

STRATEGIES FOR EFFECTIVE SUBROGATION RECOVERY AND SETTLEMENT

The Pennsylvania Workers' Compensation Act provides a remedy to the worker compensation insurer to recover its payment of wage loss benefits and medical expense reimbursements to an injured worker, where the compensable injury is caused, in whole or in part, by the act or omission of a third party.¹

The recovery of the subrogation lien of a worker compensation insurer, continues to be a problematic issue for both the worker compensation insurance claim representative and the attorney representing the injured worker in a civil litigation action arising from the work injury. As noted by Workers' Compensation Judge David B. Torrey in the June 1999 Pennsylvania Workers' Compensation Section newsletter, a sense of frustration remains, on behalf of the participants in the civil action (plaintiffs, defendants, and judges) regarding their inability to efficiently or completely dispose of all of the disputed issues arising in a civil action, unless all interested parties, including the representative for the worker compensation subrogation lien, are involved in their pre-trial efforts for settlement.

This concern recognizes that the interests of the worker compensation insurer must be considered in resolution of a civil action arising from a compensable work injury. To ignore the impact of the worker compensation subrogation lien, does not allow a meaningful and accurate financial evaluation of the civil action claim for damages, in the context of settlement negotiations.

It is noteworthy that the civil action participants wish to avoid the apparent resolution of the disputed issues of liability and damages in the civil action, only to have their settlement evaluations "disrupted" by the assertion of the worker compensation subrogation lien. Post-resolution consideration of the worker compensation subrogation lien reimbursement will adversely impact upon the economic recovery actually realized by the injured worker in the civil action settlement.

- Statutory Language

The Pennsylvania Workers' Compensation Act provides a right of subrogation for the worker compensation insurer/employer against any third party civil action settlement proceeds or recovery in the first paragraph of Section 319, 77 P.S. §671:

¹See: Pennsylvania Workers' Compensation Act §319, 77 P.S. §671.

“Where a compensable injury is caused in whole or in part by the Act or omission 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 third party to the extent of the compensation payable under this article by the employer; reasonable attorney’s fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be pro rated between the employer and employee, his personal representative, his estate, or his dependents. The employer shall pay the proportion of the attorney’s fees and other proper disbursements that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation heretofore paid by the employer shall be paid forthwith to the employee, his personal representative, his estate or his dependents, and shall be treated as an advance of payment by the employer on account of any future installments of compensation.”

The Pennsylvania Workers' Compensation Act has been interpreted to provide an "**absolute right**" of subrogation to the worker compensation insurer, where the compensable injury has been caused, to some degree, by a third party.² Over the years, the Pennsylvania appellate courts have addressed various challenges to the "**absolute right**" of subrogation asserted by representatives of the worker compensation insurer. The scope of this presentation is to identify the anticipated challenges to the assertion of the subrogation rights of the worker compensation insurer and to provide a frame work for effective subrogation recovery strategies.

²See: Heckendorn v. Consolidated Rail Corp., 455 A.2d 609 (Pa. 1993).

§ 8.01 **Identification of the Existence of a Worker Compensation Subrogation Lien**

[1] Injury Caused by Third Party

One must review the employer and employee's reports of the work injury and subsequent investigative materials to determine if the **act** or **omission** of a third party played a role in the occurrence of the work injury.

[A] QUESTIONS:

- i. Was claimant working with "co-workers" i.e., employees of the same employer or employees of a different employer on the work site -- did their acts or omissions contribute to the cause of the accident/injury?
- ii. Was claimant working with any machine or equipment which contributed to the cause of the work accident/injury?
- iii. Did another employer or third party fail to provide or maintain proper equipment or safe work site conditions?

[B] SUBROGATION EXISTS AS OF THE DATE OF INJURY

The Supreme Court of Pennsylvania, in an evenly divided opinion, held that the date of the employee's injury operates as the deciding factor in determining the existence of subrogation rights. The Supreme Court held that the date of injury, not the date of settlement, determines whether there is a right of subrogation against the settlement funds. Gokalp v. Pennsylvania Manufacturers Association Insurance Co., 719 A.2d 1033 (Pa. Supreme 1998).

[2] Course and Scope of Employment

When injured, was the claimant, within the **course and scope of his/her employment** at the time of the work injury?

The employer/insurer's right to subrogation has been upheld in a variety of civil actions arising from injuries occurring **within the course and scope of ones employment**. The definition of injury at §301(c)(1) broadly defines "**injury**" and this language has been

broadly interpreted by the appellate courts to effectuate the "humanitarian" purposes of the Workers' Compensation Act. Therefore, a work-related injury may occur (and a subrogation interest may attach) in two distinct situations: (1) where the employee, whether on or off the employer's business premises, is injured while actually engaged in the furtherance of the employer's business or affairs; or (2) where the employee, although not actually engaged in the furtherance of the employer's business is (a) on the premises under the control of the employer; (b) is required by the nature of his/her employment to be present on the premises; and (c) sustains injury caused by a condition of the premises or operation of the employer's business.

[a] Effect of "Expanded" Course and Scope of Employment.

In instances where the employer's liability for workplace injuries is expanded, a corresponding subrogation lien may arise. Thus, if an employee is injured while traveling to a physical therapy session, the motor vehicle accident could give rise to right for subrogation. Berro v. W.C.A.B. (Terminex International, Inc.), 645 A.2d 342 (Pa. Cmwlth. 1994).

[b] An employee injured in a company-sponsored softball game can be considered to be within the course and scope of employment and sustain a compensable injury. Scott v. W.C.A.B. (Packaging Corp. of America), 536 A.2d 492 (Pa. Cmwlth. 1988). If there is a corresponding civil action for negligent maintenance of the ballfield or negligent act of a third party, then there would be a right of subrogation against any civil action proceeds.

[3] **Notice to Parties of Worker Compensation Subrogation Lien**

We recommend prompt **notice** to the parties, of the existence (or potential right) of the subrogation rights of the worker compensation insurer. **Effective notice** to the proper parties is an essential element of establishing the worker compensation subrogation lien. We recommend:

1. Notice by written correspondence delivered by regular mail and certified mail, return receipt requested.

2. Notice should be made to all concerned parties: claimant, claimant worker compensation counsel; claimant's civil action attorney (if different); civil action defendant insurer (if known); civil action defendant insurance attorney (if known).
3. Request written confirmation of their acknowledgment of the worker compensation insurer right of subrogation for wage loss benefits and medical expense payments made as a result of the work injury.
4. Request their agreement to provide periodic litigation updates during pre-trial discovery.
5. Request a copy of all pleadings with identification of the parties, additional defendants, and identification of insurers.
6. Request an agreement to provide discoverable evidence regarding liability issues and damages.
7. Provide your agreement to release periodic updates of worker compensation benefit payments to document the subrogation lien.
8. Provide your agreement to release discoverable portions of the worker compensation file materials upon receipt of proper authorization or subpoena.

[a] Practice Pointer

Do not request or allow plaintiff attorney to "represent" the worker compensation subrogation lien of the insurer in the civil action proceedings, due to the inherent conflict of interest with the rights and interests of the plaintiff-claimant.

[4] Conflict of claimant-plaintiff attorney regarding worker compensation insurance subrogation lien representation.

We believe there is an inherent conflict of interest in the circumstance where claimant-plaintiff attorney is designated to represent the subrogation lien of the worker compensation insurer, where that attorney is representing the interests of the injured worker in a civil action or worker compensation proceeding. This conflict of interest has actually arisen on several occasions in the negotiation of a civil

action settlement which incorporates a reduction of the worker compensation insurer subrogation lien, in order to obtain a settlement with the civil action defendants.

[a] The Rules of Professional Conduct, which govern the professional ethical behavior of attorneys, provides a clear instruction. "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship of the other client; and (2) each client consents after consultation.

[b] A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests...."

[c] A Real Conflict of Interest

A conflict of interest can occur in a variety of circumstances but often it occurs when the plaintiff attorney agrees to "represent" the subrogation lien interest of the worker compensation insurer in the settlement negotiations in the civil action. In an effort to maximize the recovery for one client (the injured worker), the attorney "**negotiates**" a reduced percentage for the recovery of the subrogation lien payable to the worker compensation insurer. Thus, even if the **dual representation** is disclosed to each client, the actual "dual representation," adversely affects the rights of the second client (the worker compensation insurer).

[d] Similarly, a **conflict of interest** can occur in a Fatal Claim Petition, which gives rise to a civil action. In this context, the plaintiff attorney will have a conflict of interest in **apportioning** the amount of settlement proceeds to be attributed to the decedent's death claim versus the spousal or dependents survivor cause of action. In service to one client, the attorney must argue for an apportionment which "shields" the greatest amount of the civil recovery from the effects of the worker compensation subrogation lien recovery. Obviously, the "shielding" of the plaintiff's recovery from the impact of any subrogation lien, is to the detriment of the "other" client, the worker compensation insurer. Once again, zealous

representation of one client, inures to the detriment of the second client.

[e] When the Conflict Arises...

