

PA Workers' Compensation Law

John J. Muldowney

Statutory Right to Subrogation

Very few employers and their insurers would rank Pennsylvania as a favorable forum for workers' compensation claims. Yet, subrogation recovery remains a well-protected right of relief for employers and their insurers in this Commonwealth. The effectiveness of subrogation as a right of recovery in Pennsylvania is due to its statutory genesis. This article emphasizes the positive impact of Pennsylvania's statutory scheme in protecting the subrogation recovery rights of employers and their insurers.

Statutory Foundation

The concept of subrogation is based on two general equitable principles (i.e., fairness):

1. To prevent a claimant from receiving payment twice for the same injury ("double recovery") and;
2. To ensure that the party at fault is ultimately held responsible for the injury claimed.

While subrogation is conceptually rooted in equity, subrogation rights under Pennsylvania law are directly derived from statute under Section 319 of the Pennsylvania Workers' Compensation Act (the "Act").

Section 319, in relevant part, provides:

Where the compensable injury is caused in whole or part by the act or omissions of a third party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependents, against such party to the extent of compensation payable under this Article by the employer...
77 P.S. sec. 671 (emphasis added).

The extent of compensation paid equals medical expenses plus indemnity benefits. See *Thompson v. WCAB (USF&G Co.)*,

566 Pa. 420, 781 A.2d 1146 (Pa. 2001). Subrogation recovery under Pennsylvania law means that an employer who issues workers' compensation payments to an injured employee can recover such payments from the injured employee when the employee obtains a settlement and/or verdict award from the alleged tortfeasor(s) in an action arising from the same incident as the compensable work injury.¹

The classification of subrogation rights as statutory, rather than equitable, is a monumental distinction. Subrogation derived from common law equity is subject to equitable limitations, whereas subrogation recovery derived from statute is unassailable to most equitable challenges.

Equitable Challenges Thwarted

Pennsylvania courts have consistently rejected equitable challenges to an employer's right to subrogation recovery under the Act. In upholding this "absolute" statutory right, the courts have rejected the following arguments as bases for eliminating or reducing the employer's subrogation recovery:

1. *Lack of Cooperation* – The employer's failure to cooperate with the employee in the third party action does not bar or reduce the employer's subrogation recovery. *Winfree v. Phila. Elec. Co.*, 520 Pa. 392, 554 A.2d 485 (Pa. 1989); *Kelly v. WCAB (A-P-A Transport Corp.)*, 107 Pa. Cmwlt. 223, 527 A.2d 1121 (Pa. Commw. Ct. 1987).

2. *Lost Evidence/Spoliation* – The loss of evidence by the employer, which would have assisted plaintiff in his third party claim, does not serve to bar the employer's right to subrogation. *Thompson v. WCAB (USF&G Co.)*, 566 Pa. 420, 781 A.2d 1146 (Pa. 2001); *Glass v. WCAB (City of Phila.)*, 61 A.3d 318 (Pa. Commw. Ct. 2013).

3. *Subrogation Recovery Should be Reduced by Claimant's Comparative Negligence* – A claimant's right to recovery in a third party action, reduced by his own comparative negligence, does not reduce the employer's right to recovery of the full lien amount. *Goldberg v. WCAB (Girard*

Provision Co.), 152 Pa. Cmwlt. 559, 620 A.2d 550 (Pa. Commw. Ct. 1993).

4. *Employer's Partial Responsibility for Injury* – The employer's statutory right to subrogation may not be challenged by an allegation that the employer was partially responsible for the employee's injury. *Heckendorn v. Consol. Rail Corp.*, 502 Pa. 101, 465 A.2d 609 (Pa. 1983).

5. *Laches* – Laches, an equitable doctrine which serves to bar a party from seeking relief when he fails to do so in a timely manner, is not applicable to the statutory right of subrogation. *Superior Lawn Care v. WCAB (Hoffer)*, 878 A.2d 936 (Pa. Commw. Ct. 2005).

