IN THE SUPREME COURT OF THE VIRGIN ISLANDS
SCT-CIV-2022-0110

GOVERNMENT OF THE VIRGIN ISLANDS, MARK LONSKI, AND PROPERTYKING, INC.,
Appellants/Defendants,
v.
ELVIS GEORGE,
Appellee/Plaintiff.

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
CIVIL NO. ST-2021-CV-00079

APPELLANT GOVERNMENT OF THE VIRGIN ISLANDS REPLY BRIEF

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RESPONSE TO APPELLEE ELVIS GEORGE'S SUPPLEMENTAL STATEMENT OF FACTS

Appellant Government of the Virgin Islands, Department of Labor, Division of Workers' Compensation (the "Division"), files this single Reply Brief in response to Appellee Elvis George and Appellees Mark Lonski and PropertyKing, Inc.'s separately filed Briefs.

Although Appellee Elvis George states that Director Raina Thomas testified at the November 9, 2022, Hearing on All Pending Motions that "the amount of attorney's fees and costs expended in settling the case would be subtracted from the full amount of the settlement, and the balance would go to VIDOL," George's Brief, p. 1, but Commissioner Molloy testified at the same hearing that "there was no decision on my part other than that we had to follow the Code based on what was there." (JA 358:15-20.) The Superior Court acknowledged that "[t]here appears to be a disagreement as to the ultimate resolution of the meeting". (JA 257.) Therefore, George's contention that the Division admitted to agreeing to allow attorney's fees to be subtracted from the settlement funds is a fact in dispute.

ARGUMENT

I. THE TRIAL COURT DISREGARDED THE CLEAR AND UNAMBIGUOUS LANGUAGE OF 24 V.I.C. § 263 WHEN IT ORDERED THE RELEASE OF SETTLEMENT FUNDS TO GEORGE'S COUNSEL BEFORE ENSURING THAT ALL SUMS DUE THE GOVERNMENT WERE SECURED.

a. Section 263 does not require the Division to be responsible for paying an injured employee's attorney's fees.

The real issue argued by the Appellees is not **whether** the Division is entitled to be reimbursed from the settlement funds under 24 V.I.C. § 263.[1] Instead, the

[1] 24 V.I.C. § 263. Liability of third persons; subrogation

In cases where the injury, the occupational disease or the death entitling the workman or employee or his beneficiaries to compensation in accordance with this chapter has been cause under circumstances making third persons responsible for such injury, disease or death, the injured workman or employee or his beneficiaries may claim and recover damages from the third person responsible for said injury, disease, or death within two years following the date of the injury. The Administrator may subrogate himself to the rights of the workman or employee or his beneficiaries to institute the same action in the following manner:

When an injured workman or employee, or his beneficiaries in case of death, may be entitled to institute an action for damages against a third person in cases where the Government Insurance Fund, in accordance with the terms of this chapter, is obliged to compensate in any manner or to furnish treatment, the Administrator shall subrogate himself to the rights of the workman or employee or of his beneficiaries, and may institute proceedings against such third person in the name of the injured workman or employee or of his beneficiaries, within two years following the date of the injury, and any sum which as a result of the action, or by virtue of a judicial compromise, may be obtained in excess of the expenses incurred in the case shall be delivered to the injured workman or employee or to his beneficiaries entitled thereto. The workman or employee or his beneficiaries shall be parties in every proceeding instituted by the Administrator under the provisions or this section, and it shall be

concern raised by the Appellees is whether the Division is responsible for paying an injured employee's attorney's fees if the employee elects to pursue their own claim against a third-party tortfeasor.

George indicates that allowing the Division to "[t]ak[e] advantage of the time and effort of Mr. George and his attorney, is… a windfall to the Government."

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the duty of the Administrator to serve written notice on them of such proceedings within five days after the action is instituted.

The injured workman or employee or his beneficiaries may not institute any action, nor may compromise any right of action they may have against the third person responsible for the damages, unless the Administrator is a party to the action or agrees to the compromise, but the failure to join the Administrator shall not deprive the courts of jurisdiction over the claim or otherwise result in dismissal of the claim, so long as the injured worker or employee acknowledges that all sums due the Government Insurance Fund are secured by any recovery.