The representation of the subrogation interests by plaintiff counsel may not produce an immediate conflict of interest until there is a finite settlement offer which must lead to a compromise the interests of the injured worker or the subrogation lien. At this juncture, the anticipated conflict of interest actually develops, and plaintiff counsel should properly advise the worker compensation insurer that they must seek replacement counsel to adequately represent their separate, conflicting legal interests. Thus, although one may not anticipate the development of a conflict of interest at the inception of litigation, a conflict may develop due to the necessity to apportion the civil action settlement proceeds. **One can avoid this conflict of interest via separate legal representation of the subrogation interests of the worker compensation insurer, at the outset of the litigation.** Importantly, your evaluation of the liability damages and apportionment issues may differ from the evaluation proffered by the plaintiff's civil action attorney!

§ 8.02 Why Monitor the Civil Action Proceedings?

We believe that the continued **monitoring of the civil action proceedings** is essential to an effective subrogation lien recovery plan. As noted below, there are appropriate, and at times, creative efforts by plaintiff attorneys to limit the right of a worker compensation insurer to obtain a portion of the civil action settlement/verdict proceeds, as a reimbursement of the worker compensation benefit payments. The "absolute right" of subrogation to the worker compensation insurer has been challenged on factual, legal, and equitable grounds.

Plaintiff attorneys may properly continue to assert a **right to apportion** and exclude a portion of the civil action settlement proceeds, based upon identification of a portion of those proceeds as damages for spousal loss of consortium, or damages beyond wage loss and medical expenses.

[1] Monitor civil action proceedings and review discoverable evidence to assess the accuracy of plaintiff-claimant representations regarding:

- i. Assessment of liability of each party to the injury or accident.
- ii. Degree of contributory negligence of plaintiff which may reduce the actual civil action recovery.
- iii. Amount of claimant damages alleged and established for each count in the Civil Action Complaint.
- iv. Amount of damages established which are not subject to the worker compensation lien i.e., spousal or dependent claims.
- v. Prospects for successful litigation of civil action vis-à-vis the plaintiff and defendant settlement evaluation.

[2] Avoid a “Laches” Argument

We advocate ongoing monitoring of the status of civil action litigation, where a potential subrogation lien recovery exists.

In Superior Lawn Care vs. WCAB (Noffer), 878 A.2d 936 (Pa. Cmwlth. 2005), total disability benefits were voluntarily commenced via NCP for a left knee injury when claimant encountered a “charging” dog in the course of his work duties.

Insurer placed Claimant on notice of its subrogation rights in 5/93 after claimant filed a civil action in 3/93. Plaintiff counsel responded that subrogation was barred as the alleged injury arose from the use of a motor vehicle (the court noted this was a questionable representation). A civil action settlement was completed in 4/94. Insurer’s Review Petition was not filed until 5/02.

The court held that the Supreme Court rejected equitable notions, as applied to subrogation. It is an absolute statutory right, in the absence of deliberate bad faith conduct on the part of the employer. Finding no such conduct and that employee failed to demonstrate he came before the court with “clean hands” the arguments to apply the doctrine of laches were rejected. Claimant failed to advise the insurer that a settlement of the civil action was achieved, which would have

allowed the parties to resolve any outstanding subrogation issues at that time. 878 A.2 at 941.

§ 8.03 Preserving Civil Recoveries for Subrogation Recovery Lien

[1] Proper apportionment of consortium claim

In Darr Construction Company v. W.C.A.B. (Walker), 715 A.2d 1075 (Pa. Supreme 1998), **the Pennsylvania Supreme Court** addressed the issue of **apportionment** of the civil action recovery in addition to affirming the gross method as the proper means for calculation. An apportionment issue arises whenever there is a **loss of consortium claim** by ones spouse. Over the last twenty-five years, this area of law has led to a fair amount of appellate litigation.

Prior to Darr Construction, the general rule was that the plaintiff could not allocate specific amounts of a settlement to various elements of damage such as **pain and suffering** or **loss of consortium** in an attempt to adversely affect or limit the right or amount of subrogation to the worker compensation insurer/employer. See: Bumbarger v. Bumbarger, 155 A.2d 216 (Pa. Super. 1959). Despite creative attempts, this rule of law was often asserted to preserve the subrogation lien of the Pennsylvania worker compensation insurer.

[2] Proper Apportionment for Separate Civil Actions

These prior appellate decisions were subject to one limitation. In death cases with a surviving spouse and children, the insurer/employer was only entitled to a credit for that portion of the settlement, which is based upon the Wrongful Death Act and Survivor Act, that is actually recovered by the widow in her own right. The employer was not entitled to a credit for that portion of the Wrongful Death Act recovery paid to the dependent children. Anderson v. Borough of Greenville, 273 A.2d 512 (1971). This rule of law apparently functioned rather well as there are few reported appellate cases regarding the litigation of apportionment issues in civil actions for separate damages payable for dependent children.

[3] Standard for Consortium Claim Apportionment

In Darr Construction (a non-fatal injury), an **apportionment issue** arose regarding the workers' wives damages for loss of consortium. The case reported that five employees were injured in a gas explosion which occurred during their employment. The civil action against the third party defendants

was settled, and the wives signed **separate settlement agreements** and received **separate settlement checks**. Defendant/employer, Darr Construction was not involved in the settlement negotiations of the civil action. When Darr Construction filed Review Petitions in the Worker Compensation Arena to seek their subrogation recovery, defendant/employer, Darr Construction, argued that the **entire recovery** should be subject to the subrogation lien and a **voluntary apportionment** should not be allowed or respected by the court. The Commonwealth Court agreed with defendant/employer's arguments.

[a] Supreme Court Ruling

On appeal, the Supreme Court of Pennsylvania reversed and held there was no authority for a worker compensation official to review and determine the amount attributable to the loss of consortium recovery. The worker compensation authorities did not have the right to review and apportion the recovery, as the claimants' spouses signed separate settlement agreements and received separate payments. The Pennsylvania Supreme Court ruled that these damages were **not subject to the right of subrogation.**

[b] Potential for Abuse in Apportionment

The Pa. Supreme Court expressly noted:

"We recognize that a potential for abuse exists in the structuring of loss of consortium settlements between a claimant and a third party tortfeasor due to the lack of participation by the employer in the proceeding. A claimant would have the opportunity to shield his recovery from the employer's subrogation interests by **fraudulently attributing an unwarranted amount of damages** to the spouse's claim for loss of consortium. Fear of abuse, however, is an impermissible basis upon which to require the forfeiture of a spouse's valid recovery. In the event the settlement is unreasonably apportioned, an employer may always seek recourse in the Court of Common Pleas 715 A.2d at 1081.

[c] ANALYSIS: Thus, although the Court recognizes that there may be fraudulent behavior and the potential for abuse, the defendant/employer was not able to challenge the

apportionment of the civil action proceeds in a worker compensation proceeding! The only **legal recourse** appears to be active participation in the third party civil action (note the waiver argument in Thompson) and/or further litigation in a separate post settlement civil action if there is an unreasonable apportionment by claimant/plaintiff of the civil action proceeds.

[4] Rejection of the "Pain & Suffering" Apportionment Argument

In June of 2002, the Commonwealth Court once again rejected the argument of an injured worker that a civil action settlement must be apportioned on the basis that the settlement terms specified a portion of the recovery as "**pain and suffering**," an element of civil action damages outside the scope of the worker compensation benefit payments for wage loss and medical expense reimbursement.

The injured worker may not simply characterize a civil action recovery as solely for "pain and suffering" as a method to deprive the employer/insurer of its statutory right to subrogation. Citing, Bumbarger and rejecting Darr Construction apportionment arguments. Thompson v. WCAB (USF&G), 16/2114, 06-21-2002 Cmwlt. Ct.

[a] Recent Applications of Bumbarger Rule

A WCAB Decision is Instructive in the Review of a Workers' Compensation Judge's Authority to Address the Apportionment of Civil Action Settlement Proceeds.

When apportioning the civil action settlement proceeds, the Court of Common Pleas judge must identify the character of the net settlement proceeds payable to the injured worker, to avoid the imposition of the worker compensation subrogation lien upon the entire net recovery.

Sherrer v. WCAB (Beck Arnley World in Parts), 17 PAWCLR 1012 WCAB 09-09-02. In Sherrer, the civil action was settled with 20% apportionment to claimant's wife for her loss of consortium claim and 80% of the recovery to claimant for his claims. Of the 80% to claimant, the Common Pleas judge allocated 20% of

that amount for the worker compensation insurer subrogation lien, and the remaining 80% of the claimant's net recovery to pain, suffering, and other damages of claimant. Thus, the gross proceeds were to be distributed 20% to claimant's wife, 16% to defendant/insurer (20% of claimant's net share), and 64% (80% of claimant's net share) to claimant.

In litigation of defendant/insurer's Petition for Suspension before the workers' compensation judge, to enforce its subrogation lien, a suspension of benefits was granted, together with a calculation of the "grace period" for reimbursement of attorneys' fees and costs.

Importantly, the workers' compensation judge determined that the **allocation** of the third party civil action recovery by the Court of Common Pleas judge (where defendant/insurer was not a party), **did not preclude** defendant/insurer from enforcing its subrogation rights pursuant to §319 77 P.S. §671. The workers' compensation judge agreed that, claimant's wife's loss of consortium share of 20% of the recovery, was not subject to the defendant/insurer's subrogation lien. **However, the entire 80% settlement share for the injured worker was subject to the subrogation lien.**

On Appeal, the WCAB agreed with the workers' compensation judge's decision as the order settling the civil action did not specifically allocate claimant's net recovery between portions subject to the subrogation lien and portions not subject to the subrogation lien.

