Ohio Supreme Court Rules on BWC Subrogation Interest in Tort Claim Insurance Settlements

By Megan Faust and Chris Cotter, Shareholders

The Supreme Court of Ohio issued an opinion last week that provides a cautionary tale whose main antagonist is the broad reach of Ohio's automatic subrogation provision set forth in R.C. 4123.931(G). In *Bur. of Workers' Comp. v. Verlinger*, Slip Opinion No. 2018-Ohio-1481, the Supreme Court of Ohio reinforced the right of a party paying workers' compensation benefits to hold both the claimant ***and the tortfeasor*** jointly and severally liable to pay the party the full amount of its subrogation interest.

In *Verlinger*, the claimant Loretta Verlinger sustained serious injuries in an accident on August 1, 2011. About two weeks later, she applied for workers' compensation benefits from Bureau of Workers' Compensation (BWC). The BWC disallowed the claim on September 6. Ms. Verlinger then appealed the denial to the Industrial Commission. During the pendency of the appeal, Ms. Verlinger settled her tort claims with the insurer of the driver who caused the accident and her own insurer, resulting in payments to Ms. Verlinger and her husband. The settlement was finalized on December 15, 2011. On December 23, the Industrial Commission allowed Ms. Verlinger's claim, finding that she "sustained an injury in the course of and arising out of her employment," and she began receiving workers' compensation benefits.

The primary issue in the case was whether Ms. Verlinger was a "claimant" under R.C. 4123.931(G) when she settled her third-party claims with the insurance companies. The Court, following the concise language of the statute, held that a person injured in a workplace accident becomes a "claimant" at the time of the injury and ***remains*** eligible unless and until a determination that the claimant is not entitled to benefits has been made and has become final (i.e., is no longer subject to appeal). If the person does not file a workers compensation claim, the Court concluded that the person is a "claimant" and remains so until the time for filing a claim has elapsed.

Under R.C. 4123.931(G), a claimant "shall notify a statutory subrogee (a self-insuring employer or the BWC) and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery." In the case of a self-insuring employer, the claimant need not notify the attorney general. Should the claimant fail to make such notification, or if a settlement with the third parties excludes the self-insuring employer or BWC, "the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest."

The Supreme Court of Ohio found this statute "to be straightforward." It found Ms. Verlinger was a "claimant," despite the original denial of benefits and pending appeal, and that the party who began paying benefits after the appeal (the BWC) was a statutory subrogee. Thus, Ms. Verlinger had a statutory duty to notify BWC of the settlement. Since there was no notification, she ***and the insurers who settled with Ms. Verlinger*** were jointly and severally liable to the BWC with respect to its statutory lien.

This is an extremely harsh result for insurers and companies seeking to settle third-party claims with claimants who are injured in the course and scope of their employment. The statute is structured such that only the claimant owes the duty to notify the self-insuring employer or BWC of the existence of third-party claims, and yet the settling insurers or companies are held responsible should the claimant fail to make such notification. We believe the constitutionality of R.C. 4123.931(G) is subject to attack on this basis, for

violation of substantive and procedural due process. To date, the constitutionality of R.C. 4123.931(G) has not been reviewed.

During briefing to the Supreme Court of Ohio in *Verlinger*, Foremost Insurance did not present a constitutionality challenge, but did argue that it is unfair to hold a third party jointly and severally liable without regard to its knowledge of any subrogation rights. The Court acknowledged the argument in its opinion, but concluded that "this is a policy argument best made to the General Assembly."

In the meantime, insurers or companies that reach a settlement with a claimant who was or may have been in the course of employment at the time of the accident must shoulder the responsibility of determining whether a self-insuring employer or the BWC has paid workers compensation benefits or may at some point in the future be required to pay workers compensation benefits to the claimant. Those insurers or companies should also take it upon themselves to notify with BWC or self-insuring employer, or at least ensure the claimant does so.

If benefits have been paid, or the possibility of future benefits exists, a settlement entered into prior to finalization of the workers compensation matter would be precarious at best. The release with the claimant can, and should, include language requiring the claimant to defend, indemnify and completely hold harmless the parties entering the settlement with the claimant. This language will not prevent a future lawsuit from the BWC or self-insuring employer, but if drafted properly, can make the claimant ultimately responsible for addressing the workers compensation right of subrogation.

If you have any questions about this case or how it may impact your company, please contact any of the following Roetzel attorneys.

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