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"Ask the Expert"

Another Perspective: "May An Employer Seek Subrogation Under Section 319 Of The Act Where It Has Paid Disability And Medical Benefits Under A Notice Of Temporary Compensation Payable?"

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In the "Ask the Expert" section of the July 2005 PSIA Newsletter, a reader questioned whether an employer who has paid benefits under a Notice of Temporary Compensation Payable ("NTCP"), has the right to seek subrogation reimbursement against the injured employee's third-party civil recovery, pursuant to Section 319 of the Act.

The question is a good one because it invokes the broader inquiry of how minor workers' compensation claims should be administered in Pennsylvania.

Since the advent of Act 57 of 1996, it is not uncommon for the self-insured employer, faced with what is perceived as a minor work injury - one that will involve no lost time or only a minimal period of disability - to file an NTCP pending the injured employee's expected return to work. Once the employee returns to work without wage loss, the employer issues a Notice Stopping Temporary Benefits and essentially closes its workers' compensation file.

While it is true that in many instances, proceeding in that fashion results in an efficient disposition of a non-descript claim, complications can arise when the work injury evolves in an unforeseen manner. Moreover, since the Commonwealth Court issued its ruling in Lemansky v. Workers' Compensation Appeal Board (Hagan Ice Cream), 738 A.2d 498 (1999) it has become much more common for the injured employee to retain counsel in an effort to obtain "formal" recognition of the work injury, as well as an award of penalties and counsel fees for improper claims administration, even in the context of a minor work injury.

Furthermore, as the July 2005 PSIA "Ask the Expert" question confirms, it is not uncommon these days for an employer who has administered a work injury through the filing of the NTCP and Notice Stopping, to eventually seek subrogation reimbursement against the employee's third-party civil recovery.

In his response to the July, 2005 "Ask the Expert" question posed, attorney Charles S. Katz, Jr. concludes that "it appears that the [employer] will probably not be entitled to subrogation, even in a clearly compensable case, where it has used a Notice Stopping and a Notice of Denial as a substitute for a Petition for Termination."

In support of conclusion, counsel refers to a case that I litigated before WCJ John W. Liddy on behalf of a workers' compensation insurer, which asserted a subrogation lien against a third-party civil recovery arising out of a work-related motor vehicle accident.

This article seeks to provide another perspective on the issue raised. In offering that perspective I will attempt to provide a full accounting of the legal theories underlying client's subrogation effort and the procedural tools it employed in ultimately succeeding in that effort. My discussion will also address my client's reaction to the WCJ's adjudication of the subrogation issue and will describe how another Southeastern Pennsylvania WCJ adjudicated a similar subrogation matter.

Although it is true, as Mr. Katz has recounted, that the work injury presented to my client was administered through the issuance of a NTCP and the subsequent issuance of a Notice Stopping Temporary Compensation Benefits and Notice of Compensation Denial ("NCD"), it is important for the reader to understand that while relying upon the NCD form, my client did not presume to deny the compensability of the work injury at issue.

Rather, the NCD form that the defendant filed, acknowledged the compensability of the employee's work injury, but indicated its unwillingness to provide disability benefits beyond a certain date, in light of its receipt of a medical release declaring the employee physically capable of returning to work without wage loss.

Furthermore, the defendant did not, in conjunction with its issuance of the NCD, refuse to cover additional related medical bills incurred by the injured worker. Quite the contrary, the defendant continued to cover all reasonable, necessary and related medical bills for nearly **two years following the work injury** without ever declaring itself absolved from having to do so.

Moreover, during that two-year period, the defendant placed claimant on notice that it was asserting its subrogation lien against any third-party recovery he might recover and, while doing so, made every effort to cooperate with him and his counsel as he pursued civil damages.

So, when the injured worker finally obtained his civil settlement, and suddenly announced that he would not honor its lien, defendant had no choice but to file a Petition under Section 413(a) of the Act.

In response to claimant's counsel's Answer to the Petition - that the defendant had no right to subrogation because it had never "officially" accepted claimant's claim through the issuance of a Notice of Compensation Payable ("NCP") - the defendant responded as follows: (1) through its issuance of a NCD, which acknowledged the compensability of the work injury, but which limited claimant's entitlement to disability benefits, it **did** accept the compensability of claimant's work injury on an official basis;

(2) by filing a Petition with the WCJ under Section 413(a) of the Act – a provision that allows either party to ask for a WCJ to adjudicate the compensability of an injury – the defendant invoked the WCJ’s power to officially declare claimant’s work injury “compensable” in the absence of an NCP and (3) the defendant officially admitted to the compensability of claimant’s claim before the WCJ in a number of ways – including the testimony of the assigned claims representative and in various filings and pleadings submitted to the Bureau and the WCJ.

Still, the WCJ, as Mr. Katz has reported, eventually disallowed the defendant’s subrogation lien even though he determined, on the basis of a series of Findings of Fact, that claimant had suffered a compensable work injury under the Act.