Citing Bumbarger, the WCAB ruled that civil action settlement proceeds to claimant, identified as compensation for **pain and suffering**, would be subject to the worker compensation subrogation lien, absent a specific apportionment. Thus, the worker compensation insurer subrogation lien could be applied against the entire claimant recovery, 80% of the claimant's recovery, not merely the 64% figure mentioned in the civil action settlement order of the Court of Common Pleas.

[b] Query: Is this an exception to the Pennsylvania Supreme Court ruling in Darr Construction?

No, as the civil action settlement in Sherrer erroneously "sheltered" pain and suffering damages, which were appropriately subject to the worker compensation insurer subrogation lien.

[c] No Apportionment “after the arbitration”.

In Martino v. W.C.A.B. (Peco Energy), 813 A.2d 945 (Pa. Cmwlt. 2002), the Commonwealth Court rejected the claimant's arguments regarding apportionment for an alleged loss of consortium deduction from the civil recovery.

The facts are unusual, in that claimant and the third party defendant agreed to high-low figures payable in the arbitration. By agreement, and unknown to the arbitrator, claimant would have received no less than \$100,000 and no more than \$650,000. The arbitrator did not grant any award, therefore, claimant received the "low" settlement figure of \$100,000.

The worker compensation insurer sought payment of its subrogation lien against the entire amount. Claimant countered by requesting the arbitrator provide a "breakdown" of the award. His response was that he would have apportioned 50% to claimant's cause of action and 50% to the spouse's loss of consortium claim. The Commonwealth Court rejected this argument, ruling that the arbitrator did not have any authority to make an apportionment, after his initial decision.

As there was no portion of the recovery separately designated as payment for a loss of consortium claim, the entire amount of settlement was subject to the worker compensation subrogation lien.

§ 8.04 The “Not So Absolute” Right of Subrogation in Medical Malpractice Cases

[a] General Rule

There is a right of subrogation against a third party civil action for **medical malpractice** where the negligent medical treatment was provided in connection with the original work-related injury. Powell v. Sacred Heart Hospital, 514 A.2d 241 (Pa. Cmwlt. 1986).

[b] Revision of the Rule

The employer filed a Modification Petition asserting a right to subrogation which was granted by the workers' compensation judge. The judge found that the surgery was a result of the same compensable injury for which employer was compelled to make

worker compensation benefit payments. The Appeal Board affirmed this decision and the Commonwealth Court reversed.

The Commonwealth Court reasoned that even though employer has demonstrated that the back surgery was the result of the original work injury, because it was performed to alleviate conditions caused by the injury, that does not necessarily mean that it was **compelled to make payments** as a result of the medical malpractice, as required by the statutory language at §319 of the Pennsylvania Workers' Compensation Act. The Court concluded that the **medical deposition testimony** of the expert from the malpractice case did not specifically address the issue of **whether a successful surgery would provide the outcome that claimant would become employable again**. The medical testimony demonstrated that the surgery caused claimant's back condition to worsen but there is no evidence of the probability of recovery in a successful procedure. Because the employer did not sufficiently demonstrate that claimant could have ever sufficiently recovered from her work-related injury to be employable, it correspondingly **failed to establish that it was compelled to make payments due to the medical malpractice**, thereby being precluded from asserting subrogation rights against claimant's settlement.

[c] The "New" Standard in Med Mal Subrogation cases

Where a right of subrogation is asserted for worker compensation benefits, against a civil action for medical malpractice, the defendant/insurer must establish that the civil action settlement arose from medical malpractice that caused or increased the worker compensation insurer's liability for payment of benefits. In Edder v. W.C.A.B. (Glenshaw Glass Co.), 767 A.2d 617 (Pa. Cmwlth. 2001), the claimant sustained a back injury while at work in 1986 and underwent two surgical procedures in 1987. He experienced complications, including neurogenic impotence and incontinence. He pursued and settled a medical malpractice claim against the surgeon. Defendant/employer filed a Petition to Modify Benefits based upon its subrogation lien for worker compensation benefit payments. The Commonwealth Court affirmed the **denial of the subrogation lien** to the worker compensation insurer on the basis that the defendant/employer must establish (1) **a causal connection** between the original work injury and the subsequent event for which the third party is liable and (2) that as a result of the subsequent event, the defendant/employer/insurer was

compelled to pay compensation benefits greater than those required by the initial injury. Edder citing Griffin v. W.C.A.B. (Thomas Jefferson University Hospital), *infra*.

[d] In Sharkey v. W.C.A.B. (Sharkey's American Hardware), 744 A.2d 345 (Pa. Cmwlth. 1999), the Commonwealth Court reversed the decision of the workers' compensation judge to grant the employer's Petition for Modification to establish its right of subrogation against the employee's widow's third party recovery in a medical malpractice action. The decedent was injured when a car struck a utility pole, thereby sustaining cervical shoulder and left knee injuries. The employee subsequently sustained a fatal heart attack, and his widow was successful in establishing the death was a direct result of the physical injuries. Following her husband's death, claimant filed a medical malpractice action which was settled for \$700,000.00. On appeal from the recognition of employer's subrogation lien, claimant argued that the stipulation which settled the third party civil action dealt only with the procedural history of the case and **did not contain any evidence to support the employer's burden of proof** that the negligent medical treatment was related in some manner to the original work injury or to the subsequent heart attack. From the stipulation, it was impossible to tell what treatment decedent received when the malpractice occurred or what injuries the medical malpractice caused.

[e] **PRACTICE POINTER:** Remember your burden of proof to establish a subrogable interest when examining the facts to determine if a subrogation lien exists!

Defendant/employer/insurer must establish by unequivocal medical evidence that the **subsequent injury** from the medical malpractice is in whole or in part a **contributing factor** to the original compensable injury. When a claimant undergoes a negligent surgical procedure to alleviate a work-related condition, the negligence is considered a contributing factor and not a separate event disassociated from the original injury. The second step is to establish that the worker compensation insurer was **compelled to make compensation benefits** as a result of the negligent surgery. That requires the production of an expert medical opinion that claimant would have become employable but for the negligent surgery. Similar to the Petition for Suspension/forfeiture of benefits due to refusal to undergo reasonable medical services, the medical testimony must reflect an unequivocal opinion regarding the probability of recovery and

employability of the injured worker, but for the unfortunate medical treatment result.

§ 8.05 **Additional Limitations Upon the Worker Compensation Insurer Right to Subrogation Recovery**

[1] **The PIGA Exception**

The right of subrogation of the worker compensation insurance carrier is also limited where the injured worker pursues a medical malpractice lawsuit, whose insurance carrier was placed in liquidation by the Insurance Commissioner. The Pennsylvania Property & Casualty Insurance Guaranty Association assumes responsibility for a portion of the civil action liability. The Commonwealth Court held that the **subrogation rights** of the defendant/employer pursuant to §319 are **abrogated** when the third party recovery is paid pursuant to the Pennsylvania Property & Casualty Insurance Guaranty Association Act. The Court held, where the third party insurance company becomes insolvent, the statutory scheme shifts the normal burden of loss and requires the solvent insurer to remain responsible for the payment of worker compensation benefits, thereby precluding the worker compensation carrier from exercising its traditional right of subrogation. See: Cullen v. W.C.A.B. (Pennsylvania Property & Casualty Insurance Guaranty Association), 760 A.2d 1198 (Pa. Cmwlth. 2000).

[2] **Limitation Upon Subrogation Recovery - Claimant's Own Insurance Policy**

[a] **No Subrogation Recovery – The Employee’s Policy**

A right of subrogation can be pursued against the civil action proceeds received by the injured worker from a negligent third party. However, there is **NO** entitlement to subrogation against the settlement proceeds where the injured worker received payment pursuant to his **OWN** uninsured or underinsured motorist provision of his personal motor vehicle insurance policy. Where the work injured worker obtains settlement proceeds through his own insurance policy and the premiums are paid exclusively by the claimant, they are fundamentally different from proceeds obtained from a third party and, therefore, are not subject to subrogation. See: American Red

Cross v. W.C.A.B. (Romano), 745 A.2d 78 (Pa. Cmwlth. 2000) and Standish v. American Manufacturers Mutual Insurance Co., 698 A.2d 599 (Pa. Super. 1997).

[b] Subrogation Recovery - The Employer's Insurance Policy

A right to recovery by the worker compensation insurer for its subrogation interest pursuant to §319, is available where the civil action recovery is available from the **employer's insurance for uninsured/underinsured** motor vehicle insurance coverage.

In City of Meadville v. WCAB (Kightlinger), 810 A.2d 703 (Pa. Cmwlth. 2002), the Commonwealth Court ruled that it would be "illogical" to allow the claimant to be in a better position by recovering from the employer's uninsured/underinsured motor vehicle insurance policy, than if claimant recovered directly from the third party tort-feasor. The Court noted, there is no provision in the Motor Vehicle Financial Responsibility Law (MVFRL) which precludes an employee from recovering uninsured or underinsured benefits under a motor vehicle insurance policy maintained and wholly funded by the employer.

Citing the Pennsylvania Superior Court decision in Warner v. Continental Insurance Company, 688 A.2d 177 (Pa. Super. 1996), the Commonwealth Court noted that the 1993 Amendments (Workers' Compensation Act 44) to the MVFRL, reflected the legislative intent to allow an injured employee to recover uninsured/underinsured under a motor vehicle policy purchased by his employer as the purchase of those motor vehicle policy benefits were optional, and those benefits were subject to the employer's worker compensation insurer's right of subrogation.

