IDENTIFYING AND PURSUING SUBROGATION RIGHTS

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All benefits paid under the Pennsylvania Workers’ Compensation Act constitute a lien against any third-party recovery and there is also a right to a future credit. The employers right of subrogation is absolute and set forth in §319 of the Act, 77 P.S. §671.

I. STANDING

The statutory rights set forth in §319 have been extended to include the employer’s Workers’ Compensation Carrier. *McDaniel v. Rexnord, Inc.*, 537 A.2d 365 (1988). In other words, if the benefits were insured, then the carrier is the lien holder, not the employer. If the insurance carrier is both the Workers’ Compensation Carrier and the Liability Carrier for the tortfeasor, the insurance carrier is still entitled to subrogation for its role as the Workers’ Compensation insurer. *Cox v. WCAB (Otis Elevator)*, 615 A.2d 878 (1992). The Commonwealth Court has also allowed a Workers’ Compensation Security Fund to subrogate against a third party recovery as it stood in the shoes of the employer/carrier on behalf of which it was paying compensation benefits. *Donaldson v. WCAB*, 728 A.2d 994 (1999).

Although the Act gives the employer/carrier the right of subrogation, the proper party to bring the action is the employee and not the employer or carrier. The right of subrogation is a “derivative of the injured employees common law right” and under most circumstances, neither the employer nor the carrier can bring a direct action against the tortfeasor. Thus, the employer/carrier may have to rely upon the injured employee to bring suit. *Reliance insurance*

If Claimant will not bring suit against the tortfeasor, or the statute of limitations is about to expire, the insurer/employer may have an option to file a complaint as a subrogee or “use plaintiff” along with a petition for intervention under Pennsylvania Civil Procedure Rule 2327. However, the right of intervention is not absolute and may be denied by the trial court. Maginley v. Robert Elliot, Inc., 498 A.2d 977 (1985).

II. CONTROL OF THE LITIGATION

Generally speaking, the employee has the right to control the litigation including the right to select counsel, negotiate the fee arrangement and to settle or discontinue the action without the employer/carrier’s consent. These rights are probably subject to some equitable limits but there is no law defining the parameters. Creighan v. WCAB (Mellon Stuart Corp.), 624 A.2d 680 (1993).

III. SUMS RECOVERABLE FROM THIRD PARTY ACTIONS

The Act provides that the employer is entitled to a recovery of past paid Workers’ Compensation Benefits and a credit against future Workers’ Compensation Benefits where the recovery, either by verdict or settlement, exceeds the amount of past paid benefits. This right is not affected by high/low agreements, out of Court settlements or verdicts, the employer’s fault in causing injury, or the employer’s failure to cooperate in third party litigation.

As a general rule, all monies paid by the insurer for medical care, indemnity payments and attorneys fees are recoverable from the Claimant if he or she recovers from a third party action.
The law provides that a Workers’ Compensation lien can go against all monies recovered, even non-economic damages such as pain and suffering (with some exceptions).

One such exception is monies allocated to compensate for an injured spouse’s loss of consortium. If the award is judicially determined and a portion is allocated to the loss of consortium claim, that allocated amount is not subject to lien. *Darr Construction Company v. WCAB*, 715 A.2d 1075 (1997). If Claimant’s counsel arbitrarily allocates a portion of the award in settlement to loss of consortium in order to avoid the Workers’ Compensation lien, without obtaining an agreement by the parties or an endorsed settlement, he or she may be subject to a cause of action for fraud. *General Accident Insurance Company v. Weiss*, 46 Lehigh L.J. 310 (1995). If the matter is settled prior to a judicial allocation of monies between the Claimant’s cause of action and the spouse’s loss of consortium claim, the entire amount of the settlement recovery is subject to lien.

IV. COMMON THIRD PARTY ACTIONS

a) Motor Vehicle Accidents

The employer/carrier has a right of subrogation to third party cases arising out of motor vehicle accidents which occurred after July 29, 1993, the date on which provisions of Act 44 of the Workers Compensation Act pertaining to motor vehicles became effective. *Byard F. Brogan, Inc. v. WCAB (Morrissey)*, 637 A.2d 689 (1994). The Workers’ Compensation Act and Motor Vehicle Financial Responsibility Law were amended to reflect the legislative intent to preclude double recovery of both Workers’ Compensation Benefits and damages in tort.

The employer/carrier is not entitled to subrogation out of the employee’s recovery under a

b) **Medical Malpractice**

As a general rule, if it is determined that medical malpractice arose in the course of treatment for the work-related injury, and there is a subsequent third party recovery, a basis for a subrogation lien is created. The employer must put the Claimant on notice of the lien and a clear causal connection must be shown. *Helms Express v. WCAB*, 525 A.2d 1269 (1987). In addition, the employer can only recover that amount of benefits paid which can be attributable to the medical malpractice and proven that “if not for” the malpractice, the benefits would not have been paid.

c) **Products/Premises Liability**

Employees engaged in the furtherance of the employer’s affairs who are injured by a dangerous or negligent condition on the premises of another or by exposure to defective products or defective machinery may file suit against the premises owner, distributors and manufactures. *Belik v. Advance Process Supply Co.*, 822 F.Supp. 1184 (1993); *Wasserman v. Fifth & Reed Hospital.*, 660 A.2d 600 (1995).

d) **Intentional Torts**

An injured employee may recover for intentional torts of a co-worker if the employee’s injuries are the result of a co-worker’s intentional acts, such as an assault and
employee for negligence, as this is barred by exclusive remedy provisions of the Act.

e) **Legal Malpractice**

An injured employee may pursue an action against the attorney who failed to
prosecute their third party action. If the injured employee is successful, the employer/carrier has
subrogation rights against any recovery from Claimant’s legal malpractice claim. *Graham v.*

V. **WHEN AND HOW TO RECOVER YOUR LIEN**

Generally speaking, the employer/carrier does not have to take any action to “perfect” its lien. Claimant’s counsel is required to be generally knowledgeable of the law and to protect the lien. It is always advisable to provide written notice to the Claimant’s attorney and to periodically update that notice as to the amount of the lien. Just remember, failure to notify or delay in assertion of the lien does not bar enforcement at a later time, even after distribution to the Claimant.

