

BENJAMIN B. WOMACK, Employee, v. FIKES OF MINN. and W. NAT'L MUT. GRP.,
Employer-Insurer/Appellants, and AMCO INS. CO., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 12, 2001

No. [REDACTED SSN]

HEADNOTES

THIRD PARTY ACTIONS - SUBROGATION. Where an employee fails to give notice of institution of a third-party action or notice of trial, and the employee obtains a verdict and recovery after trial, the employer and insurer shall be entitled to a credit against future workers' compensation benefits owed. The credit shall be calculated by reducing the verdict by the cost of recovery. The deduction of one-third of the net recovery under the formula in Minn. Stat. § 176.061, subd. 6, or deduction for non-subrogable damages, per Henning v. Wineman, 306 N.W.2d 550, 33 W.C.D. 545 (Minn. 1981), shall not be permitted in calculating the credit.

Reversed.

Determined by Wheeler, C.J., Johnson, J., and Pederson, J.
Compensation Judge: Peggy A. Brenden.

OPINION

STEVEN D. WHEELER, Judge

The employer appeals the compensation judge's determination of the amount of credit to which it is entitled as a result of the jury verdict award in favor of the employee in a third-party lawsuit. We reverse.

BACKGROUND

The employee, Benjamin B. Womack, worked for the employer, Fikes of Minnesota, as a route sales technician, servicing equipment and providing bathroom supplies to establishments in the northern suburbs of the Twin Cities. He was first employed by Fikes in 1991. On March 14, 1997, after he had completed his sales route, had finished paperwork and picked up supplies at the sales office, he was injured in a motor vehicle accident while en route to his home. At the time of the injury, the employee was 36 years of age and had a weekly wage of \$427.69.

Following the accident, the employee was immediately provided with medical care and was totally disabled. He did not return to work until April 15, 1997. The employee made a claim for medical expenses and wage loss benefits through his personal automobile no-fault insurance carrier, AMCO Insurance. AMCO paid wage loss benefits at the rate of \$250.00 per week for the period of the employee's total disability, in the total amount of \$1,118.95. AMCO paid medical expenses for care by the emergency care facility at Pro Urgent Care and for

chiropractor Gregory Holmberg and the Noran Clinic through August of 1998. The total amount paid in healthcare expenses by AMCO was \$8,218.24.

The employee was first seen by Dr. Holmberg on March 19, 1997, and then approximately 80 more times through the last known treatment in December 1999. Initially, the employee was treated by Dr. Holmberg on an almost daily basis. Over time, the frequency of treatments was reduced to several times per week and by 1998 treatment was less than monthly. The employee was first seen at the Noran Clinic on April 16, 1997. An MRI, an EEG and a brain stem test were performed on the employee, all of which were read as normal. X-rays of the employee's spine indicated that the employee's condition was normal, with the exception of a congenital fusion of several of the employee's cervical vertebra and some mild endplate irregularities in the thoracic spine. Dr. Steven Noran, a neurologist, diagnosed a closed-head injury and a cervical strain. The employee was followed by the Noran Clinic on an intermittent basis, with the last recorded examination by Dr. Noran on August 26, 1999. A cervical MRI requested by Dr. Noran and performed on August 17, 1999 indicated that the employee had no cervical disc herniations and no stenosis. It did disclose a congenital fusion of the C3-4 vertebra. It also showed that the employee had mild degenerative disc disease at C5-6 and mild marginal spurring and disc bulging at C5-6, with no nerve impingement. The employee was last seen by a physician's assistant at the clinic on November 29, 1999.

The employee did not realize that his March 14, 1997 car accident was potentially work-related until approximately 18 months after the accident. Within a short period after being informed of the possibility of workers' compensation coverage, he notified the employer of his potential claim. At some point after the accident, the employee contacted a personal injury attorney who instituted a suit against the driver of the vehicle which had caused the accident in March of 1997. During the pendency of this action, in December 1999, the employee, using a different attorney, filed a claim petition, seeking workers' compensation benefits. The employer and insurer denied liability, contending that the employee had failed to give timely notice and had not been in the course and scope of his employment at the time of the accident. The employee did not notify the employer or its workers' compensation insurer of the institution or pendency of the third-party action. The third party action proceeded to trial in late February 2000. The employee did not notify the employer or insurer that the trial was proceeding. A special verdict was issued as a result of that trial, in which the jury found that the third party was negligent, that the negligence caused the employee to sustain a nonpermanent injury on March 14, 1997, and that the employee was entitled to total damages of \$14,410.00, comprised of the following elements:

(1)	Past pain, disability and emotional distress	\$3,950.00
(2) a.	Past healthcare expenses? Medical (not including x-rays or MRI examination)	\$5,000.00
b.	X-rays	\$ 396.00
c.	MRI examination	\$2,364.00
(3)	Past wage loss	\$ 700.00
(4)	Future pain, disability and emotional distress	\$2,000.00

(Pet. Ex. 6.) Following the issuance of this verdict on February 24, 2000, the attorney for the employee consulted with the attorney representing the defendant in the third-party action and it

was determined that the employee was entitled to a net verdict of \$7,162.93. In reaching that figure, the \$14,410.00 verdict was reduced by the amount of the medical and wage loss payments made by the no-fault carrier, \$6,547.07¹ and \$700.00, respectively. Pursuant to the collateral source statute, the third party was not required to reimburse the no-fault carrier for these expenses. Minn. Stat. § 548.36. Rather than having judgment entered on the verdict, the parties to the personal injury suit simply agreed to pay the amount that would have been required had a judgment been filed. On March 31, 2000, the employee was paid \$9,746.29, representing the net verdict plus \$2,583.36 to reimburse the employee's attorney for costs and disbursements. The employee signed a release of all claims against the third-party. (Resp. Ex. 2.) Later, the employee used the \$7,162.93 verdict to pay the contingent attorney fees of \$2,456.14 and out-of-pocket medical expenses of \$2,015.02 (representing payments to Blue Cross, Noran Clinic and Holmberg Chiropractic). The remaining balance of \$1,917.23 was paid directly to the employee.

The employer in this case maintained its denial of primary liability, and the employee's claim for workers' compensation benefits proceeded to hearing before a compensation judge at the Office of Administrative Hearings on November 16, 2000. The compensation judge, in her Findings and Order of December 7, 2000, determined that the employee had given timely notice of injury and was in the course and scope of his employment at the time of the accident on March 14, 1997. She awarded temporary total disability benefits from March 14 through April 14, 1997, in the amount of \$1,283.04, representing 4.5 weeks at \$285.12 per week. She found that the medical services provided by the Noran Clinic through November 29, 1999, were reasonable and necessary. She further determined that not all of the services of chiropractor Holmberg were reasonable and necessary. She awarded payment for the treatments rendered through April 30, 1997, and for the services provided on May 21, June 13, July 21, and August 20. All of the remaining treatments were found to be not reasonable and necessary. She ordered that the no-fault carrier, AMCO, should be reimbursed for the wage loss benefits it had paid, \$1,118.95, less Edquist attorney fees.² She also awarded AMCO reimbursement for most of its claim for medical expenses in the amount of \$7,924.53, plus statutory interest.³ She determined that the employer

¹ The medical expenses awarded by the jury included a charge for two MRI scans. The charge for the MRI done in August 1999, \$1,212.93, was not paid by the no-fault carrier. As a result, while included in the damages awarded by the jury, this amount was not deducted from the verdict to be paid by the third party. This amount was subsequently paid to the healthcare provider, the Noran Clinic, by the employee from the payment made to the employee after the verdict.

² Edquist v. Browning-Ferris, 380 N.W.2d 787, 38 W.C.D. 411 (Minn. 1986).

³ Included in the amount of reimbursement of medical expenses ordered to be paid to AMCO was \$4,077.22 for payments made to the Noran Clinic. (Order 2.) This appears to be an error since the bills from the Noran Clinic approved by the compensation judge in her findings (Exhibit A2) total \$4,118.23, and include several charges for services which were provided after August 1998 when AMCO made its last payment. These include the charges for services on January 18, August 5, August 17, August 19, August 26 and November 29, 1999. (See EE Ex. A2 and Ex. A to AMCO's Motion to Intervene.) Apparently these bills were all paid, but not by AMCO. (For example, we know that the employee paid the Noran Clinic \$1,212.93 for the August 19, 1999 MRI from the proceeds of the verdict.) The employer and insurer should

was entitled to a credit of \$2,824.76 against workers' compensation benefits payable to the employee as a result of the amounts received by the employee from the verdict in the third-party action. In making this determination, the judge agreed with the employee that an allocation under the supreme court decision in Henning v. Wineman, 306 N.W.2d 550, 33 W.C.D. 545 (Minn. 1981), would be appropriate. The employer appeals from the amount of the credit awarded.