The Pennsylvania Supreme Court rendered the same conclusion when it addressed this issue in 722 A.2d at 1046. The Supreme Court reasoned that the repeal of §1735 and §1737 of the MVFRL did not affect the ability of employee to recover both worker compensation and underinsured motorist benefits, rather the repeal of §1735 permitted the employee to recover from the insurer, although the worker compensation insurer would be a beneficiary, through assistance of the subrogation lien to prevent a double recovery.

§ 8.06 **Civil Action Recovery - Pre-dating Worker Compensation Claim**

The Pennsylvania Workers' Compensation Appeal Board recently addressed a controversy arising where a worker alleged disability due to workplace exposure to asbestos materials, resulting in pulmonary injury and a subsequent diagnosis of lung cancer. The evidence before the workers' compensation judge and WCAB was found competent and credible to establish a work-related disease and disability arising from claimant's employment with the school district. The motion to join claimant's former employer as a necessary defendant was denied.

The workers' compensation judge denied a request by the school district to assert a right of subrogation against any settlement proceeds from civil actions against the manufacturers of asbestos products manufactured between 1989 and 1997, a period concurrent with claimant's employment with the school district from 1984 to 1996. These third party civil action settlements pre-dated finding of a work injury as of 11-03-97.

The Workers' Compensation Appeal Board, relying upon the Commonwealth Court decision in Dale Manufacturing Co. v. W.C.A.B. (Bressi), 382 A.2d 1256 (Pa. Cmwlth. 1978), the Appeal Board reasoned that an employer must show that they are compelled to make worker compensation payments by reason of the negligence of the third party and they seek subrogation for the same injury. Although this rule was established in the context of a third party's action after the compensable injury, the Appeal Board applied this reasoning to conclude that the worker compensation insurer and employer could not meet the burden of proof to establish entitlement to a right of subrogation. The Appeal Board explained that the settlement arguments in the civil action did not specify the cause of action and identify the harm compensated. Without this information, the Appeal Board concluded that defendant did not meet its burden of proof to establish that any of the companies involved in the civil action settlements were responsible in whole or in part for claimant's lung injury. See: Thomas v. Philadelphia School District, 16 PAWCLR 1086 (Pa.W.C.A.B., 01-30-02).

§ 8.07 **Civil Action Recovery – After Work Compensation Settlement**

[1] Factual Background

The parties entered into a compromise and release settlement for loss of an eye and facial disfigurement. The “box” on the LIBC form for existence of subrogation lien was checked “no”. The space provided to describe the credit, formula used and attachment of a Third Party Settlement Agreement was “blank”.

The settlement was approved. Afterwards, claimant filed a civil action, and made a recovery. Employer petitioned to recover its subrogation lien. The insurer’s evidence did not reflect any discussion of a third party action or waiver of the subrogation lien. Claimant testified he was not aware of the possibility of a third party recovery until after the work comp settlement.

[2] Appellate Ruling

The Commonwealth Court affirmed the decision of the WCJ; the evidence fails to establish that the employer released or waived its subrogation rights. At the time of C&R a civil action was not contemplated.

“The fact that employer stated in the C&R that there was no lien or potential lien for subrogation does not indicate a waiver of a right to subrogation. Rather it merely indicates employers belief that a lien or potential lien did not exist; a believe that claimant agrees was correct at that the time”. 952 A.2d at 752.

See: Gorman v. WCAB (Kirkwood Construction), 952 A.2d 748 (Pa. Cmwlth. 2008).

§ 8.08 Settlement Agreements Varying Worker Compensation Rights

[1] General Rule

The Commonwealth Court has declared **null and void** a settlement agreement which varies the amount of benefits to be paid or the period of benefit payments.

[2] Case Law – Extension of Grace Period

In Budd Co. v. W.C.A.B. (Settembrini), 786 A.2d 866 (Pa. Cmwlth. 2002), the Commonwealth Court reviewed the case

where the injured worker received worker compensation benefits and settled his civil action for \$200,000.00. The subrogation lien was approximately \$171,000.00. The employer agreed to a \$75,000.00 partial payment of its accrued lien. An agreed upon credit of \$115,000.00 was to be applied against future worker compensation benefits subject to employer payment of its pro rata attorneys' fees and costs. The agreement reflected that employer did not waive any subrogation interest, the \$115,000.00 amount was designated as an advance payment of worker compensation benefits. As the payment of \$75,000.00 and "credit" of \$115,000.00 exceeded the worker compensation lien, the workers' compensation judge found this credit violated the provisions of the Workers' Compensation Act. Employer argued it accommodated employee's desire for a smaller up front payment and longer grace period.

The Court held the agreement **null and void** as the agreed upon credit exceeded the balance of recovery to claimant, according to the Bureau method of calculation.

[3] Practice Pointer:

The Court noted, an employer is not prohibited from voluntarily waiving immediate payment of its past subrogation lien, so long as the future credit upon which the grace period is computed does not exceed the actual balance of recovery to the claimant.

[4] Extension of Grace Period II

The WCAB exceeds its authority when it reduced the work comp insurer's weekly rate of subrogation lien recovery. The WCJ calculated employer's subrogation lien and ordered a suspension of benefits for 241.38 weeks to allow a full lien recovery.

On appeal, the WCAB "reduced" the weekly subrogation lien recovery to "a just and manageable sum" of \$80.00 per week, deducted from the TTD rate. This extended the time period for subrogation recovery to a period of 494.30 weeks. (About double the time).

The Commonwealth Court reversed. Subrogation is “absolute and can be abrogated only by choice.” (Citing Winfrey v. Philadelphia Electric Co., 554 A.2d 485 (Pa. 1989).

Subrogation is automatic; ad hoc equitable exceptions do not apply to Section 319.

See: Monessen, Inc. v. WCAB (Fleming), 875 A.2d 415, 418 (Pa. Cmwlth. 2005).

[5] Agreement for Subrogation – Oral vs. Written

The parties may enter into voluntary settlement discussions. We recommend caution and clarity of instructions to avoid undesired results. In an awkward decision, the Commonwealth Court held that an oral argument between the claimant and the worker compensation insurer representative was not enforceable regarding a negotiation of the right of subrogation of the worker compensation insurer against claimant’s recovery from a work-related motor vehicle accident. Prior to the hearing before the workers’ compensation judge regarding calculation of the subrogation interest arising from the civil action settlement, the parties reached an oral agreement stipulating that the workers’ compensation insurer would be entitled to recover its full lien, in exchange for the insurer’s agreement to only deduct \$100.00 per week from claimant’s total disability benefits. After the hearing, the insurance representatives “changed their mind” and refused to prepare a written agreement. On appeal, the Commonwealth Court held that the oral agreement was not enforceable. A Compromise and Release Agreement must be signed by the parties, claimant must testify regarding his/her understanding of the “full legal significance” of the agreement and the WCJ must circulate a decision approving the agreement.

In Rissmiller, the WCJ did not take evidence in this matter, based upon the (correct) belief that an oral agreement was not enforceable.

See: Rissmiller v. WCAB (Warminster Township), 768 A.2d 1212 (Pa. Cmwlth. 2001).

[6] Settlement Agreements – Waiver of Subrogation Recovery

The parties may negotiate and reach an agreement whereby the workers' compensation insurer agrees to reduce or waive the net lien amount (as calculated by the Bureau method).

The parties may negotiate and agree to waive a portion or the entire future credit or "grace period".

The parties may negotiate and agree to a "combination" of the above.

[a] A WCJ may assess the credibility of witnesses and determine that discussions at the time of the Civil Action Settlement Conference supported a finding that the insurer's agreement to accept \$86,666 in compromise of its lien of \$180,000 **did not** include an unstated settlement of any lien for future medical expenses.

On appeal the Commonwealth Court affirmed. The limited correspondence of the parties did not rise to the level of a judicial admission.

Reeder vs. W.C.A.B (Mercer Lime and Stone Co.), 871 A.2d 337 (Pa. Cmwlth. 2005).

[7] Gratuitous Attorney Fee Reduction is the Proper Figure for Subrogation Recovery Calculations

In a Third Party Civil Action Settlement, an insurer's calculation of the pro-rata share of attorney's fees and costs should be made based upon the actual amounts paid. Where the Claimant counsel has reduced his fee and characterized the waived portion of the fee as a "gift", the insurer's subrogation recovery should not be calculated based upon the original attorney fee contract amount.

As noted in these materials, an increase in the amount of the civil action attorney fees and costs will reduce the net subrogation recovery and prolong the grace period, proportionately.

In Good Tire Service v. WCAB (Wolfe), 978 A.2d 1043 (Pa. Cmwlth. 2009), the decision of the WCJ was affirmed on appeal.

The actual “lower” amount of the attorney fee paid by claimant should be used for the subrogation calculations. The “hypothetical” attorney fee of 40%, as originally contracted was gratuitously reduced by clamant counsel. The WCJ ruled the waived and refunded fee amount is not a “reasonable attorney fee” incurred in obtaining the civil action recovery.

