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## Pa. Workers Comp Act and an Employer's Subrogation Entitlement Rights

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By **James R. Bucilla II** | March 11, 2021



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The Pennsylvania Workers' Compensation Act (the act) provides employers subrogation rights, applicable where injured workers receiving workers' compensation benefits recover for their work injuries but in a claim against a third party other than the employer. Employers may thus recover for benefits paid to or on behalf of an injured worker, where that injured worker has recovered from a third party. For example, the delivery driver who was working and injured while rear-ended by a negligent third party. The employer pays workers' compensation benefits to the delivery driver, who makes a claim against the other driver. When the injured worker recovers a settlement or judgment due to the motor vehicle incident and the other driver's negligence, the employer can then recover from those funds from the third-party case for workers' compensation paid and payable.

There is a three-fold rationale for employers' subrogation entitlements: to prevent a double recovery by the worker for the same injury, to ensure the employer is not compelled to make payments only made necessary by the act of a third party, and to prevent a third party from escaping liability for his own conduct. See *Dale Manufacturing v. Bressi*, 421 A.2d 653 (Pa. 1980).

Section 319 of the act contemplates this automatic subrogation right but with two distinct scenarios. First, an employer has an accrued subrogation lien, representing benefits paid, including workers' compensation disability payments and medical expenses, up to the date of the recovery in the third-party case. This accrued lien is a claim against the third-party recovery that is payable, immediately upon the third-party recovery, to the employer.

Second, the act addresses the balance of the third-party recovery leftover after reimbursement to an employer in light of previously paid compensation. While the balance of recovery is paid to the injured worker, it is also considered an advance payment by the employer of "future installments of compensation." Thus, when the injured worker collects a third-party settlement or judgment, the employer not only can collect for workers' compensation paid to the time of the third-party recovery, but also, the employer may recover further but in the context of reduced payment of workers' compensation benefits continuing and following resolution of the third-party claim.

The act contemplates a proration of expenses and fees incurred in connection with the claim against the third party, as between the employer and injured worker when calculating the employer's net lien and reimbursement entitlement. This proration is outside the scope of this article but is noted, given the impact upon the amount recovered by an employer. In light of these expenses and fees incurred, an employer does not recover one hundred percent of workers' compensation benefits paid at the time of a third-party recovery.

It appeared that when an injured worker recovered in a third-party claim, employers would not only be reimbursed for the accrued subrogation lien (first scenario), but also employers could recover further for disability and medical benefits payable following the third-party recovery in light the "balance of recovery" received by the injured worker (second scenario). In fact, insurance carriers acted upon this premise.

However, in *Whitmoyer v. Workers' Compensation Appeal Board (Mountain Country Meats)*, 186 A.3d 947 (Pa. 2018), the Pennsylvania Supreme Court interpreted whether "installments of compensation" as used in Section 319 of the act, concerning application of an employer's lien but upon the balance of recovery, encompassed both ongoing workers' compensation disability and medical payments. The *Whitmoyer* court held that the excess recovery is to be treated as an advance payment only on account of future disability benefits, such that an employer cannot take a credit in light of a third-party recovery when it came to its obligation to pay future medical expenses. For claims where the parties had settled an injured workers' right to receive ongoing workers' compensation disability benefits but not medical benefits, such that only medical payments continued—an employer would recover the net accrued lien at the time of a third-party recovery, but to the extent the third-party recovery exceeded the accrued lien, it appeared the employer no longer had a vehicle to reduce future medical payments on the claim based upon the injured workers' receipt of funds from a third-party.

An outcome like *Whitmoyer* may have both employers and injured workers questioning the power of an employer's subrogation rights, and if not that, still questioning what impact the decision has upon claims where an employer is utilizing a prior third-party recovery to reduce or offset its obligation to pay for ongoing medical care?

The recent result in *Hoss v. Workers' Compensation Appeal Board (Select Staffing)*, No. 241 C.D. 2020 (Pa. Cmwlth. Feb. 25, 2021), while not binding, includes a persuasive opinion with guidance on how to view this third-party recovery issue and an important reminder of the strength of employers' subrogation entitlements under Section 319 of the act.

In *Hoss*, the parties settled the injured worker's entitlement to ongoing workers' compensation wage loss benefits via compromise and release, but medical benefits continued. Three years later the parties entered into a third-party settlement agreement listing a third-party recovery of \$187,500 expenses of that recovery of \$85,925.65 (inclusive of attorney fees and expenses), but a workers' compensation lien accrued at that time of \$472,688.47. The agreement further provided that employer's insurer agreed to a partial reimbursement of \$50,787.17—in exchange for a credit for future medical benefits the injured worker may come due in the future, in the amount of \$50,787.17, the sum the injured worker received from the third-party claim. The parties also executed a separate agreement providing the insurer accepted one-third of the net third-party settlement, \$50,787.17, and agreed to the injured worker's like receipt of one-third of the net third-party recovery, but while also agreeing the insurer would receive a credit for any future medical expenses on his claim up to the amount the injured worker received from the third-party case.

Years later, the U.S. Supreme Court decided *Whitmoyer*, and the injured worker then filed a review petition seeking to eliminate the employer's credit against ongoing medical expenses. The injured worker argued that employers were no longer permitted to take subrogation reimbursement for future medical expenses due to third-party settlements, and regardless of whether the settling of the third-party claim had occurred prior to *Whitmoyer*. The WCJ denied the petition, and the Workers' Compensation Appeal Board (WCAB) affirmed. Upon review, *Hoss* concluded that *Whitmoyer* did not preclude the taking of an agreed-upon credit against ongoing medical expenses in this scenario, distinguishable from *Whitmoyer*.

That is, in *Hoss*, the employer's accrued subrogation lien far exceeded the third-party recovery such that the parties essentially agreed to a one-third split of the proceeds, between the employer, claimant and counsel. The court noted that but for the settlement agreements between the parties, the employer would have been entitled to the entirety of the third-party recovery given its accrued subrogation lien (scenario one). Instead, the employer took a substantially reduced payment, permitting the injured worker to receive a like payment, but in exchange for a credit applied against future medical expenses in the same amount. Therefore, while the credit was applied against medical expenses incurred following the third-party recovery, in reality, the credit was not against any "excess" recovery (scenario two). In other words, the employer was taking a credit against ongoing medical expenses against funds from the third-party settlement that, but for its settlement agreement deferring payment, the employer was initially entitled to receive.

The recent outcome in *Hoss* speaks to the strength of employers' subrogation rights. Absent change, employers questioning whether compromising a subrogation lien at the time of a third-party recovery makes any sense, in light of *Whitmoyer* and a concern for ongoing medical treatment, can point to *Hoss* and argue the employer can accept a compromised lien recovery but in exchange for a written agreement to apply a remaining portion of its automatic lien entitlement toward future medical expenses. Recipients of third-party recoveries insufficient to cover an employer's accrued subrogation lien and who did not re-pay, after proration of fees and costs, an employer its due share, should not be able to hide behind the result of *Whitmoyer* while bargaining for a deferred accrued lien reimbursement. Employers and insurers can and should question whether there is a benefit of or expected treatment response to deferring lien reimbursement on a file, where there remains an open obligation to continue medical payments.

Of course, the outcome may be different dependent upon a variety of factors, such as whether the third-party recovery exceeds the workers' compensation lien accrued at that time, or dependent upon the wording of the agreement(s) between the parties. Employers, insurers and injured workers are each cautioned to address the particular circumstances of a claim with counsel.

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