STANDARD OF REVIEW

“[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo.” Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

The parties agree that the employer is entitled to a credit against workers' compensation benefits as a result of the employee's failure to notify the employer and insurer of the institution of suit and of trial and his subsequent recovery in the third-party action. The parties disagree about the proper method for determining the amount of the credit and how it may be used. The employer contends, based on Easterlin v. State, 330 N.W.2d 704, 35 W.C.D. 650 (Minn. 1983), the credit should be in the amount of the net verdict obtained in the third-party action (\$7,162.93) and should be taken dollar for dollar against benefits payable to the employee or any provider. The employee argues that the Easterlin decision does not apply and the employer is only entitled to the lesser of either the credit calculated in the formula provided in Minn. Stat. § 176.061, subd. 6,⁴ or the credit calculated as a result of the performance of a Henning allocation by a

reimburse whoever paid these bills. Order 2 is modified to require reimbursement to AMCO only for the amounts paid by AMCO to cover the costs at the Noran Clinic. If the parties are not able to determine the appropriate adjustments to Order 2, the matter should be returned to the compensation judge for a final resolution.

⁴ The statutory formula in Minn. Stat. § 176.061, subd. 6, provides as follows:

Costs, attorney fees, expenses. The proceeds of all actions for damages or of a settlement of an action under this section, except for damages received under subdivision 5, clause (b) received by the injured employee or the employee's dependents or by the employer or the special compensation fund, as provided by subdivision 5, shall be divided as follows:

(a) After deducting the reasonable cost of collection, including but not limited to attorneys fees and burial expense in excess of the statutory liability, then

(b) One-third of the remainder shall in any event be paid to the injured employee or the employee's dependents, without being subject to any right of subrogation.

(c) Out of the balance remaining, the employer or the special compensation fund shall be reimbursed in an amount equal to all benefits paid under this chapter to or on behalf of the

compensation judge or a district court judge.⁵ The selection of whether to use the formula or the Henning allocation method would be at the option of the employee. (EE's brief at 3-4.)

In reaching her conclusion that the employer's credit from the third-party action is limited to \$2,824.76, the compensation judge set forth the following credit calculation in her memorandum:

I agree with the employee, that Henning v. Wineman, 306 NW2d 550 (1981) governs the credit calculation in this case. I apply Henning as follows:

Verdict damages recoverable under worker's compensation

Health care expenses:	\$7760
Past wage loss:	<u>\$ 700</u>
	\$8466 (Employee Exhibit 6)

Fees/costs attributable to recoverable workers compensation benefits: \$3123.18

(Total recoverable under workers compensation (\$8466)/total verdict (\$14410) = 60%. Total costs (\$5205.30) x 60% = \$3123.18.)

employee or the employee's dependents by the employer or special compensation fund, less the product of the costs deducted under clause (a) divided by the total proceeds received by the employee or dependents from the other party multiplied by all benefits paid by the employer or the special compensation fund to the employee or the employee's dependents.

(d) Any balance remaining shall be paid to the employee or the employee's dependents, and shall be a credit to the employer or the special compensation fund for any benefits which the employer or the special compensation fund is obligated to pay, but has not paid, and for any benefits that the employer or the special compensation fund is obligated to make in the future.

There shall be no reimbursement or credit to the employer or to the special compensation fund for interest or penalties.

⁵ In the Henning decision, the supreme court stated that where an employee entitled to workers' compensation benefits also receives a recovery from a third-party tortfeasor, the employee has the option to protect certain portions of the recovery from the subrogation claims of the workers' compensation insurer. Using the step-by-step approach set forth in Minn. Stat. § 176.061, subd. 6, after the net recovery (total recovery less cost of recovery) has been determined (Step 6(a)), the employee can choose to segregate or protect either one-third of the net recovery amount or all the non-subrogable damages contained in the total recovery. The amount to be protected is subtracted from the net recovery and paid to the employee in Step 6(b). The balance remaining is available for payment to the employer and/or can be used to calculate a credit to the employer under subdivisions 6(c) and 6(d).

\$8466.00

-\$3123.18

\$5342.82 = the “balance remaining” referenced in M.S. 176.061 sub. 6(c). No allowance is made for the employee’s statutory right to one third of the recovery pursuant to Henning, supra, pgs. 552-553.

The employee’s credit:

$$\$5342.82 - \$3123.18 / \$8466 \times \$7924.53 = \$2932.08.$$
 (M.S. 176.061 sub. 6(c) and (d).