§ 8.09 Work-Related Motor Vehicle Accident and Workers' Compensation Subrogation

[1] 1993 Amendments Allow Workers' Compensation Subrogation

Sections 1735 and 1737 of the Motor Vehicle Financial Responsibility Law were amended in 1993 by the Pennsylvania Workers' Compensation Amendments, known as Act 44, to eliminate the prohibition upon the right of a worker compensation insurer to seek a right of subrogation against motor vehicle insurance benefits payable as a result of a work-related motor vehicle accident. Previously, subrogation was not permitted for injury arising out of the operation or use of a motor vehicle prior to 08-31-93, regardless where the civil action recovery was obtained. Byard F. Brogan, Inc. v. W.C.A.B. (Morrissey), 637 A.2d 689 (Pa. Cmwltth. 1994).

As discussed above, a right of subrogation of the worker compensation insurer may be applied against any civil action recovery for a work-related motor vehicle accident occurring after 08-31-93 where the civil action recovery is not the result of the motor vehicle insurance policy of the injured worker.

[2] Recovery of Workers' Compensation Subrogation Lien - Motor Vehicle Settlement

The recognized rights of a worker compensation insurer against any civil action recovery arising from a work-related motor vehicle accident remains undisputed since 08-31-93. But for the exception, where a worker makes a recovery against his own motor vehicle insurer, the rights of the worker compensation insurer remain preserved.

The Commonwealth Court upheld the right of the worker compensation insurer to assert its right of subrogation against a civil action settlement for a motor vehicle accident, even where the injured worker attempted to conceal the true amount of that recovery.

[3] Undisclosed Settlement Terms

The Court upheld the right of the worker compensation insurer to assert its subrogation rights against the declared settlement amount of \$85,000.00 and the **undisclosed amount of annuity** payments by the motor vehicle insurer. In Mrkich v. W.C.A.B. (Allegheny County CYS), 801 A.2d 668 (Pa. Cmwlth., 2002), the Commonwealth Court found that the workers' compensation judge correctly ordered claimant to "turn over" the annuity payments to the worker compensation insurer. Simply stated, §319 of the Pennsylvania Workers' Compensation Act allows the employer/insurer a right of subrogation to the rights of the injured worker. There is no distinction to the type of recovery or manner of payment. The annuity in this case represents a part of the civil action recovery, no less than the initial lump sum payment of \$85,000.00. It is equally subject to the subrogation rights of the employer/insurer.

§ 8.10 Legal Malpractice - Subrogation Recovery?

In the past, a federal district court decision held that an employer/insurer that paid workers' compensation benefits is entitled to a subrogation lien in a civil action against an attorney for **legal malpractice** for failure to file a third party civil action. The court reasoned that the case was no different than any other subrogation claim in a normal third party action. There is no reason why the subrogation interest should not apply where the plaintiff is merely obtaining from his attorney the damages he would have obtained from the original tort-feasor directly, but for the attorneys malpractice. Graham v. Liberty Mutual Group, 1999 U.S. Dist. Lexis 20026, 1998 WL 961376 (E.D. Pa. 1998).

[1] Pennsylvania Precedent

In Poole v. W.C.A.B. (Warehouse Club, Inc.), 810 A.2d 1182 (Pa. Cmwlth. 2002), the Pennsylvania Supreme Court decided that a worker compensation insurer was entitled to assert a right of subrogation against the claimant's recovery from the legal malpractice settlement, arising from the failure of claimant's attorney to timely file the civil action arising from the work injury.

§ 8.11 **Continuing Attacks Upon the Employer/Insurer's Right to Subrogation**

[1] Degree of Employer's Cooperation in Civil Litigation

Often the attorney for plaintiff/claimant would argue before the workers' compensation judge that the defendant/insurer/employer is not entitled to a subrogation lien against any third party civil action as the defendant/employer did not cooperate and assist plaintiff/claimant in obtaining the civil action settlement or recovery from the tort-feasor.

In some instances, the representatives of the employer would be called to testify against the interest of the plaintiff/claimant and this event would further the logic of this equity argument. Rather consistently, the Supreme Court of Pennsylvania and Commonwealth Court held that the employer/insurer's right to subrogation is not limited by the employer's failure to cooperate with the claimant in the third party civil action. See: Winfree v. Pennsylvania Electric Co., 554 A.2d 485 (Pa. Supreme 1989) and Kelly v. W.C.A.B. (APA Transport Corp.), 527 A.2d 1121 (Pa. Cmwlt. 1987).

[2] Review of Plaintiff Arguments

This comfortable position was threatened by the Commonwealth Court decision filed in the decision Thompson v. W.C.A.B. (USF&G Co. and Craig Welding and Equipment Rental), 730 A.2d 536 (1999) (Pa. Cmwlt. 1997). This decision in Thompson I. was **reversed** by the Supreme Court of Pennsylvania on October 17, 2001. A review of the factual background is instructive.

The claimant was voluntarily paid worker compensation benefits for a serious injury which occurred when a crane platform collapsed. A civil action was filed in the Court of Common Pleas of Allegheny County and prior to the trial, the employer lost the bolts which had been removed from the crane. The bolts were not available for inspection by the defendant's expert for measurement and comparison to the original bolts to determine if they were the correct specifications and the possible reasons for failure. During the trial, the manufacturer and crane owner filed a Motion in Limine that the trial court preclude any evidence of claimant's lost wages or medical expenses, arguing that they are prejudiced by the failure of employer to produce the bolts. Representatives of the insurer and its attorney were present at various discussions, and they were aware of the motion but **did not intervene**

or join as a party to the action to prevent this maneuver. The trial court granted the motions, and the case ultimately settled. **The settlement did not include calculation of wage loss or medical benefits.** When the defendant/insurer/employer filed a Petition for Suspension to enforce subrogation rights, they prevailed before the workers' compensation judge and the Appeal Board. The Commonwealth Court reversed that decision and reasoned that a plaintiff would be barred from recovering any damages if it destroyed evidence, therefore, the employer/insurer must suffer a similar fate as they failed to intervene and prevent the trial judge's ruling.

Importantly, the Commonwealth Court stated:

“A trial judge cannot efficiently dispose of tort claims unless he or she has the ability to require all interested parties to try or settle their claims in the case called for trial. In this case, the compensation carrier chose to ignore the ruling of the trial judge and to seek reimbursement for its subrogation claim not from the third party tort-feasor, but from the proceeds of claimant's settlement for his damages, which did not include any damages arising out of the subrogation claim”. 730 A.2d at 538

[3] Supreme Court Ruling

The Supreme Court reviewed Thompson and reiterated that the defendant/employer/insurer had an **absolute right of subrogation** pursuant to §319 of the Pennsylvania Workers' Compensation Act. Although there may be circumstances where the civil action settlement is manipulated to limit the right of subrogation of the worker compensation insurer, in this case, there was no evidence of bad faith by the parties in a civil action. The Supreme Court rejected the “equitable” arguments of Plaintiff. The Supreme Court remanded the case to determine whether the loss of consortium claim of the spouse was subject to the valid subrogation interest of the worker compensation insurer. See 781 A.2d 1146.

[4] Subrogation Recovery on Remand

In Thompson II, 801 A.2d 635, (Pa. Cmwlth. 2002), on remand to the Commonwealth Court from the Supreme Court, the Court held that

defendant/employer was entitled to a **subrogation recovery** with regard to civil action damages obtained that were attributed to "**pain and suffering**" in the trial court approved settlement.

Citing the original subrogation case law precedent of Bumbarger v. Bumbarger, 155 A.2d 216 (Pa. Super. 1959), the court noted that settlement funds designated as solely attributable to "pain and suffering" were subject to the subrogation rights of the worker compensation insurer. In light of this case law precedent and the Supreme Court decision at Thompson, the Commonwealth Court approved the subrogation lien recovery.

[5] Analysis

This was a rather significant challenge to the "absolute" right of subrogation provided by §319 of the Pennsylvania Workers' Compensation Act. Similar arguments by plaintiff counsel can be anticipated in future litigation.

It is noteworthy that Plaintiff's presented arguments against subrogation lien recovery based upon equitable principles, which did not "trump" the statutory right of subrogation.

§ 8.12 **Fatal Claim and Loss of Consortium Claim Apportionment of the Civil Action Proceeds**

[1] Apportionment Arguments

Another line of attack upon the employer/insurer's right to subrogation arises in the context of a civil action for the loss of consortium claim of one's spouse. In Darr Construction Company v. W.C.A.B. (Walker), 715 A.2d 1075 (Pa. Supreme 1998), the Pennsylvania Supreme Court addressed the issue of **apportionment** of the civil action recovery in addition to affirming the gross method as the proper means for calculation.

An apportionment issue arises whenever there is a loss of consortium claim by one's spouse. Over the last twenty-five years, this area of law has led to a good deal of litigation. Prior to Darr Construction, the general rule was that the plaintiff could not allocate specific amounts of a settlement to various elements of damage such as pain and suffering or loss of consortium in an attempt to adversely affect or limit the right or amount of subrogation to the worker compensation insurer/employer. Bumbarger v. Bumbarger, 155 A.2d 216 (Pa. Super. 1959). Despite creative attempts, this rule of law protected the subrogation lien of the Pennsylvania worker compensation insurer.

[2] Apportionment Available

In death cases with a widow and children, the insurer/employer was only entitled to a credit for that portion of the settlement, which is based upon the Wrongful Death Act and Survivor Act that is actually recovered by the widow. The employer was not entitled to a credit for that portion of the Wrongful Death Act recovery paid to the dependent children. Anderson v. Borough of Greenville, 273 A.2d 512 (1971). This rule of law has apparently functioned rather well, as there are few reported appellate cases regarding the litigation of attempted subrogation recovery from dependent children.

