

05.26.20



New Jersey Workers' Compensation Alerts - May 26, 2020

Subrogation Lien Rights Protected by the Supreme Court

In the case of New Jersey Transit Corporation v. Sandra Sanchez, the Supreme Court protected the subrogation lien rights of New Jersey Transit (NJT). NJT sought to recover workers' compensation benefits paid to their employee, David Mercogliano, who sustained injuries during a work-related motor vehicle accident. The third-party defendants at fault in the accident were Sandra Sanchez and Chad Smith. The recovery was sought pursuant to N.J.S.A. 34:15-40, which permits reimbursement of workers' compensation benefits paid to an injured worker in the event of a third party recovery. The allegation was that the subrogation reimbursement rights were barred by the Auto Insurance Costs Recovery Act (AICRA). The case was decided on May 12, 2020.

The Trial Court decided to deny the employer's right to subrogation and concluded the injured worker had sustained no uncompensated loss of income or property and thus no economic loss for the AICRA. This decision led the way for the case to be heard through the Appellate Courts. The Appellate Division and Supreme Court then reversed the decision of the Trial Court. The Appellate Court felt it was clear that the compensated loss of both wages and medical benefits incurred by the employer and the workers' compensation carrier were completely available for subrogation lien reimbursement rights under Section 40. Pursuant to Section 40 of the statute, the Act "gives the workers' compensation carrier an absolute right to seek reimbursement from the tortfeasor for the benefits it paid to the injured employee." The Appellate Courts made it clear that the Workers' Compensation Act and Section 40, not AICRA, are the governing law for subrogation claims based upon workers' compensation benefits paid to an injured worker due to a motor vehicle accident arising out of the course of employment.

What is most interesting about the Supreme Court decision is the members of the Court were equally divided. As a result, the judgment of the Appellate Division affirmed enforcing the subrogation lien rights. Three justices felt there should be no subrogation lien rights. They equated the payments made by the workers' compensation carrier to the payments that could have been made by the personal injury protection (PIP) policy for the employee. Since New Jersey No-Fault Automobile System would prevent subrogation relative to PIP benefits under AICRA, the justices felt that the prevention also applied to payments made by the workers' compensation carrier. Surprisingly, the justices did not see the distinction between the injured worker's personal policy versus the workers' compensation policy of his employer, which was required to pay benefits due to the third party's negligence. The remaining three justices found the subrogation lien rights were enforceable and noted when the no-fault provisions were enacted and updated in AICRA, the legislature did not amend the Workers' Compensation Act to eliminate the right of subrogation under Section 40. As a result, those lien rights remain intact.

Comments: This case is unique. Fortunately, the Appellate Division decision was upheld, but only because the Supreme Court justices split equally, three and three. The seventh justice did not participate in the decision. It is important to note that three justices felt that the workers' compensation carriers' interests in subrogation lien rights should be no greater than the PIP carriers' rights. When PIP pays the benefits, the

05.26.20



injured worker has been made whole by his own policy. When workers' compensation pays the benefits, the injured worker has been made whole by his employer's policy. The dissenting Judges' opinion that allowing subrogation would cause unnecessary litigation is misplaced. The calculation and enforcement of lien rights is ordinarily efficient and does not result in litigation. For now, lien rights remain intact concerning the payment of benefits in connection with a work-related motor vehicle accident.

The Need for Due Process Once Again Emphasized by the Appellate Division

In June 2019, we reported on an Appellate Division decision, *Haggerty v. Crothall Service Group*, wherein the Appellate Division overturned the decision of a Judge of Compensation findings. The Judge of Compensation found that the Judge erred in finding a medical witness to be credible based upon an unrecorded telephone call with no formal testimony. The Court noted how important it is that all significant issues and decisions must be made on the record with the parties having the appropriate opportunity to present evidence. This issue has been raised again in the recent decision of *McGory v. SLS Landscaping* decided on May 8, 2020.