In affirming the employer's absolute statutory right of subrogation against equitable challenges, the Pennsylvania Supreme Court in *Thompson v. WCAB (USF&G)*, 566 Pa. 420 781 A.2d 1146 (2001), reasoned: "The General Assembly already having weighed the equities, it would be inappropriate for this Court to approve of ad hoc equitable exceptions to subrogation."

Despite the straightforward statute, backed by unwavering support from the Pennsylvania appellate courts, equitable challenges may continue to be raised by claimants seeking to protect their double recovery. Such challenges may occur in the workers' compensation forum and/or in third party forums.

The Shield of Exclusivity

Employers and their counsel may be faced with various challenges from opposing counsel in the civil forum, as well as civil litigation judges, and/or mediators concerning the rights and/or amounts of subrogation recovery. Fortunately, the absolute statutory right of subrogation is further protected by the exclusivity provisions of the Pennsylvania Workers' Compensation Act, which serve as a shield to protect against adverse decisions by outside forums. See, Section 303(a) of the Pennsylvania Workers' Compensation Act, as amended.

¹ Under Section 401 of the Act, the term "employer" includes its "insurer". 77 P.S. sec. 701.

Subrogation (continued)

A few examples of the effects of the exclusivity shield are referenced below:

1. *Civil Courts May Not Determine a Waiver of the Subrogation Lien* – Failure of the workers’ compensation carrier to appear at a third-party common pleas pre-trial conference does not serve as a waiver of the employer’s subrogation rights, even when the court of common pleas had found that such conduct served as a waiver. *Romine v. WCAB (CNF, Inc.)*, 798 A.2d 852 (Pa. Commw. Ct. 2002).

2. *Denial of the Subrogation Right in a Civil Forum Does Not Prevent Subrogation Recovery* – No res judicata/collateral estoppel effect arises from a civil court decision regarding determination of an employer’s subrogation rights. The denial of the employer’s subrogation right in a civil forum does not bar the employer from asserting such right in the Workers’ Compensation forum. *PMA Ins. Grp. v. WCAB (Kelley)*, 665 A.2d 538 (Pa. Commw. Ct. 1995).

3. *Even a Verdict in Favor of Defendant May Not Extinguish an Employer’s Subrogation Rights* – A verdict in favor of the defendant, where the parties had entered into a high/low settlement agreement with a guaranty to the claimant of recovery regardless of the jury verdict, does not extinguish the employer’s right to recovery under such a settlement agreement. *Id.*

4. *Molding of a Verdict or Settlement in a Third-Party Action Does Not Limit the Rights of Recovery* – A molding of a verdict or settlement to include only recovery of pain and suffering damages does not eliminate the employer’s right to full subrogation of its lien. *Bumbarger v. Bumbarger*, 190 Pa. Super 571, 155 A.2d 216 (Pa. Super. Ct. 1959).

5. *The Filing of a Post-Verdict Action Does Not Stay Subrogation Recovery* – The claimant’s filing of a post-verdict complaint for abuse of process, allegedly arising from the underlying third-party action, does not serve to stay the employer’s right of subrogation recovery. *Stout v. WCAB (Pensbury Excavating, Inc.)*, 948 A.2d 926 (Pa. Commw. Ct. 2008).

...it is of little recourse to assert the absolute right of subrogation long after the claimant has spent his third party settlement funds.

Regardless of any representations or determinations by any third party forums, the determination of whether an employer/insurer is entitled to subrogation remains within the exclusive jurisdiction of the workers’ compensation authorities. Thus, any determinations outside of the workers’ compensation forum have no effect on the employer’s subrogation rights.

Pennsylvania Compared with Subrogation Schemes of Other States

As with Pennsylvania, the analysis of the right to subrogation recovery by employers in other states begins with the statutes of each individual state. However, the means by which subrogation can be obtained and the limitations on the recovery can vary greatly from one state to the next. Many states, by statute and judicial interpretation, provide limitations based on the percentage of employer liability for the alleged injury and/or provide equitable limitations of recovery under the “made whole doctrine”. *The Made Whole Doctrine*, Gary L. Wickert, Esq.