[3] **Apportionment Inappropriate**

In Darr Construction (a non-fatal injury), there was an apportionment issue regarding the wives' damages for loss of consortium. Five employees were injured in a gas explosion which occurred during their employment. The civil action settled, and the wives signed separate settlement agreements and received separate settlement checks. Defendant/Employer, Darr Construction was not involved in the settlement negotiations of the civil action. When Darr Construction filed Review Petitions in the worker compensation arena to seek their subrogation recovery, defendant/employer, Darr Construction, argued that the entire recovery should be subject to the subrogation lien and a voluntary apportionment should not be allowed or respected by the court. The Commonwealth Court agreed with defendant/employer's arguments.

On appeal, the Supreme Court of Pennsylvania reversed and held there was no authority for a worker compensation official to determine the amount attributable to the loss of consortium recovery. The worker compensation authorities did not have to apportion the recovery as the claimants' spouses signed separate settlement agreements and received separate payments. These damages were not subject to the right of subrogation.

[4] **Analysis**

Thus, although the Court recognizes that there may be near fraudulent behavior and the potential for abuse, the defendant/employer was not able to challenge the apportionment of the civil action proceeds in a worker compensation proceeding! The only legal recourse appears to be participation in the third party civil action (note the waiver argument in Thompson I above) and/or further litigation in a separate post settlement civil action if there is an unreasonable apportionment by claimant/plaintiff of the civil action proceeds.

§ 8.13 Preservation of the Health Insurer Subrogation Lien

[1] Overview

In addition to the subrogation interests of the worker compensation insurer against any civil action recovery for injury caused by a third party, §319 of the Pennsylvania Workers' Compensation Act has been interpreted to provide for a right of subrogation for payments made by a Health Insurer for payment of medical expenses determined to be the result of a compensable work injury. Payment of "sickness and accident" benefits may also give use to a right of subrogation by the long-term or short-term disability insurer.

[2] Statutory Language

"Where an employe has received payments for the disability or medical expense resulting from an injury in the course of his employment paid by the employer or an insurance company on the basis that the injury and disability were not compensable under this act in the event of an agreement or award for that injury the employer or insurance company who made the payments shall be subrogated out of the agreement or award to the amount so paid, if the right to subrogation is agreed to by the parties or is established at the time of the hearing before the referee or the board." Section 319, 77 P.S. §671.

[3] Challenge to Lien

Controversy regarding the assertion of subrogation rights by a health or disability insurer typically arises regarding the proper assertion and preservation of the right of recovery in the workers' compensation judge's decision. Often the health insurer will contract with the claimant attorney to assert and preserve its lien. The liability insurer may contract with the claimant or defendant attorney to preserve its lien.

An employer's right to a credit for subrogation benefit payments may be waived, if it is not raised, preserved, and documented before the workers' compensation judge. Boeing Helicopters v. W.C.A.B. (Cobb), 713 A.2d 1181 (Pa. Cmwlth. 1998). There is limited case law authority regarding the application of the rule to the health insurers which will be

discussed below. Typically, the health insurer is not a part to the initial worker compensation claim proceedings. Where these rights are represented by the claimant attorney, its case law addresses the proper preservation of these rights.

[4] Proper Preservation of Rights

It is sufficient that claimant counsel submit a letter from the health insurer regarding their retention as legal counsel and documentation of the health insurer payments to preserve the subrogation rights of the Health insurer, **prior to the close of the evidentiary record before the workers' compensation judge.**

In Industrial Recision Services v. W.C.A.B. (Farbo), 808 A.2d 994 (Pa. Cmwlth. 2002), the submission of a letter of legal representation with an itemization of the health insurer payments was sufficient to preserve the subrogation rights of the health insurer, even if submitted **after the final hearing** and one week before the closure of the evidentiary record.

Even though additional documentation was necessary to resolve inconsistencies over the amount of the lien, the subrogation lien was properly preserved, as the health insurer's right to subrogation was raised and acted upon, while the matter was still subject to review before the WCJ. 808 A.2d at 999.

[5] Penalties for Failure to Pay Properly Documented Health Insurer Subrogation Lien

A health insurer subrogation lien is properly documented when:

- (1) The Compromise and Release Stipulation included a separate attorney fee agreement for efforts obtaining reimbursement of the health insurer's subrogation lien;
- (2) The WCJ issued an amended order directing employer to issue payments for medical expenses referenced in the C&R inclusive of the reimbursement of the health insurer lien;

(3) Employee did not appeal.

These facts supported the filing of a Penalty Petition.

A Penalty Petition was granted.

Employer's argument that duplicate payments were issued and claimant bore the burden of seeking recovery was rejected.

See: Lusby v. WCAB (Fischler Co.), 976 A.2d 1230 (Pa. Cmwlth. 2009).

[6] Waiver of Subrogation Rights

The failure to raise and preserve the subrogation rights of the health insurer can be waived where those rights were not raised before the workers' compensation judge and supporting documentation was not submitted. See: Baierl Chevrolet v. W.C.A.B. (Schubert), 613 A.2d 132 (Pa. Cmwlth. 1993). The distinguishing factor in denial of the subrogation rights, as noted by the Commonwealth Court in Farbo, *supra*, was that the health insurer in Baierl did not attempt to assert any right to subrogate until after the resolution of the worker compensation claim via a compensation agreement. The right of subrogation must be agreed upon by the parties or established at the time of hearings before the workers' compensation judge.

[7] Subrogation vs. Credit

Note: The decision in Baierl incorrectly relied upon WCAB (Jante) v. Olivetti Corp., 364 A.2d 735 (Pa. Cmwlth. 1976) for justification of a denial of subrogation where that decision actually allowed a subrogation "credit" to an employer's disability insurer, despite the lack of a subrogation agreement in the record, presumably to prevent a double recovery.

In Olivetti Corp. the Commonwealth Court reviewed a situation where an employee was injured at work lifting a typewriter. She reported her injury, treated with the "plant nurse" and was assured her claim would be processed.

Unbeknownst to claimant she received monthly payments from the employer non-occupational sickness and accident insurer (Aetna).

After filing a "Review" petition she was granted work comp benefits payable by Travelers.

A right of subrogation of Aetna was denied as Aetna did not raise a subrogation issue until after the WCJ decision and Aetna did not join in the proceedings. Aetna was not **subrogated** to claimant's right to receive work comp payments from Travelers.

YET, The Employer (not Aetna) is entitled to a **credit** against its liability for work comp benefits paid to claimant by its non-occupational sickness and accident insurer. 364 A.2d at 469-470

§ 8.14 **"Show Me the Money" – An Overview of Subrogation Recovery Calculations**

The question of whether one should employ the net method or **gross method** for calculation of the subrogation interest has been decided by the Supreme Court in two separate decisions. This controversy initially arose from the Supreme Court decision in Rollins Outdoor Advertising v. WCAB (Mass), 487 A.2d 794, (1985), wherein the Supreme Court concluded that one should employ an algebraic equation to calculate the subrogation lien, the balance of recovery and the grace period. The explanation did not fit the Bureau third party settlement form, nor did it fit within the prior appellate court explanations.

This issue was clarified in the Supreme Court of Pennsylvania decisions at P & R Welding and Fabricating v. W.C.A.B. (Pergola), 701 A.2d 560 (Pa. Supreme 1997) and Darr Construction Co. v. W.C.A.B. (Walker), 715 A.2d 1075 (Pa. Supreme 1998).

[1] **Legal Standard**

The Supreme Court decided that the gross method should be utilized in calculating an employer/insurer's subrogation rights pursuant to §319 with respect to an employee's recovery in the third party tort action. The legal fees and costs are pro rated as the employer receives the benefit of each grace period week, in contrast to the net method, whereby all of the costs associated with the third party recovery are deducted from the total recovery for purposes of determining the amount available as a future credit.

[2] PRACTICE POINTER:

Footnote 9 in the P & R Welding decision provides the clearest explanation and description of the terms for calculation of a subrogation lien. Also included in the materials for reference is a copy of the LIBC-380 Form, the Third Party Settlement Agreement. This revised form is substantially easier to use, especially with reference to the P & R Welding calculations.

[3] P & R Welding Footnote No. 9 at 701 A.2d @ 496

Using the figures in this case, the gross method would render the following result:

| | |
|--|--|
| (1) Total Recovery | \$ 165,000.00 |
| less: accrued lien | 117,167.25 (71% of Total Recovery) |
| Balance of Recovery | \$ 47,832.74 (29% of Total Recovery) |
| (2) Total Expenses | \$ 57,610.95 |
| Expenses attributed to accrued lien | 40,903.77 (71% of Total expenses) |
| Expenses attributed to balance of recovery | 16,707.18 (29% of Total expenses) |
| (3) Accrued Lien | \$ 117,167.25 |
| less: expenses attributed to accrued lien | (71% of legal expenses of \$57,610.95) |
| Net Lien (satisfied by \$ 35,000..00) | \$ 76,263.48 |
| (4) Balance of Recovery divided by weekly compensation rate | 47,832.75 |
| Grace Period 142 weeks | 336.00 |
| (5) Legal Expenses attributed To balance of recovery divided by grace period 142 weeks | \$ 16,707.18 |

Reimbursement of Expenses
Attributed to Balance of
Recovery \$ 117.66 per week

Thus, under the gross method, Employer would receive a grace period of 142 weeks during which it would not have to make any future workers' compensation payments to appellant. Employer, however, would have to pay appellant \$ 117.66 per week during the 142 week grace period in order to reimburse appellant for the legal expenses attributable to the grace period.

