

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA

3 CONWED CORPORATION,

Civil No. 5-92-88 (DDA/RLE)

4 Plaintiff,

5 vs.

6 ORDER ON PLAINTIFF'S
7 MOTION TO DISMISS
8 COUNTERCLAIM

9 UNION CARBIDE CORPORATION,

10 Defendant.

11 Brownson & Ballou, PLLP, by ROBERT D. BROWNSON and KRISTIK. WARNER, Minneapolis,
12 Minnesota, for Plaintiff Conwed Corporation.

13 Foley & Lardner, by TREVOR J. WILL and MICHAEL D. ROSENBERG, Milwaukee, Wisconsin,
14 and LISA M. ELLIOTT, Minneapolis, Minnesota, for Defendant Union Carbide Corporation.

15 This is a workers' compensation subrogation action under Minnesota law. In its present
16 posture, the case involves the common law tort claims of approximately 130 former employees¹ of
17 Plaintiff Conwed Corporation ("Conwed"), which Conwed asserts in its own name against
18 Defendant Union Carbide Corporation ("Union Carbide"), as Minnesota law permits. See Minn.
19 Stat. § 176.061 (defining an employer's subrogation rights under Minnesota's workers'
20 compensation scheme). Union Carbide settled each of the 130 tort claims at issue with the
21 employees pursuant to Naig v. Bloomington Sanitation, 258 N.W.2d 891 (Minn. 1977), which allows
22 an injured employee independently of the employer to settle that part of the employee's claims for
23 damages against a third-party tortfeasor in which the employer has no subrogation interest. Id. at
24 894-95. Union Carbide asserts by way of a counterclaim that Conwed is liable for contribution to
25 those Naig settlements because Conwed's own negligence contributed to causing the former
26 employees' injuries. Conwed has moved to dismiss Union Carbide's counterclaim, arguing that an

27 ¹ The Court earlier entered final judgment pursuant to Fed. R. Civ. P. 54(b) on a group of
28 employee claims involving mesothelioma, and the parties voluntarily dismissed a group of employee
claims involving lung cancer. The employee claims in those groups no longer are before the Court.

FILED FEB 11 2004
RICHARD D. SLETEN, CLERK
JUDGMENT ENTO _____
DEPUTY CLERK _____

1 argues that its settlement payments to those employees are the functional equivalent of jury verdicts
2 and that, as in Lambertson, Conwed should contribute to each settlement payment an amount
3 proportional to Conwed's fault in causing the employee's injury but not to exceed Conwed's
4 workers' compensation liability to that employee. Lambertson contribution in practice has the effect
5 of limiting the employer's subrogation interest, Horton by Horton v. Orbeth, Inc., 342 N.W.2d 112,
6 115 (Minn. 1984), and Union Carbide similarly suggests that its counterclaim should act as an
7 equitable setoff to Conwed's subrogation claim. Union Carbide, in other words, does not seek an
8 affirmative recovery from Conwed but instead seeks to reduce Conwed's subrogation interest by the
9 amount Conwed would be required to contribute to Union Carbide's settlements under Lambertson.
10 This procedure, according to Union Carbide, would ensure that Conwed does not pay more than its
11 workers' compensation liability while at the same time requiring Conwed to take responsibility for
12 its negligence to the extent that Lambertson permits.

13 Union Carbide's position is consistent with some of Lambertson's reasoning, but Union
14 Carbide's argument is flawed because it fails adequately to consider the complete reimbursement
15 procedure of which Lambertson contribution is a part. If an injured employee receives a verdict
16 against a third-party tortfeasor, the rights of the employee, the employer, and the third-party
17 tortfeasor to the proceeds of the resulting judgment are determined through a three-step procedure:
18 the third-party tortfeasor first pays the employee the full amount of the judgment, the employer then
19 pays any Lambertson contribution to the third-party tortfeasor, and the employee finally reimburses
20 the employer for workers' compensation benefits paid and payable by allocating the judgment
21 proceeds through the formula set out in Minn. Stat. § 176.061 Subd. 6² Johnson v. Raske Bldg. Sys.,
22 Inc., 276 N.W.2d 79, 81 (Minn. 1979). The employer in the end receives some reimbursement and
23 possibly a credit against future workers' compensation payments from the proceeds to which the
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25 ² In the alternative, the employee may petition the trial court to allocate the verdict between
26 damages recoverable and not recoverable under workers' compensation and include only the
27 damages recoverable under workers' compensation in the Minn. Stat. § 176.061 formula. Drake v.
Reile's Transfer & Delivery, Inc., 613 N.W.2d 428, 433 (Minn. Ct. App. 2000).