The compensation judge did not indicate why she felt an application of the Henning allocation process was appropriate or why she did not apply the Easterlin principles, as requested by the employer. She simply provided the calculation set forth above.

The parties also agree that the employer was entitled to notice of the institution of the third-party action and notice of the trial pursuant to Minn. Stat. § 176.061, subd. 8(a). They disagree about the consequences to the employee for failure to give the required notice. Minn. Stat. § 176.061, subd. 8(a), provides as follows:

Notice to employer. In every case arising under subdivision 5, a settlement between the third party and the employee is not valid unless prior notice of the intention to settle is given to the employer within a reasonable time. If the employer or insurer pays compensation to the employee under the provisions of this chapter and becomes subrogated to the right of the employee or the employee’s dependents or has a right of indemnity, any settlement between the employee or the employee’s dependents and the third party is void as against the employer’s right of subrogation or indemnity. When an action at law is instituted by an employee or the employee’s dependents against a third party for recovery of damages, a copy of the complaint and notice of trial or note of issue in the action shall be served on the employer or insurer. Any judgment rendered in the action is subject to a lien of the employer for the amount to which it is entitled to be subrogated or indemnified under the provisions of subdivision 5.

From the standpoint of importance to the process of protecting an employer’s subrogation rights, the requirement to provide notice of an intention to settle is essentially equivalent to the requirement to provide notice of the institution of suit or notice of trial. As a result, the consequences for failure to give notice of institution of suit or of trial should be the same as for a failure to give notice of an intention to settle. The supreme court, the court of appeals and this court have not addressed a case in which the employee failed to give notice of the institution of a third-party action or of trial but have issued a number of decisions in cases where the employee

has failed to provide notice of an intention to settle the third-party action. All have involved situations where the settlement negotiations have resulted in a so-called Naig settlement.⁶ While these decisions are helpful, they do not provide complete direction concerning the method for determining the amount of the credit to be given the employer and insurer or how it can be used.

The first such decision after the Naig decision was Easterlin. The Easterlin court explained that, while in a Naig settlement, an employee settles only those claims not subject to subrogation by the employer, the employee's settlement with a tortfeasor might lead to subsequent prejudice when the employer seeks to enforce its rights. In addition, the court believed such notice was necessary to "encourage complete rather than piecemeal settlements." The court noted that the requirement to provide the notice was "hardly an onerous chore." Accordingly, the supreme court reasoned that the "the employer should not be denied whatever tactical advantage there might be in attempting to settle its subrogation claim at the same time the employee is settling his claim for non-workers' compensation damages . . . [It is important] that every reasonable effort be made to avoid a multiplicity of lawsuits." Easterlin at 707-08, 35 W.C.D. at 655-57.⁷ In Easterlin, the supreme court held that the lack of notice of settlement negotiations was "presumptively prejudicial to the employer, and if the presumption is not rebutted by the employee, the employer is entitled to a credit for future compensation payable against the employee's Naig settlement recovery." Id. at 708, 35 W.C.D. at 657 (emphasis added). From this language, the employer argues that when the employer has not been given a notice required by Minn. Stat. § 176.061, subd. 8(a), that the employer is entitled to a credit equal to the employee's entire recovery from the tortfeasor and that the credit can be taken dollar-for-dollar against future benefits payable to any payee. It argues that Easterlin holds that, because in a Naig settlement situation all the non-subrogable damages recovered are subject to being used for a credit, all amounts recovered in a third-party action which goes to verdict are also to be used to provide a future credit to the employer.

⁶ Naig v. Bloomington Sanitation, 258 N.W.2d 891, 30 W.C.D. 12 (Minn. 1977). A Naig settlement is one in which an injured employee settles with a third-party for those claims which are not compensable under the workers' compensation act. The concept that an employer would be entitled to a credit from a settlement recovery in the third-party action, even those which represented damages not recoverable under the workers' compensation act, was articulated by the supreme court in the Naig decision. The court stated, "If the employer is notified of such settlement negotiations and if the employee demonstrates that the resulting settlement compromises only damages not recoverable under workers' compensation . . . the employer cannot credit the nonrecoverable portion of the settlement against compensation benefits." Id. at 894 (emphasis added). This language suggests that if the employee does not give notice of an intention to settle, that the portion of the settlement not recoverable under the workers' compensation act would no longer be protected from being used to reimburse the employer for past workers' compensation payments and to calculate a credit to be given the employer against compensation payments payable by the employer in the future.