[4] Practice Note:

A well written and well reasoned opinion authored by Senior Judge Samuel L. Rodgers of the Commonwealth Court at Emanuel v. WCAB (Coco Bros. Inc.), 692 A.2d 1182 (Pa Cmwlth. 1997) provides a comparison of the gross method vs. net method of subrogation lien calculations. Judge Rodgers provides calculations of the figures at issue, to demonstrate the differences regarding net payment to the insurer and the duration of the grace period.

In the end, the Court finds that the "gross method" is correct and supported in the law.

§ 8.15

Supersedeas Fund Reimbursements and the Subrogation Lien Compromise

[1] Overview

There are competing considerations when an insurer enters into settlement negotiations with claimant.

The parties may stipulate to a date of modification or termination of wage loss benefits.

The insurer may accept a reduced amount from the civil action recovery.

However, the insurer may not seek reimbursement from the Supersedeas Fund for amounts compromised with the third party tortfeasor.

[2] The Supersedeas Fund Cannot be Used to Finance an insurer's compromise.

Pep Boys, Inc. v. WCAB (Young), 818 A.2d 601 (Pa. Cmwlth. 2003).

Insurer filed a Termination Petition 1/94. Supersedeas was granted 10/94. Termination decision was 11/97. In 11/06 claimant settled a civil action arising from the work injury. To facilitate the settlement, insurer compromised its subrogation lien from \$32,000 to \$16,000 (rounded figures).

After termination decision insurer filed for supersedeas fund reimbursement of benefits paid from filing of petition to WCJ decision.

Commonwealth Court held insurer was not entitled to Supersedeas Fund Reimbursement, as insurer voluntarily compromised its lien. The insurer must seek subrogation for the full amount of compensation it is owed from the third party tortfeasor

[3] Further Case Law Support:

CNA Ins. Co. v. WCAB (Romeo), 578 A.2d 1375 (Pa. Cmwlth. 1990)

And

CW of PA; Dept. Labor & Industry v. WCAB (Commercial Union), 510 A.2d 373 (Pa. Cmwlth. 1986).

[4] . . . A New Development

The recent decision at CW of PA, Department of Labor and Industry v. WCAB (Old Republic Ins. Co.), 2 A.3d 790 (Pa. Cmwlth. 2010) **granted** an application for supersedeas fund reimbursement for recovery of attorney fees and costs related to third party litigation.

[a] Factual Background

Insurer filed termination petition 12/05. supersedeas was denied. Benefits continued until termination granted 1/07.

Claimant settled third party civil action for \$175,000.
Insurer lien was approximately \$69,000.
Net lien payment was approximately \$39,000

Insurer filed for supersedeas fund reimbursement and was successful to the extent it paid attorneys fees and costs during the supersedeas denial.

[b] Reasoning

The WCJ found that insurer paid benefits after denial of supersedeas which were 32% of the entire amount paid. She found 32% of the net subrogation lien was attributed to benefits paid during supersedeas period. Therefore, she concluded that figure should be subtracted from total amount paid to get net supersedeas fund recovery.
[\$39,392 net lien x 32% = \$12,585.
Supersedeas request of \$22,271 minus \$12,585 equals \$9,686; amount of supersedeas recovery].

[c] See also: Department of Labor and Industry v. WCAB (Excelsior Ins.), 987 A 855 (Pa. Cmwlth 2010).

§ 8.16 A Case Study

Two businessmen perish in a small airplane crash while on a work-related trip. Workers' compensation benefits are voluntarily paid via an Agreement for Compensation for Death. Two years later, the civil action is

nearly settled against various defendants. Plaintiff counsel contacts your representative during the final phase of settlements and **for the first time he questions your entitlement to any subrogation lien**. There is a challenge regarding the apportionment of benefits among the decedents' wrongful death, the widows' survivor, and the children's survivor actions. When you arrive at the judge's chambers for a settlement conciliation, the Darr Construction case is presented for discussion. You were told that **all** of the settlement will be apportioned to the widow's loss of consortium and wrongful death actions on behalf of the surviving children, leaving little, if any, of the multi-million dollar settlement available to payment of the worker compensation insurer subrogation lien. **Have you effectively preserved your right to recover the subrogation lien for past benefits and for future benefits payable? What do you do?**

[1] **The Math! – Before any Settlement and Apportionment Discussions**

A. Early Intervention and Discussion of Subrogation Lien Is an Essential Element of Any Successful Recovery Strategy.

It is important to address, at the outset of any civil litigation arising from a work injury, any questions regarding the right of the worker compensation insurer to receive a pro rata share of the wage loss and medical expense benefits paid to an injured worker. There may be conflicting evaluations of the liability of the civil action defendants and of the damages presented in the claim of the injured worker. It behooves all parties, the insurer, the employer, the injured worker, and his/her attorney, to address the issues of settlement and subrogation lien recognition, before the final hours of settlement negotiations in the civil action.

The most significant issues for discussion, after the recognition of the worker compensation insurer subrogation lien, are questions of apportionment for claims arising from the family members of the injured worker and negotiation of payment of the existing subrogation lien for past worker compensation benefit payments, as distinguished from calculation of future worker compensation benefit payments and reimbursement of pro rata attorneys' fees and costs.

B. Calculate Before Negotiate

Often discussions center upon the request for compromise of the existing worker compensation subrogation lien for partial payment. However, in cases involving serious injury or death, we believe the more significant issues arise in discussion of the future worker compensation benefit payments, particularly when an apportionment argument arises. For this reason, we offer a brief review of the effect of apportionment of the civil action recovery upon the worker compensation subrogation lien recovery for worker compensation benefits paid and the calculation of the "grace period" for suspension of worker compensation benefit payments during the period of reimbursement of the worker compensation insurer's pro rata share of attorney fees and costs.

[2] Four Illustrations of Apportionment

ILLUSTRATION NO. 1
FULL RECOVERY

| | | |
|----|--|--|
| 1. | Total Recovery | \$1,350,000.00 |
| | less: accrued lien | <u>135,800.00</u> (10.6% of total recovery) |
| | Balance of Recovery | \$1,214,200.00 |
| 2. | Total Expenses | \$ 550,000.00 |
| | Expenses Attributed to Accrued Lien | <u>55,330.00</u> |
| | Expenses Attributed to Balance of Recovery | \$ 494,670.00 |
| 3. | Accrued Lien | \$ 135,800.00 |
| | Less Expenses Attributed to Accrued Lien | <u>\$ 55,330.00</u> |
| | Net Lien | \$ 80,470.00 |
| 4. | Balance of Recovery | \$ 494,670.00 |
| | ÷ Weekly Compensation Rate | 493.00 |
| | Grace Period | 2,462.88 weeks |
| 5. | Legal Expenses Attributed to Balance of Recovery | \$ 494,670.00 |
| | ÷ by Grace Period 2,462.88 wks. | |
| 6. | Reimbursement of Expenses Attributed to Balance of Recovery | \$ 200.85 |

ILLUSTRATION NO. 2
50% APPORTIONMENT

| | | |
|----|---|---|
| 1. | 50% of Total Recovery Less: Accrued Lien | \$ 675,000.00 \$ <u>135,800.00</u> (20.12% of total recovery) |
| | Balance of Recovery | \$ 539,200.00 (79.88%) |
| 2. | Total Expenses ÷ 50% Expenses Attributed to Accrued Lien Expenses Attributed to Balance of Recovery | \$ 300,000.00 <u>60,360.00</u> \$ 239,640.00 |
| 3. | Accrued Lien Less Expenses Attributed to Accrued Lien | \$ 135,800.00 \$ <u>60,360.00</u> |
| | Net Lien | \$ 75,440.00 |
| 4. | Balance of Recovery ÷ Weekly Compensation Rate Grace Period | \$ 539,200.00 493.00 1,093.71 weeks |
| 5. | Legal Expenses Attributed to Balance of Recovery ÷ by Grace Period 1,093.71 wks. | \$ 239,640.00 |
| 6. | Reimbursement of Expenses Attributed to Balance of Recovery | \$ 219.11 |

ILLUSTRATION NO. 3
ONE THIRD 1/3 APPORTIONMENT

| | | |
|----|--|--|
| 1. | 1/3 of Total Recovery Less: Accrued Lien | \$ 450,000.00 <u>135,800.00</u> (30.17% of total recovery) |
| | Balance of Recovery | \$ 314,200.00 (69.82%) |
| 2. | 1/3 of Total Expenses Expenses Attributed to Accrued Lien Expenses Attributed to Balance of Recovery | \$ 200,000.00 <u>60,340.00</u> \$ 139,660.00 |
| 3. | Accrued Lien Less Expenses Attributed to Accrued Lien | \$ 135,800.00 \$ <u>60,340.00</u> |
| | Net Lien | \$ 75,460.00 |
| 4. | Balance of Recovery ÷ Weekly Compensation Rate Grace Period | \$ 314,200.00 493.00 637.32 weeks |
| 5. | Legal Expenses Attributed to Balance of Recovery ÷ by Grace Period 637.32 wks. | \$ 139,660.00 |
| 6. | Reimbursement of Expenses Attributed to Balance of Recovery | \$ 219.14 |

ILLUSTRATION NO. 4
TWENTY PERCENT (20%) APPORTIONMENT

| | | |
|----|--|---|
| 1. | 20% of Total Recovery Less: Accrued Lien | \$ 270,000.00 <u>135,800.00</u> (50.30% of total recovery) |
| | Balance of Recovery | \$ 134,200.00 (49.70%) |
| 2. | 20% of Total Expenses Expenses Attributed to Accrued Lien Expenses Attributed to Balance of Recovery | \$ 120,000.00 <u>60,360.00</u> \$ 59,640.00 |
| 3. | Accrued Lien Less Expenses Attributed to Accrued Lien | \$ 135,800.00 <u>60,360.00</u> |
| | Net Lien | \$ 75,440.00 |
| 4. | Balance of Recovery ÷ Weekly Compensation Rate Grace Period | \$ 134,200.00 \$ 493.00 272.21 weeks |
| 5. | Legal Expenses Attributed to Balance of Recovery ÷ by Grace Period 272.21 wks. | \$ 59,640.00 |
| 6. | Reimbursement of Expenses Attributed to Balance of Recovery | \$ 219.10 |

[3] Four Illustrations of Apportionment – What Do We Learn?