It is also advisable to notify the third party’s attorney of the lien and to request the courtesy of notice of intention to make any distribution. As a general rule third parties do not have a duty to protect the lien.

a) **Statute of Limitations/Laches**

The Act does not contain a time limitation for filing a subrogation claim. Courts have been reluctant to unequivocally state that there is a time limitation to assert a subrogation claim. *DeVore v. WCAB (Sun Oil Co.)*, 645 A.2d 917 (1994). Remember, the Statute of
Limitations for the underlying third party action is the same for the Claimant and the employer/carrier.

b) **Employer’s Negligence**

For employee injuries after 1975, the employer’s negligence does not bar the Workers’ Compensation Lien nor can the Workers’ Compensation Lien be reduced on account of the employer’s negligence. The employer is also immune from joinder as a party in any third party litigation and that immunity can only be waived by written and specific contractual agreement predating the injury. *Swink v. WCAB*, 510 A.2d 860 (1986). Beware, under the “dual capacity doctrine,” an employer may be liable in tort to an injured employee, if employer was not acting as employer at the time of injury, but rather was acting as a third party outside the scope of the Act. *Snyder v. Pocono Medical Center*, 690 A.2d 1152 (1997).

VI. **CALCULATION OF LIEN**

Following the recovery against a third party by either settlement or award, the Bureau requires the parties to enter into an agreement for distribution of the third-party recovery in which the parties stipulate to the amount recovered; the amount of the attorney’s fees and costs; the benefits paid under the Act to that point; the amount distributed to the carrier for its past lien; the amount distributed to the Claimant and the amount of future credit. The employer/carrier is obligated to pay a pro rata share of counsel fees and expenses that were incurred in producing the third-party settlement or verdict.

**Future Credit Calculations**

There are two methods of calculating future credit. If the parties can agree upon which
method applies then this agreement should be clearly set forth in a Supplemental Agreement or on a modified version of the Bureau’s Third Party Settlement Agreement form. The two methods are as follows:

1. Bureau/Gross Method

The first method is referred to as the Bureau/Gross method of handling future credit. This method requires that a pro rata return of counsel fee be paid on a periodic basis as the carrier uses its future credit to offset the weekly disability benefit or medical bills. After much litigation and confusion, the Supreme Court has held that this method is the preferred method to be used to determine an employer’s/insurers subrogation interest in a third party recovery. *P. & R. Welding v. WCAB (Pergola)*, 701 A.2d 560 (1997).

2. Net/Rollins Method

The second method is referred to as the Net/Rollins Method of handling future credit. This method involves a total cessation of any payments by the employer/insurer until its obligation to make payments exceeds the net recovery of the Claimant, after deduction of the Claimant’s share of fees and costs at the time of settlement or distribution. Put simply, the insurer cuts off Claimant’s benefits until the recovery amount is exceeded. Once the recovery amount is exceeded, payments must begin again unless there is an agreement or Claimant has reached full recovery.

VII. WAIVER OF YOUR SUBROGATION LIEN

An employer may voluntarily reduce or even waive its subrogation rights. *Dasconio v. WCAB (Aeronca, Inc.)*, 559 A.2d 92 (1989). Compromise and Release Agreements are
frequently used to limit the lien amount on the excess settlements or verdicts and due away with the future credit calculations. Also, corporate general releases in which the employer releases its right to subrogation have been upheld as valid and enforceable under the Act. SKF USA, Inc. v. WCAB (Smalls), 714 A.2d 496 (1998).

VII. CONCLUSION

As a final comment, an employer or carrier operating in Pennsylvania should recognize that while the law on subrogation is virtually the same in the surrounding states, there is a distinct difference in attitude towards the lien in Pennsylvania. It is typical for Plaintiff’s to attempt to avoid payment of all or part of the lien. It is also typical for the Plaintiff’s counsel to provide very little or no information concerning the merits of the case or the status of settlement negotiations until the “11th hour.” It is during this “11th hour” that Plaintiff’s counsel, sometimes assisted by the Court, will demand the adjuster or other representative of the carrier/employer make an immediate decision regarding settlement or compromise of its lien without full disclosure of the merits and value of the case. Plaintiff’s counsel uses the threat that the prosecution of the claim will be “tendered” to the worker’s compensation carrier, or a similar threat, unless the lien is waived or compromised. Therefore, you should consider retention of counsel to obtain copies of the pleadings, expert reports and other information pertinent to an assessment of the merits of the third party action and information on the Worker’s Compensation Claim sufficient to evaluate the “future exposure.” This way when a settlement is on the table, you as the adjuster are in a position to intelligently address these issues when faced with an “11th hour” demand to take a position on compromising the past lien and/or treatment of future credit.