⁷ The notice requirement adopted in Easterlin was codified by the enactment of Minn. Stat. § 176.061, subd. 8(a), in 1983.

The employee, however, argues that whatever penalty is required by Easterlin cannot be invoked because the employer was not prejudiced by the employee's failure to give notice of the institution of suit. The employee points out that the matter went to trial and a verdict was reached which established the third party's negligence. The employee also contends that the compensation judge resolved the issue of prejudice against the employer when she did not rule on the employer's claim that it had been prejudiced. (EE's brief at 11-12.) The employer counters by arguing that the employee has offered no evidence to rebut the presumption of prejudice. The employer contends it is prejudiced because it is still required to institute suit and that it is not clear to what extent the verdict would be binding in that suit. At a minimum, the employer argues it would still be required to prove its past and future workers' compensation liability. Tyroll v. Private Label Chemicals, Inc., 505 N.W.2d 54 (Minn. 1993). The employer claims it would need the assistance of the employee, who may have no interest in participating. In addition, the employer argues that by failure to give the required notice, the employer was denied the opportunity to admit workers' compensation liability, pay the benefits and be reimbursed through settlement or trial in the employee's name. The compensation judge's decision does not indicate that she considered the issue of whether the employee had rebutted the presumption of prejudice. We do not believe it necessary to remand the matter as the employee's arguments are not compelling.⁸ As a result, we find that the employer is entitled to a credit in keeping with the Easterlin decision.

In the alternative, the employee argues that if Easterlin does apply that the credit referred to in the decision should be calculated by applying the credit calculation found in Minn. Stat. § 176.101, subd. 6, or its counterpart developed in the Henning decision.

How to calculate the credit called for in Easterlin is an issue of first impression. It is not clear that the supreme court in Easterlin addressed the issues raised in this case. In addition, decisions of this court and the Minnesota Court of Appeals which have involved the question of the employer's entitlement to a credit after failure of an employee to give notice of settlement negotiations prior to a Naig settlement have not squarely dealt with the issue. The best that can be said of these decisions is that this court and the Court of Appeals have issued decisions which have effectively granted credits to the employer based on a multiplicity of possible calculation methods.⁹ In the Ruddy decision, the court of appeals rejected the use of the formula in section 176.061, subd. 6, to require direct payment from the Naig settlement and remanded the matter for the "calculation of the credit to which the employer is entitled." Ruddy at 636. Unfortunately, the court did not indicate how the credit was to be calculated. In each of these cases, including

⁸ While the compensation judge did not rule on the issue of whether the presumption of prejudice had been rebutted, we find no basis for such a finding in the record and see no reason to remand for a review of that issue. We note that the employee's post-trial brief to the compensation judge did not contain an argument that the presumption of prejudice had been rebutted. This issue was only raised on appeal.

⁹ Hozouri v. Walser Imports, Inc., slip op. (W.C.C.A. Apr. 5, 1994); Risdal v. Independent Sch. Dist. #146, slip op. (W.C.C.A. Apr. 6, 2000), Minnich v. Isenberg Equip., Inc., slip op. (W.C.C.A. Feb. 21, 2001), and Ruddy v. Ford Motor Co., 399 N.W.2d 634 (Minn. Ct. App. 1987).

Easterlin, it does not appear that there was a dispute between the parties concerning the amount of the credit or how it would be used.

We agree with the employer and insurer that when the employee fails to give notice as required by Minn. Stat. § 176.061, subd. 8(a), he is not entitled to request a Henning allocation of the recovery from a verdict or settlement. In Naig, and in the cases involving failure to give notice of a Naig settlement, the supreme court held that the right to protect the otherwise insulated nonworkers' compensation damages in the settlement recovery was lost by the failure to give the required notice. Therefore, since the purpose of such allocation is to protect those damages from creating a recovery or credit to the employer, the performance of a Henning allocation is inappropriate. In a verdict situation, the same principle would apply and a Henning allocation could not be performed to protect the non-subrogable elements of the verdict from the calculation of the credit. As a result, the compensation judge's Henning allocation is reversed.