Mr. McGory filed a workers' compensation claim alleging that he fractured his right foot when he jumped from a loft while working for the respondent at the respondent's premises. The petitioner appealed from a May 29, 2019 Order dismissing the claim without prejudice and a July 10, 2019 Order dismissing the Petition with prejudice. The petitioner's primary argument on appeal centered on the fact that the Judge of Compensation violated his procedural due process rights and applicable procedural rules by entering the Dismissal Orders. Most notably, the petitioner had his case dismissed before being allowed to testify. The petitioner's testimony was crucial since the original hospital records set forth a history that petitioner injured himself at home.

The respondent took the position that the petitioner's claim should be dismissed due to the lack of credibility, and the medical records contradicting the petitioner's allegations. On the Claim Petition, the petitioner claimed that his injury took place while at work when he jumped from a loft after retrieving a bucket. It was the petitioner's position in his Affidavit (not testimony) that he was embarrassed that he caused his own injury due to the unwise decision to jump from the loft. He felt that his employer should not be responsible for providing benefits due to his own negligence. As a result, he initially told the providers that he injured himself at home. Preliminary evidence did seem to reveal that the petitioner's supervisor heard the petitioner land on the employer's premises after the jump, and they witnessed the petitioner limping after this jump. The litigation did not proceed far enough before the claim was dismissed to allow the petitioner to present evidence of his misrepresentation to the medical providers and the actual circumstances giving rise to his injury.

During discussions on the record, the Judge was concerned about the issue of fraud and whether the respondent intended to pursue fraud charges. Interestingly, the respondent's counsel indicated that they did not anticipate filing a fraud motion. The Appellate Division seemed somewhat swayed by that position. The implication could certainly be that the overall circumstances of the claim were not entirely inconsistent with the petitioner's version of events that the injury occurred at work and that misrepresentations to the medical

05.26.20

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providers were due to his own sense of guilt or embarrassment that his jumping activity caused his injury.

The respondent did present two witnesses. Notably, the one witness who was on the premises at the time of the accident did not see the petitioner jump from the loft. However, she did testify that she heard the sound of the impact when the petitioner landed. She asked the petitioner if he needed assistance and observed that he appeared to be in "a lot of pain." The petitioner declined medical treatment.

On May 28, 2019, the respondent filed a Motion to Dismiss based upon the medical records showing that petitioner was injured at home. There was a hearing held on May 29, 2019. The petitioner's counsel argued that the petitioner had not had the opportunity to present any evidence, had a right to testify and was prepared to testify at the prior hearing in April and the hearing on May 29. The Court noted that although the Judge declared there was a need for a hearing, he proceeded to make findings based upon the petitioner's Affidavit and not the petitioner's testimony. The Judge concluded that the petitioner was a "multiple liar." He found the petitioner engaged in horseplay when he jumped from the loft. The Judge dismissed the Claim Petition without prejudice. He advised the petitioner's counsel that he could seek a reinstatement of the case stating, "If you can prove to me he's honest, you can begin to present your case. If you cannot prove to me he's honest, then under the circumstances, the Motion to Restore is questionable."

One mistake perhaps made by counsel for the petitioner was that a Motion to Reconsider or Restore was not filed. Instead, an appeal was taken directly to the Appellate Division. Nevertheless, the Appellate Division was not overly disturbed by that procedural issue, but more so by the Judge's decision to dismiss the claim both with and without prejudice, even though the petitioner was never allowed to testify. Without going into the further procedural history of the case, including the Motions, the Appellate Division reversed the Order of the Judge. They noted that although the Judge offered the petitioner the opportunity to testify at a July 10 hearing, the Court felt that the Judge had predetermined the issue of the petitioner's credibility noted throughout the proceedings on the record. The Appellate Division reversed the Orders dismissing the Claim Petition, both with and without prejudice and remanded the matter for further proceedings before a different Judge.

Comment: This decision is important and similar to the Haggerty decision, in that the Appellate Division insists that Workers' Compensation Judges render decisions based upon competent evidence allowing both parties to be heard. The Judges of Compensation cannot decide a contested matter without allowing both parties to present facts and medical witnesses. Although the Rules of Evidence are relaxed in workers' compensation, they are not so relaxed that due process rights are still not available to both parties. In this case, the opportunity for the petitioner to testify is essential.

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