The statutes of Pennsylvania’s neighboring states of Delaware, New Jersey, and New York, are similar to Pennsylvania in providing subrogation recovery without reduction for employer liability and/or equitable limitations. *Workers’ Compensation in All 50 States*, Gary L. Wickert, Esq. The New York statute does, however, provide that an action can be brought against an employer for contribution when the injury, as defined by statute, is a “grave injury”. *Id.*

States in which the employer’s liability for an injury provides a percentage based reduction in the amount of subrogation recovery, include: Alaska, Arizona, California, Idaho, Kentucky, Louisiana,

Minnesota, New Mexico, Texas, and Utah. *Id.*

States in which equitable limitations based on the nature and/or amount of damages recovered include: Arkansas, Colorado, Georgia, Kansas, Massachusetts, Michigan, New Mexico, and South Carolina. *Id.* In summary, these states limit the recoverable amounts from subrogation to medical expenses and wage loss, while disallowing recovery from third party damages that are non-economic such as pain and suffering.

Preserving the Actual Recovery

While Pennsylvania provides a more expansive base of subrogation recovery than many other states, it is of little recourse to assert the absolute right of subrogation long after the claimant has spent his third party settlement funds.

Third party actions should be closely monitored by the employer and/or their counsel to determine the status of a third party action and evaluate potential recovery. A written agreement should be obtained from the claimant’s third party counsel to escrow funds from the third party settlement/award prior to satisfaction of the lien. Absent a written agreement, the claimant’s third party counsel is under no legal or contractual obligation to protect the lien of the employer. *CNA Ins. v. Ellis and Weiss*, 764 A.2d 1118 (Pa. Super. Ct. 2000) (published without opinion). Mere notification to the claimant’s third party counsel of the workers’ compensation lien is not enough to impose an obligation on claimant’s third party counsel to protect the lien. *Id.*

In the event that claimant’s third party counsel will not sign a written agreement to protect the subrogation lien, an attorney should be retained to represent the employer’s interest in subrogation recovery. It may be necessary for the employer’s attorney to intervene in the third party action to ensure recovery of the lien in advance of the distribution of the third party award or settlement. At the very least, a stipulation should be obtained from the claimant’s third party counsel confirming agreement to the lien distribution.

Recovery and Settlement

The issue of subrogation recovery often arises during settlement negotiations of the pending third-party litigation. In attempting to obtain a settlement of the third party action, counsel for both the third party plaintiff and defendant (and even the third party judge) may place pressure on the employer to compromise its subrogation lien. In responding to such pressures it should be kept in mind that 1) The employer is under no obligation to compromise; and 2) the ultimate goal is to obtain the maximum amount of subrogation recovery. Accurate analyses of both the liability and anticipated damages in the third party case are essential for determining whether a lien should be compromised to effect settlement.

In civil cases involving a significant workers' compensation lien, with less than certain civil liability, an agreed upon compromise of the workers' compensa-

tion lien might be advisable. Under these circumstances, the employer's workers' compensation representative should be apprised of settlement negotiations and/or even involved in a settlement conference. Of course, such participation should be entered into with caution, with the exclusivity protections of the workers' compensation asserted.

To achieve maximum subrogation recovery it may be advisable to retain and consult with counsel to evaluate the potential value of the third party recovery, monitor the third party action, confirm agreement to lien protection, intervene if necessary, participate in third party settlement conferences, and follow up with a petition in the workers' compensation forum to effectuate lien recovery.