In ruling that that the defendant was not entitled to subrogation, the WCJ seized upon the fact that it had never issued an NCP, while commenting that had the carrier issued a “Medical Only Notice of Compensation Payable” form, it could have avoided the ramifications of his ruling.

While the WCJ’s reference to the use of the Medical Only NCP was certainly helpful, since, it provides some indication as to how the courts will treat the new form, it was not helpful in the subject case for three reasons. First, the defendant could not have issued a Medical Only NCP within twenty-one days of the occurrence of the employee’s injury because the form did not exist at the time the claim was first reported. Second, the form probably could not have been issued even if it had existed at the time, because the work injury at issue did not involve a “Medical Only” claim, but involved a limited period of disability. Third, the WCJ failed to consider that the NCD that the defendant did issue in the case was in certain respects the equivalent of a Medical Only NCP since it did not presume to challenge the compensability of the work injury but limited its challenge to the extent of claimant’s resulting disability period.

Following the circulation of the WCJ’s ruling, the defendant filed an Appeal with the Appeal Board urging, among other things, that since the WCJ’s Decision formally declared claimant’s work injury compensable, he should have granted subrogation since a WCJ adjudication is one of three methods available under the Act for officially establishing the compensability of a work injury. In other words, given the WCJ’s declaration of compensability there was no need for the defendant to rely upon the two remaining methods for establishing “compensability” under Section 315 – an Agreement between the parties or the an NCP.

In an effort to streamline the litigation process, the defendant, in conjunction with its Appeal, decided to act upon the WCJ’s suggestion by issuing a Notice of Compensation Payable declaring claimant’s work injury compensable, while once again, limiting his entitlement to a defined period of disability based upon his return to the work force without wage loss.

In response to the filing of the NCP claimant finally agreed to reimburse the defendant’s subrogation lien, prompting the defendant to withdraw its Appeal.

Of interest is the fact that the defendant filed its NCP on October 27, 2004 – more than three years following claimant’s July 21, 2000 work injury. In asserting its entitlement to subrogation on the basis of its filing of a NCP more than three years after the occurrence of the work injury, the defendant maintained that the NCP was timely under Section 315, since the three-year limitations period set forth in that provision **tolls** when the defending party provides the injured worker with wage loss benefits and/or medical coverage as compensation for the effects of a work injury.

That is precisely what the defendant did in this case since it continued to provide claimant medical coverage for the effects of his work injury through March 2002, meaning that the injured worker had the right to file a Claim Petition until March 2005 and the defendant had the right to file an NCP during the same extended period.

The lesson to be learned is that despite the fact that the defendant initially administered the injured worker’s claim through the issuance of an NTCP, it was able to eventually recover its lien.

The reader should also be aware of a similar matter that my office litigated before The Honorable Sarah C. Makin of Delaware County.

In that case, the employee suffered injury as a result of a work-related motor vehicle accident on November 2, 1998. Rather than issue any formal notice addressing the compensability of the employee’s injury, which did not result in any wage loss, the defendant provided medical coverage for the effects of the work incident, including a surgical procedure, for the ensuing four years, through April 30, 2002, while accumulating a total medical benefit lien of \$21,105.66.

In April 2002, claimant settled the third-party civil action that he had instituted on the basis of his November 2, 1998 work injury for \$35,000.00.

When defendant sought subrogation reimbursement, claimant refused to honor the lien relying upon the fact that defendant had never formally accepted his claim as compensable under the Act.

On that basis, the defendant filed a Petition under Section 413(a) of the Act.

In an Answer to the Petition, claimant asserted that the defendant “has never filed a Notice of Compensation Payable or an Agreement, and, accordingly, there exists no ‘compensable injury’.”

In response to claimant’s Answer, the defendant, recognizing that it had the right to file a Petition under Section 315 of the Act in order to obtain an adjudication declaring claimant’s injury compensable and recognizing that the time period for filing a Petition under Section 315 had been extended through its payment of medical benefits through April 30, 2005, and mindful of the Commonwealth Court’s sanctioning of its use, issued a “Medical-Only Notice of Compensation Payable form on December 22, 2003, formally accepting claimant’s claim as compensable under the Act.

By Decision and Order circulated June 8, 2004, WCJ Makin granted the defendant's Petition, directing that claimant reimburse defendant's net subrogation lien under Section 319 of the Act. In doing so, the WCJ recognized her authority under Section 315 of the Act to adjudicate the compensability of claimant's injury under Article IV of the Act. She also recognized the defendant's right to file a "Medical-Only Notice of Compensation Payable" more than three years after the work injury, on the basis of the defendant's continued payment of those medical bills arising out of claimant's work injury for four years, through April, 2002.

So, the reader should be mindful that while the filing of a TNCP and a subsequent Notice Stopping Temporary Benefits might initially preclude subrogation recovery, subsequent steps can be taken under Sections 315 and 413 of the Act in order to obtain reimbursement from a work-related civil recovery of damages.

If you wish to review the Brief my office filed with WCJ Makin addressing this issue in greater detail, please check the Resources section of my law firm's website at www.chartwelllaw.com.