- A.** Notice that as the amount of the settlement available for subrogation recovery decreased from 100% to 20%, the corresponding **grace period** regarding benefit payment **dramatically changes** from 2,462.88 weeks to 272.21 weeks in our illustration.
- B.** Also notice that the "**grace period**" weekly reimbursement of attorneys' fees and expenses attributed to the subrogation lien recovery **does not dramatically change** from the 100% recovery figure of \$285.00 to the 20% apportionment figure of \$219.10 per week.
- C.** Notice the **net workers' compensation lien** does not dramatically change whether you consider 100% of the civil action settlement proceeds (\$80,470.00) or a 20% apportionment (net lien \$75,440.00).

[4] PRACTICE POINTER:

PLAINTIFF COUNSEL WILL OFTEN FOCUS UPON THE AMOUNT OF THE PAST ACCRUED SUBROGATION LIEN AND REQUEST REDUCTIONS TO THAT FIGURE. THE MORE IMPORTANT CONSIDERATION IS THE AMOUNT AND DURATION OF FUTURE COMPENSATION BENEFITS. FOR EXAMPLE:

- A.** The widow with the life expectancy of an additional forty years (2,080 weeks) **would never be reinstated** to the total disability compensation rate of \$493.00 per week as the grace period exceeds her life expectancy. Therefore, claimant would receive \$200.85 over her life expectancy which would yield a total payout of \$417,768.00.
- B.** If the civil action settlement proceeds are reduced and only 20% is available for the subrogation lien, the widow with the 40 year additional life expectancy would receive \$219.10 per week for reimbursement of attorneys' fees during the grace period of 272.21 weeks and then revert to her **total disability compensation** rate for the balance of her life. This would yield an estimated total benefit payment of \$950,881.68 (272.21 weeks x

\$219.10 plus 1,807.79 weeks x \$493.00 per week). *Oh, now I see why we are talking about apportionment issues!*

- C. If your opponent, plaintiff counsel, is 100% successful in defeating your right to subrogation against any portion of the civil action settlement, then, in our illustration, the widow/claimant would receive total disability benefits of \$493.00 for her **entire life expectancy** of 40 years (2,080 weeks) for a total payout of future benefits totaling \$1,025,440.00.

[5] **Conclusions**

These examples demonstrate that timely investigation and successful preservation of the worker compensation insurer subrogation lien may depend upon a thorough investigation of the underlying facts, familiarity with the civil action proceedings, and a prompt evaluation of any apportionment issues, before the commencement of any settlement discussions or negotiations.

§ 8.17 **Coordination of Worker Compensation Subrogation Lien Recovery and Case Handling – “Global Settlement”**

A timely opportunity may be present to negotiate a final resolution to future worker compensation benefit payment, in the worker compensation injury claim involving the right of an injured worker to pursue a civil action against any third party responsible, in part, for the occurrence of the work injury.

We recommend investigation and consideration of "global" settlement of the worker compensation subrogation lien and future worker compensation benefit payments. A sizeable worker compensation subrogation lien can provide "leverage" in settlement negotiations to address the related issue of future worker compensation benefit payments. Often the waiver of a portion or entire worker compensation subrogation lien can provide the financial incentive to the injured worker to accept a stipulation to a present earning capacity, necessary to obtain a modification or suspension of future worker compensation benefit payments.

Example: Worker compensation insurer has a past worker compensation lien of \$100,000.00. Weekly total disability benefits are \$306.00 based upon a 1983 average weekly wage of \$500.00. Civil action recovery is \$100,000.00. If claimant stipulates to a present earning capacity of \$250.00, the permanent partial disability rate is \$166.67 over 500 weeks. Total future wage loss liability is \$83,335.00. Waiver of the subrogation lien provides claimant with a civil action recovery and the worker compensation a “certain” future liability or basis for settlement via C&R or Stipulation.

§ 8.18

**Our Recommended Response On Behalf of Defendant/
Employer And Insurer**

1. Monitor civil action litigation; consult your attorney!
2. Petition to intervene as a use-plaintiff, this was the manner in which we successfully proceeded in the Vespaziani v. Insana case, before the Pennsylvania Supreme Court.
3. Participate in the civil action to the extent necessary to obtain copies of the evidence, allow a review of the legal issues, evaluate any challenges to the subrogation interest, and participate in settlement conciliations and motions practice.
4. If the case is being settled with an unreasonable apportionment, demand a separate hearing, non-jury trial, or jury trial on the issue of apportionment for purposes of respecting the subrogation lien of defendant/employer.
5. Pre-trial Planning: Obtain a written agreement with plaintiff counsel at the time the compensation agreement is issued to acknowledge the subrogation lien and plaintiff/claimant’s duty to repay.
6. Negotiate and obtain a written agreement regarding any apportionment issue prior to any final settlement.
7. Challenge any inappropriate apportionment and promise (do not threaten) to litigate the issue which may delay distribution of the civil action settlement process.

§ 8.19 **Conclusion**

Effective workers' compensation subrogation lien recovery requires identification and monitoring of potential third party recoveries by knowledgeable workers' compensation professionals.

§ 8.20 LIBC Forms Utilized in Subrogation Recovery and File Management

- [1] Best Practices Review**
- [2] LIBC 337 Supplemental Agreement**
- [3] LIBC 380 Third Party Settlement Agreement**
- [4] LIBC 750 Employee Report
- see paragraph 5**
- [5] LIBC 760 Employee Verification
- see paragraph 5**

“BEST PRACTICES”

3.00 **The Third Party Action and Workers’ Compensation Subrogation.**

Third party action and workers’ compensation subrogation issues arising from the statutory right of subrogation from a third party action arising from the work injury, can be addressed and referenced in the settlement documents.

3.01 The Compromise and Release Stipulation references the issue of subrogation at Paragraph No. 11, LIBC Form 755.

3.01a **Practice Pointer:** We recommend that Paragraph No. 11 of the Compromise and Release Stipulation is always answered “Yes” to the question “Is there an actual or potential lien for subrogation under §319?”

Add the additional sentence: “At the present time, employer/insurer has not received notice of a civil action arising from the work injury. In the event a legal action is filed, employer/insurer do not waive any right to subrogation lien recovery.”

3.01b We also recommend that the Compromise and Release Stipulation reflects any amount of the subrogation lien which is “waived” as a term of the settlement. This figure should be viewed as additional “consideration” for the settlement. One may calculate the Third Party Settlement Agreement figures so as to quantify the amount waived by the defendant.

3.02 Best practices dictate that the resolution of a third party action and the corresponding workers’ compensation subrogation lien must be accomplished via preparation of a “Third Party Settlement Agreement.” LIBC Form 380.

3.03 If the parties compromise (reduce or waive) the net subrogation lien figure, and/or waive the future grace period credit, best practices dictate the preparation of a Supplemental Agreement, LIBC Form 337, which reflects the reduction or waiver of the figures reflected on the Third Party Settlement Agreement Form. There is no “section” on the LIBC Form to reflect any alteration of the figures calculated on the LIBC Form 337.

3.04 A workers’ compensation insurer may settle/compromise its subrogation lien. There are two components to the subrogation lien calculations: (1) the net lien recovery and (2) the future grace period credit. The insurer may waive/settle/compromise either portion of the lien.

- 3.04a If the workers' compensation insurer waives the net lien, the future credit is not waived, unless the workers' compensation insurer explicitly waives the future credit. *Reeder v. WCAB (Mercer Lime & Stone Co.)*, 871 A.2d 337 (Pa. Cmwlth. 2005).
- 3.04b **Practice Pointer:** When a claimant request is presented to waive a portion of the workers' compensation insurer subrogation lien, as recommended above, calculate the amount of the net lien recovery and assess the amount of corresponding "credit" that the insurer may request in the pending worker compensation case. For example, if the lien waiver request amounts to \$50,000.00, that is the equivalent of \$100 of partial disability benefits over 500 weeks. Will the claimant stipulate to a post injury earning capacity "in exchange" for the subrogation waiver amount?