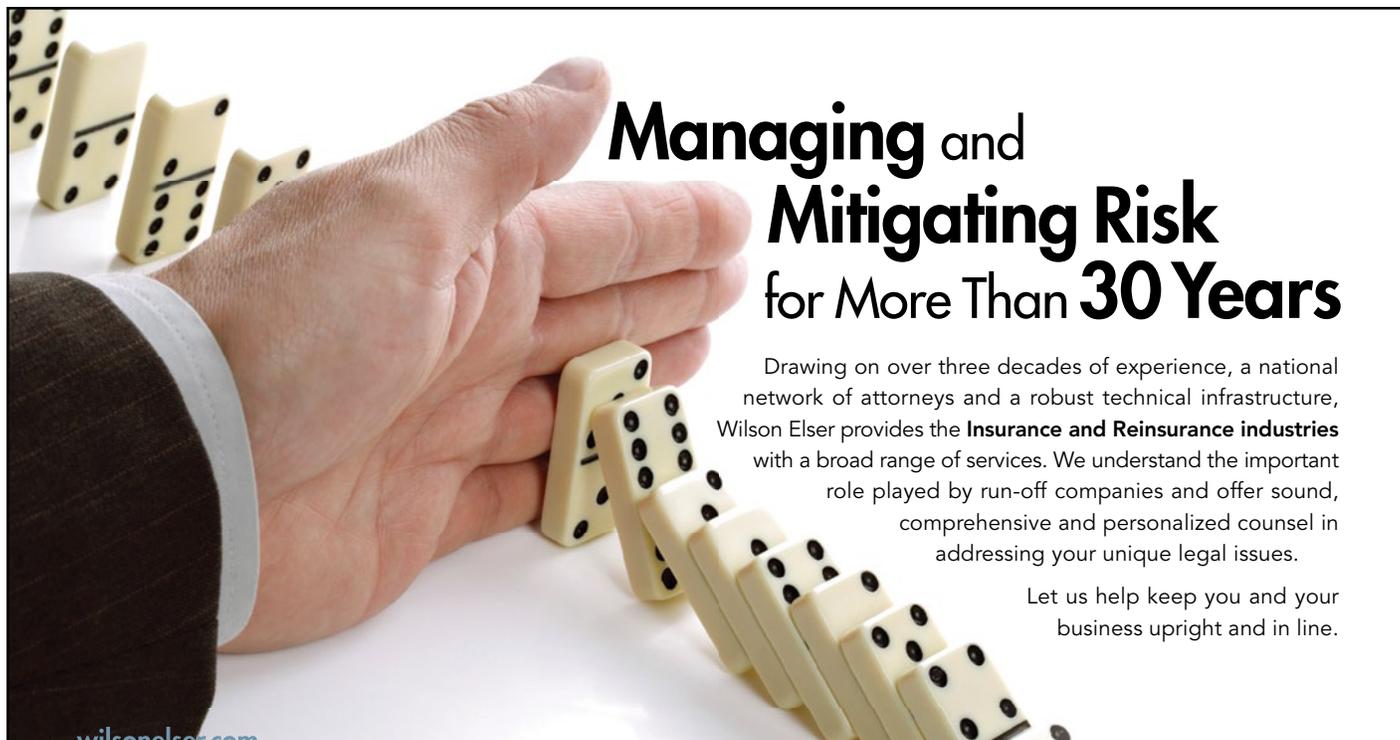
Conclusion

Subrogation recovery remains a well-protected statutory right under the

Pennsylvania Workers' Compensation Act, as confirmed by the relatively consistent decisions of the Pennsylvania courts. To maximize recovery under this right it is important to recognize the types of third party recoveries subject to subrogation, know the limitations of such recoveries and preserve the actual subrogation recovery by assistance from counsel when necessary. ●



John "Jack" Muldowney is a Partner in the Yardley, PA office of Hill Wallack LLP, where he is a member of the Complex Litigation and Workers' Compensation practice groups. jmuldowney@hillwallack.com



Managing and Mitigating Risk for More Than 30 Years

Drawing on over three decades of experience, a national network of attorneys and a robust technical infrastructure, Wilson Elser provides the **Insurance and Reinsurance industries** with a broad range of services. We understand the important role played by run-off companies and offer sound, comprehensive and personalized counsel in addressing your unique legal issues.

Let us help keep you and your business upright and in line.

wilsonelser.com

Albany • Baltimore • Boston • Chicago • Dallas • Denver • Garden City • Hartford • Houston • Kentucky
Las Vegas • London • Los Angeles • Miami • Milwaukee • New Jersey • New York • Orlando • Philadelphia
San Diego • San Francisco • Stamford • Virginia • Washington DC • West Palm Beach • White Plains
Affiliates: Berlin • Cologne • Frankfurt • Munich • Paris

 **WILSON ELSER**
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

© 2014 Wilson Elser. All rights reserved.