1 employer in effect contributed. A Naig settlement, on the other hand, is distinguishable from a tort
2 judgment in that none of the settlement proceeds are subject to the statutory allocation formula, and
3 the employer accordingly has no claim on those proceeds and receives no reimbursement or credit
4 as a result of the settlement. Naig, 258 N.W.2d at 894. Union Carbide thus is incorrect in assuming
5 that the equities justifying Lambertson contribution to a tort judgment continue to exist after a Naig
6 settlement.

7 The reasoning in Naig in fact indicates that the justification for Lambertson contribution
8 disappears altogether if the employee and a third-party tortfeasor enter into a Naig settlement.
9 Lambertson contribution exists to limit a third-party tortfeasor's liability, insofar as practicable, "to
10 no more than its established fault." 257 N.W.2d at 685. A Naig settlement, however, "concerns only
11 damages not recoverable under workers' compensation." 258 N.W.2d at 894. Stated another way,
12 a Naig settlement concerns only damages for which the third-party tortfeasor is exclusively liable
13 to the injured employee, which is why the employer has no interest in the proceeds of a Naig
14 settlement. Id. If the employer has no liability for the damages paid through a Naig settlement, the
15 employer's fault can have no bearing upon the allocation of those damages. Although Union
16 Carbide argues that an employer need not have common liability for damages settled under Naig in
17 order to justify contribution to the settlement, some form of common liability is a necessary predicate
18 for imposing contribution liability on the employer. See Horton, 342 N.W.2d at 114-15 (discussing
19 Lambertson).

20 Union Carbide, finally, cites no authority other than Lambertson in support of its position.
21 The Minnesota Supreme Court has not directly held that Lambertson is inapplicable in a Naig
22 context but has noted in dicta that an employer, regardless of fault, "is not liable to contribute to the
23 sum the tortfeasor paid the employee to settle the 'nonrecoverable' damages under the Naig release."
24 Tyroll v. Private Label Chems., Inc., 505 N.W.2d 54, 61 (Minn. 1993). The Minnesota Court of
25 Appeals has affirmatively held that an employer has no obligation to contribute to a Naig settlement,
26 albeit in an unpublished case. Sargent v. Schwing Am. Inc., No. C3-93-946, 1993 WL 469179, at
27 *1 (Minn. Ct. App. Nov. 16, 1993) (unpublished opinion). In the absence of any contrary Minnesota

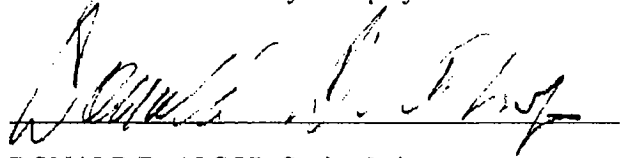
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1 authority, this Court also holds that Conwed has no obligation to contribute any amount to Union
2 Carbide's Naig settlements with Conwed's former employees. Because all the former Conwed
3 employees at issue in this case entered into Naig settlements with Union Carbide, Union Carbide has
4 no basis for maintaining its counterclaim.

5 For the foregoing reasons, **IT IS HEREBY ORDERED THAT:**

- 6 1. Conwed's motion to dismiss Union Carbide's counterclaim for contribution is GRANTED.
7 2. Union Carbide's counterclaim is DISMISSED in its entirety with prejudice.

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9 Dated: February 11, 2004



10 DONALD D. ALSOP, Senior Judge
11 United States District Court
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