No compromise between the injured workman or employee, or his beneficiaries in case of death, and the third person responsible shall be valid or effective in law unless the expenses incurred by the Government Insurance Fund in the case are first paid. No judgment shall be entered in actions of this nature and no compromise whatsoever as to the rights of parties to said actions shall be approved, without making express reserve of the rights of the Government Insurance Fund to reimbursement of all expenses incurred. The clerk of the court taking cognizance of any claim of the above-described nature, shall notify the Administrator of any order entered by the case, as well as the final deposition thereof.

The Administrator may compromise as to his rights against a third party responsible for the damages. No such extrajudicial compromise, however, shall affect the rights of the workman or employee, or of his beneficiaries, without their express consent and approval.

Any sum obtained by the Administrator through the means provided in this section shall be covered into the Government Insurance Fund.

George's Brief, p. 10. However, a "windfall" involves an "an unexpected, unearned, or sudden gain or advantage, "Marriam-Webster, "windfall," and the Division's pursuit of monies due it is hardly, "unexpected, unearned, or sudden." The Division is not obligated to forgo monies it is owed when an injured party was unable to obtain a settlement that covers all costs, expenses, and attorney's fees, and the Division is not obliged to cover their counsel's risk in taking on a personal injury case. Thus, if injured parties are allowed to subtract money the claimant owes to its counsel from money it first owes to the Division, the injured employee indeed enjoys a windfall at the expense of the Division. Ordering the Division to in effect pay a claimant's attorney's fees violates both the plain language of the statute and, here, George's agreement to be responsible for the fees himself. (Settlement Agreement, JA 75. ("Each party shall bear its own costs, expenses and attorneys' fees".)

Although George argues that the Division is not harmed when it does not receive back the monies it expends on an injured party's behalf because the Government Insurance Fund is financed by employer premiums, George's Brief, pp. 10-11, employer premiums are not sufficient to cover the amount of money the Division expends on behalf of injured employees:

> An employee shall be entitled to a maximum of $75,000 in benefits …, except that in cases determined by the Administrator to require specialized medical attendance in institutions outside of the Virgin Islands, the maximum allowable benefit shall be $200,000. … [A]n employee classified … as a member of any Class III bargaining unit

> that consists of police officers, corrections officers, firefighters, prison guards, or other persons employed in similar positions to protect the public safety and welfare …, who is injured in the line of duty, is entitled to a maximum allowable benefit of $750,000, of which the first $250,000 must be covered by the Government Insurance Fund.

24 V.I.C. § 254a.

Thus, the Division could be responsible for upwards of $250,000 in benefits per injured employee, while, for example, a total salary of $84,240.00 would reap only a $2,653.55 yearly premium to be paid by an employer into the Government Insurance Fund. *See* "Your Guide to [Virgin Islands] Workers' Compensation Insurance," p. 40, https://dof.vi.gov/ (last accessed April 24, 2023); *see also* The St. Thomas Source, "Department of Finance Government Insurance Fund to Increase Premium Rate," September 30, 2019, https://stthomassource.com/ ("Over the last 20 years, the Virgin Islands Government Insurance Fund has collected Workers Compensation premiums below market rates. These premiums are used to make adequate and timely payments to employees who suffer work-related injuries and file claims with the Workers Compensation Administration. In order to continue providing these benefits to the workers of the U.S. Virgin Islands and return the fund to solvency, there will be a premium rate increase") (last accessed April 24, 2023). The Commissioner testified that the "Fund has been in the red" and the Division is trying to rebuild the Workers' Compensation program. (JA 216 and 218.)

Because the Division is not responsible for paying elective attorney's fees, the Division should be paid the entirety of the settlement funds. (JA 68.)

b. The Division is not required to initiate a claim on an injured employee's behalf.

The Appellees reference several times the Division's decision not to first pursue a claim against the third-party tortfeasor on George's behalf. However, the clear and permissive language of Section 263 indicates that the Division does not have to institute such a suit on behalf of the injured claimant against a third-party:

> When an injured workman or employee … may be entitled to institute an action for damages against a third person in cases where the Government Insurance Fund, … is obliged to compensate in any manner or to furnish treatment, the Administrator … *may* institute proceedings against such third person in the name of the injured workman …, within two years following the date of the injury….

