

Can a Workers' Compensation Insurance Carrier Bring a Civil Action Against Third Party Defendants to Enforce Subrogation Rights Without the Participation of the Injured Employee?

The Pennsylvania Supreme Court has ruled that, the workers' compensation insurance carrier was prevented by law from bringing a civil action to enforce its subrogation rights when the injured employee did not bring the action, was not named in the action and was not joined in the action (*Liberty Mutual Insurance Company, As Subrogee of George Lawrence, v. Domtar Paper Co., v. Commercial Net Lease Realty Services, Inc., Et. Al.*, No. 19 WAP 2014, Decided: April 27, 2015).

An employee was injured in the parking lot of his employer. The carrier paid workers' compensation benefits. When the employee declined to sue the parties that owned and maintained the parking lot the carrier commenced an action to assert its subrogation claim for the benefits it had paid. The caption of the complaint identified the carrier "as subrogee of George Lawrence, Plaintiff." The trial court found that the injured employee had not sued the third party defendants. He did not assign his action to the carrier and he was neither joined in the action by the carrier nor named in the complaint.

The trial court granted the third party defendant's preliminary objections in the nature of a demurrer to the complaint of the carrier on the basis that any cause of action lies only with the injured employee and that the carrier had no independent ability to bring a subrogation claim directly against the third-party tortfeasors. The trial court citing prior case law on the issue noted that any third party action was for one indivisible wrong and thus subrogation under Section 319 must be through an action brought in the name of or joined in by the injured employee.

On appeal the Superior Court affirmed the dismissal of the case by the trial court. The Superior Court agreed that the Pennsylvania courts strongly disfavor the splitting of causes of actions between subrogors and subrogees especially in the context of a workers' compensation claim. The court held that the employer's right of subrogation must be asserted through an action in the name of the injured employee either as a party plaintiff or "use plaintiff."

The Supreme Court granted allocatur to address whether Section 319 confers on the employers or insurers a right to pursue a subrogation claim directly against a third-party tortfeasor. The Court reaffirmed that the right of action against a third-party tortfeasor under Section 319 of the Workers' Compensation Act remains with the injured employee and the right of employer's subrogation must be obtained through a single action brought in the name of the injured employee or joined by the injured employee. This fostered the policy against splitting causes of action and eliminated the possibility that third party tortfeasors could be exposed to multiple suits by both the employer and the injured employee.

The holding appears to revolve around the precise language of the caption of the complaint filed by the carrier. Case law suggested that an action in the name of the injured employee or as a "use plaintiff" may have been permitted to proceed. The carrier argued, in the alternative, that it should be allowed to amend the caption to read "George Lawrence For the Use of Liberty Mutual Insurance Company" and amicus' briefs requested that the Court clarify the "for use" practice in Pennsylvania. However, the Court declined to address the issue finding that the "for use" language was not within the scope of the appeal before it. Nevertheless, the Court also made clear that this ruling did not address or alter any prior practice regarding an employer/insurer suing a third party tortfeasor through the devices of a "use plaintiff" or joining the injured employee into its action against the third party.

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Comment: Thus it appears the method of captioning the action “as subrogee of” an injured employee will not be permitted since the cause of action lies only in the injured employee as to any third party causing the compensable injury. The injured employee must be a plaintiff or be named as a “use plaintiff” or be joined in the action so there is no possibility of separate actions against the third party, for the case to proceed.

As a practical matter bringing an action in which the injured employee has no interest nor desire to pursue may complicate proving how the injury occurred and what damages flowed from the injury. In addition, consent would have to be obtained from the injured employee to name him as a plaintiff, a “use plaintiff” or to join the plaintiff in the action. It is doubtful that a disinterested employee would provide such consent. The cooperation of the injured employee is critical in a third party action to protect an insurer’s subrogation rights.

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