mister, Mr. Levinger is interpreting periodic payment as meaning beginning immediately. We're not reading it that way. The problem there was that they did not want the Legislature did not want the insurance companies at the end of the day go in saying Flowers Construction now please write us a \$250,000 check. That isn't going to be helpful to a small employer so they're saying when it, when it comes time due to pay then you spread it out. You . . . periodic payments means payments spread out at the time. But it does not necessarily mean beginning immediately upon payment.

PHILLIPS: Are you saying the record in this case shows that Flowers never paid anything uh on this deductible to Argonaut?

WHISLER: I would, I would, I'm not, I don't recall that there's any evidence in the record that Flowers has begun to repay anything. And I that would be (interrupted)

PHILLIPS: Is there anything else (inaudible)

WHISLER: Excuse me?

PHILLIPS: Is there any evidence either way?

WHISLER: The only evidence your Honor is the contract which says that the insurance company will go after the responsible third-parties and after deducting what could be recovered

that's how you calculate what the deductible repayment will be. Getting back to the point that by definition the deductible that the employer would owe if any.

HANKINSON: So . . .

WHISLER: Can't be understood.

HANKINSON: So unlike, unlike if I have a car accident and I need to get my car repaired I'm gonna have to pay my deductible and then get the insurance carrier to pay for the rest of my damage to the car. Under these particular plans the carrier's are footing the bill for the large deductibles over a long period of time without asking for any payment from the employer for the deductible in the interim waiting to see if there's a third-party recovery?

WHISLER: That's my understanding of the way that it works just under the terms of the contractual agreement between the parties that the insurance company says.

HANKINSON: You, you keep telling me that you can't tell us one way or another and the record does not reflect that that's what's happened in this case whether that's what we're (interrupted)

WHISLER: Uh, I would tell you your Honor I don't know what, I don't know that how that has worked with this case. I have no information that Flowers Construction was ever gonna have to repay (inaudible – shuffling papers) (interrupted)

OWEN: Section D, yes, section D is (inaudible – shuffling papers) . . . that requires the insurance company to pay the employer back the deductible if nothing is recovered from a third-party. Were those provisions approved by any state agency?

WHISLER: Was my understanding your Honor that the worker's compensation contact you can't have a form. That all worker's compensation forms have to be on forms that are approved by the governmental authority of that responsibility.

OWEN: So who approved this particular provision?

WHISLER: I believe, I believe that is the insurance department that has to approve those forms.

PHILLIPS: Thank you counsel. That concludes our account in the first cause. We'll take a brief recess.