24 V.I.C. § 263. (emphasis added).

The Division has the same right to seek damages from a third-party tortfeasor that the injured employee has – and neither the Division nor the injured employee are required to file a lawsuit.

c. The statute of limitations sets a time limitation on when the Division can initiate suit, not on when the Division can enforce its right to recompense.

George argues that the Superior Court was right to deny the motion to intervene "because the two-year period for [the Division] to have instituted a third-

party action" had run. George's Brief, p. 4. The Superior Court similarly noted that "[i]t is… clear from the record that two years have passed since Plaintiff's injuries." (JA 259.)

Section 263 indicates that if the Division elects to file a complaint on an injured party's behalf, it must do so within two (2) years, but the section does not state that the Division's right to the sums due disappears if it does not pursue the funds within two (2) years: "[T]he Administrator shall subrogate himself to the rights of the workman …and may institute proceedings against such third person in the name of the injured workman or employee or of his beneficiaries, within two years following the date of the injury". Indeed, Section 263 dictates that "[n]o judgment shall be entered in actions of this nature and no compromise whatsoever as to the rights of parties to said actions shall be approved, without making express reserve of the rights of the Government Insurance Fund to reimbursement of all expenses incurred," even if the Division is not joined in the action. Therefore, the Division's right to pursue its lien on the funds had not expired and the Division was entitled to pursue the funds due.

d. The Division is not required to participate in a lawsuit to enforce its rights to sums due under Section 263.

Similarly, the Appellees argue that the Division slept on its rights because it did not participate in mediation. However, the Division is not required to participate in the lawsuit to enforce its rights under the statute:

> The injured workman … may not institute any action, nor may compromise any right of action they may have against the third person responsible for the damages, unless the Administrator is a party to the action or agrees to the compromise, but the failure to join the Administrator shall not deprive the courts of jurisdiction over the claim or otherwise result in dismissal of the claim, *so long as the injured worker or employee acknowledges that all sums due the Government Insurance Fund are secured by any recovery.*

24 V.I.C. § 263 (emphasis added).

Under the plain language of the statute, the Division is entitled to payment of the sums due to it even if it is not joined as a party and even if it does not agree to a compromise.

e. Practice and policy are not law.

George contends that the Superior Court's order should be upheld because "the Commissioner of Labor attempted to change [the Division's] past practice and policy of compromising the amount of its lien." George's Brief, p. 9. However, the statute makes it clear that the Division *may*, but is not required to, choose to

compromise its rights to settlement funds: "The Administrator may compromise as to his rights against a third party responsible for the damages."

Unlike Section 263, practice and policy are not law. *See, for example, Tracy J. v. Kijakazi, No*. 2:21-cv-00249-DBB-JCB, 2022 U.S. Dist. LEXIS 104410, at *11 n.53 (D. Utah May 20, 2022), citing *Vietnam Veterans of Am. v. Sec. of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988) ("Finding that even though agency policy was binding against its employees, as far as the court is concerned, 'the agency remains free in any particular case to diverge from whatever outcome the policy statement or interpretive rule might suggest because policy is not law").

Therefore, under the law, if a settlement is reached, the Division may elect to collect its share of the settlement or compromise its rights to the settlement.

II. THE SUPERIOR COURT ERRED WHEN IT DENIED THE GOVERNMENT'S MOTION TO INTERVENE.

George argues that the Division was not entitled to intervene once it discovered that George was intending on paying his attorney before distributing his settlement funds to the Division. However, intervention as of right is appropriate for just such a situation, where the parties had not initially joined the Division, the parties had already indicated an intent to distribute the funds outside of the requirements of Section 263, and where "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing

parties adequately rep-resent that interest." Virgin Islands Rules of Civil Procedure 24(2).