The only question left is whether the employee would be entitled to some form of application of the statutory formula in Minn. Stat. § 176.061, subd. 6, to protect one-third of the net recovery from the calculation of the credit. We do not think this option is appropriate. The proper calculation method is to take the total verdict, \$7,163.92, and subtract the attorney fees of \$2,456.14 to arrive at a gross credit of \$4,706.98.¹⁰ We select this method because it is a form of the statutory formula which treats the one-third of the net recovery that could otherwise be protected by the employee in a manner similar to the treatment of the non-subrogable damages recovered when there is a denial of a Henning allocation in a Naig settlement situation. In a Naig settlement situation, all the non-subrogable damages are protected if the employee gives notice. If notice is not given, those damages are fully available, less attorney fees, to create a credit. In a verdict or non-Naig settlement situation, where the one-third portion of the statutory formula would most likely be used, the employee, if he has given appropriate notices of the institution of suit and of trial, can protect one-third of his net recovery, after deducting the cost of recovery. If he fails to give notice in a situation where he might use a one-third deduction, then his penalty should be the loss of his right to protect that one-third interest in the net recovery. In addition, if the employee were permitted to use the one-third deduction portion of the statutory credit calculation, at least in this case, he would be able to protect some portion of the non-subrogable damages contained in the recovery.¹¹ Based on Naig and Easterlin, the entire amount of the non-subrogable damages is not protected from the credit calculation. As well, there is no reason to permit the employee to protect some part of the subrogable portions of the recovery by use of the arbitrary one-third deduction. The Easterlin or Ruddy decisions could be interpreted to favor such a method. Use of this method would produce a credit larger than would have resulted from using the statutory formula or a Henning allocation. We think this is an appropriate penalty to an employee for failure to provide the required notices. The amount of the penalty, based on full use

¹⁰ The first step of the statutory formula is to deduct the cost of recovery from the total proceeds. We do not believe the employer and insurer's credit should be for the entire proceeds. The credit should reflect the cost of recovery.

¹¹ The net verdict of \$7,162.93 was the sum of the award for pain and suffering of \$5,950.00 and medical expenses not paid by the no-fault insurer of \$1,212.93. The one-third deduction in step 6(b) would protect \$1,568.93, which exceeds the subrogable amounts.

of the recovery, is similar to the penalty imposed on employers and insurers who fail to include intervenors in settlement discussions. Brooks v. AMF, Inc., 278 N.W.2d 310, 31 W.C.D. 321 (Minn. 1979); Parker/Lindberg v. Friendship Village, 395 N.W.2d 713, 39 W.C.D. 125 (Minn. 1986).

The credit of \$4,706.98 may not be used on a dollar-for-dollar basis by the employer. The employer's credit is subject to an adjustment based on the cost of collection ratio as outlined in Kealy v. St. Paul Housing & Redevelopment Auth., 303 N.W.2d 468, 33 W.C.D. 388 (Minn. 1981). The court in Kealy stated that the resulting credit in subdivision 6(d) would not be a 100% credit, one used dollar-for-dollar to offset future benefits owed. The court held that the employer "should not avoid its obligation to share the costs of litigation while benefitting from that litigation." Id. at 475. It further stated that "for every dollar of benefits paid in the future the subdivision 6(d) credit should be reduced by 34.26%, the percentage derived in the subdivision 6(c) computation." Id. In the case at hand, as the credit is used up, the cost of the collection rate (34.3%) should be applied.¹²

In addition, we disagree with the employer's position that the credit may be used to offset its obligation to reimburse AMCO, the employee's no-fault automobile insurer. While section 176.061, subd. 6(d), permits use of the credit against "any benefits that the employer is obligated to pay," the employer cannot use the credit to defeat a no-fault insurer's right to reimbursement. As between them, the workers' compensation insurer has primary liability for the medical expenses and must reimburse the no-fault insurer. Minn. Stat. § 65B.61, subd. 1; Patrin v. Progressive Rehab. Options, 497 N.W.2d 246, 48 W.C.D. 273 (Minn. 1993). To permit the workers' compensation insurer the use of a credit against its obligation to reimburse the no-fault insurer would leave the no-fault insurer with less than the reimbursement ordered by the compensation judge and no recourse against the employee or the third-party tortfeasor. In addition, because the credit to the employer was based on the recovery by the employee, which recovery did not include the payments made to and on behalf of the employee by the no-fault insurer, the employer may not assert its credit against the no-fault insurer. The credit can be used only against the workers' compensation payments owed to the employee.

¹² Cost of collection ratio in this case is arrived at by dividing the contingent attorney fees of \$2,456.14 by the net verdict, \$7,162.93. For each dollar of benefits payable to the employee, the employer may only reduce its obligation by 65.7 cents, while reducing the credit by a dollar.