As stated above, under Section 263, an injured government employee is allowed to file a lawsuit if that individual chooses to seek additional damages. However, while a lawsuit is allowed under Section 263, compliance with the Section is required:

> The injured workman or employee or his beneficiaries may not institute any action, nor may compromise any right of action they may have against the third person responsible for the damages, unless the Administrator is a party to the action or agrees to the compromise, but the failure to join the Administrator shall not deprive the courts of jurisdiction over the claim or otherwise result in dismissal of the claim, *so long as the injured worker or employee acknowledges that all sums due the Government Insurance Fund are secured by any recovery.*

24 V.I.C. § 263. (emphasis added).

Thus, a claimant is allowed to file a lawsuit but is also required to comply with Section 263 when distributing any settlement funds. Therefore, the injured employee cannot elect to first settlement funds to their attorney before ensuring payments due the Division.

III. THE SUPERIOR COURT ERRED WHEN IT ORDERED THE GOVERNMENT TO EXECUTE A GENERAL RELEASE BECAUSE ONLY THE GOVERNMENT MAY ELECT TO COMPROMISE ITS RIGHTS TO RECOVER FROM THIRD PARTY TORTFEASORS.

a. Whether the Division previously agreed to subtract attorney's fees from settlement funds is irrelevant because the Division is not required to do so.

That the Division previously "received tenders of settlement from [Plaintiff's attorneys] equal to the amount of the settlement less attorney's fees," George's Brief, p. 1., does not bind the Division to elect to accept settlement funds minus plaintiff's attorney's fees in every case. Under 24 V.I.C. § 263, the Division may elect to pursue a claim on an injured employee's behalf in order to recoup monies the Division expended on the claimant's behalf. ("[T]he Administrator … may institute proceedings against such third person in the name of the injured workman or employee or of his beneficiaries".)

Although it is commendable that George's counsel indicates that she offered to "give her client part of the amount of any fee recovered," George's Brief, p. 2, the money she seeks to "donate" is not even her own when, as here, the settlement amount is not sufficient to cover the lien owed to the Division.

Section 263 and the Division's exercise of its right to compromise previously does not amount to a requirement that the Division subrogate its rights to the injured party's attorney's claim for attorney's fees.

b. The Division is not obligated to negotiate away its right to be paid first from the settlement funds.

George cites *Gov't of V.I. v. Garvey*, No. 7/1985, 1990 V.I. LEXIS 30 (Terr. V.I. Oct. 4, 1990), and *Jennings v. Richards*, 31 V.I. 188, 191 (D.V.I.1995), in support of his contention that Division is required to compromise its claims. Neither *Garvey* nor *Jennings* are precedential or binding, and neither required the Division to be responsible for the entirety of the attorney's fees and expenses, as George proposes here. The District Court and the then Territorial Court may have reached this conclusion because until 2002, Section 263 required the Division to be listed as a party to a suit brought by an injured employee against a third-party tortfeasor. In 2002 the Legislature amended the section to indicate that "the failure to join the Administrator shall not deprive the courts of jurisdiction over the claim or otherwise result in dismissal of the claim, so long as the injured worker or employee acknowledges that all sums due the Government Insurance Fund are se-cured by any recovery."

The statute is clear: "No compromise between the injured workman or employee, or his beneficiaries in case of death, and the third person responsible shall be valid or effective in law unless the expenses incurred by the Government Insurance Fund in the case are first paid." Therefore, the Division cannot be forced to compromise its claims to the funds to pay for the injured employee's elective attorney's fees.

IV. THE SUPERIOR COURT'S ACTIONS VIOLATE THE SEPARATION OF POWERS PRINCIPALS INHERENT IN THE REVISED ORGANIC ACT.

George argues that "the Government's unwillingness to participate in mediation of the third-party claim, the Commissioner of Labor's unwillingness to engage in a serious discussion of its lien on the settlement amount notwithstanding its statutory authority to compromise the amount of its recovery and [the Division's] past practice of compromising the amount of its recovery, the fact that counsel for Appellee [George] obtained a recovery for GVI that was $400.00 more than what the Government could have achieved if it had timely filed a suit or approached Mr. Lonski and PropertyKing, Inc., about a claim, and the fact that the Government did not dispute the amounted Mr. George expended in pursuing the third-party claim – the interpleader fund should be distributed to the Government in an amount equal to the amount of costs and attorney's fees expended." George's Brief, pp. 8-9. In sum, George argues that the Division should be forced to compromise its claim to the funds as punishment for not meeting a litany of actions that it is not required to meet anywhere in the statute.

Additionally, the Superior Court and George advocate that the Division should alert the Bar that the Division would be more consistently enforcing its rights under 24 V.I.C. § 263 instead of foregoing its rights to funds equal to the amounts due a plaintiff's attorney. George's Brief, pp. 1-2 ("Director Thomas further stated

that she was not aware whether or not [the Division] had sent written notice to members of the Virgin Islands Bar that [the Division] would expect to receive the entire amount of any settlement received by a plaintiff in any third-party litigation.") and JA 260, n. 3 ("This Court notes that perhaps, in an abundance of caution, the [Division] should [put] the legal community on notice that this past practice and procedure will no longer be recognized by the [Division].").

But "[t]his Court has repeatedly cautioned that policy arguments cannot serve as justification for creating an ambiguity in an otherwise unambiguous statute or for otherwise disregarding the statute as written by the Legislature." *Atl. Human Res. Advisors, LLC v. Espersen*, 76 V.I. 583, 604 (V.I. 2022) (citations omitted). Section 263 is unambiguous regarding the Division's right to be reimbursed: "any sum which as a result of the action [instituted by the Division], or by virtue of a judicial compromise, may be obtained in excess of the expenses incurred in the case shall be delivered to the injured workman or employee or to his beneficiaries entitled thereto," "the failure to join the Administrator shall not deprive the courts of jurisdiction over the claim or otherwise result in dismissal of the claim, so long as the injured worker or employee acknowledges that all sums due the Government Insurance Fund are secured by any recovery," "[n]o compromise between the injured workman or employee, or his beneficiaries in case of death, and the third person responsible shall be valid or effective in law unless the expenses incurred by the

Government Insurance Fund in the case are first paid," and "[n]o judgment shall be entered in actions of this nature and no compromise whatsoever as to the rights of parties to said actions shall be approved, with-out making express reserve of the rights of the Government Insurance Fund to reimbursement of all expenses incurred."

The Superior Court ordered the Division to compromise its claim without its consent, in violation of the plain language of the statute, asserting that because the Division has compromised in the past, it would continue to do so here, stating that it made this decision based on equitable principals. (JA 256.) "It is axiomatic that equitable relief is only available where there is no adequate remedy at law." *3RC & Co. v. Boynes Trucking Sys*., 63 V.I. 544, 554 (2015) (citation omitted). Equity, then, is not a substitute for following the law.

While "interpretation of a statute… is unquestionably within the jurisdiction of the Judicial Branch of the Virgin Islands," *Balboni v. Ranger Am. of the V.I.*, 70 V.I. 1048, 1085 (V.I. 2019) (citations omitted), when the plain language of a statute discloses the legislative intent, the interpretive inquiry is over. *In re Sherman*, 49 V.I. 452, 456 (V.I. 2008). Thus, when the statutory language is unambiguous, as it is here, this Court should find that the Superior Court erroneously violated the separation of powers doctrine when it circumvented the Legislature's clear intent

that the Division retain a statutory right to first consent to any distribution of settlement funds.

CONCLUSION

The parties do not dispute that the Division expended Sixty-One Thousand Two-Hundred and Five Dollars and Twenty-Seven Cents ($61,205.27) on George's behalf and that 24 V.I.C. 263 is applicable to George's claim. Appellees ask that the judicial system disregard the plain language of the statute because the Division had at times been more lenient with its statutory rights in the past when the Division exercised its alternate right to compromise. The Superior Court's order should be vacated, and this Court should find that the Division should be awarded the entire amount of the settlement funds in this matter.

Respectfully submitted,

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Dated: April 25, 2023

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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of the Supreme Court of the Virgin Islands under Virgin Islands Bar Number 1149.

/s/ *Tracy Myers*

CERTIFICATION OF COMPLIANCE WITH LENGTH LIMITATIONS

I hereby certify that the foregoing brief complies with the limitations on the number of words as provided in the V.I.R.APP. 22(f) in that the brief, exclusive of pages containing the table of contents and the table of authorities, contains 3875 words.

/s/ *Tracy Myers*

CERTIFICATE OF SERVICE

The other parties are represented by a Filing User. I hereby certify that on April 25, 2023, a true and exact copy of the foregoing was sent via VISCEFS to:

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