Claims
COVERING THE BUSINESS OF LOSS

Breaking News

WEB EXCLUSIVE: Subrogation Pitfalls in Workers' Comp

By Bryan M. Groh

Editor's Note: *As part of an expanded editorial approach,* Claims *is offering first-run, feature-length articles on our web site before they appear in our monthly print issue. These articles will be clearly marked and are intended to expand the editorial breadth of the magazine while at the same time delivering even more useful and educational insights to our readers. We hope you find this extended coverage helpful.*

Over my 25 years as a member of the defense bar, I have witnessed the myriad ways plaintiffs' attorneys manipulate settlements so that a workers' compensation carrier gets the short end of the stick when trying to protect its subrogation interests. This article will look at three ways that claimants and their attorneys have attempted to separate workers' compensation insurers and employers from their rightful subrogation recovery. The three legal strategies highlighted include wrongful death settlements involving non-beneficiaries; allocating settlements for pain and suffering; and allocating part of the settlement for a spouse's loss of consortium claim. Suffice it to say that carriers and employers need to be extremely diligent to prevent having their pockets picked.

Wrongful Death

Probably no case better exemplifies how the rights of workers' compensation subrogation can be negated than *Menees v. National Supermarkets* , which comes out of Missouri . (*Menees v. National Supermarkets, Inc* . , 863 S.W.2d 378 (Mo.App. E.D. 1993).) In *Menees* , Rose Brown, a supermarket employee, was shot in the head and murdered, as were five other store employees. Her husband, William Brown, was awarded workers' compensation benefits as a result of her death, and was the only one to receive benefits. William Brown and six of the children of William and Rose Brown, who were all fully emancipated at the time of her death, brought a wrongful death action against two defendants for failing to maintain the store in a safe condition.

During trial, the Browns and the defendants reached a settlement for $240,000. At a hearing before the trial court, William Brown testified that he and each of the children had suffered an equal loss and should therefore be divided equally, even though he was the only one that was a dependent. The supermarket argued that it should be allowed to assert a claim for subrogation against all of the settlement rather than just the one-seventh share that was going to be paid to William Brown. The trial court agreed with the plaintiff's proposed allocation and stated that the supermarket was only entitled to subrogation on one-seventh of the settlement. The case was appealed, but the Court of Appeals affirmed the trial court, although there was a dissenting opinion. The case was then appealed to the Supreme Court, but the application was denied.

Fortunately for workers' compensation subrogation holders, few jurisdictions have followed this precedent. The case *Insurance Company of North America v. Wright* is very similar to *Menees* , but

Wright is very similar to *Menees* , but with a very different result. (*Insurance Company of North America v. Wright* , 886 S.W.2d 337 (Tex.App.-HOUS. [1 Dist.], 1994).) In the Texas case, the surviving widow settled her third-party wrongful death case for $600,000. The widow, her three grown sons, and her mother-in-law decided to divide the $600,000 settlement so that the widow only received $100,000, and argued that the insurer had no rights to the funds except the $100,000 that was paid to the widow.

The Texas court held that a group of plaintiffs that includes both workers' compensation beneficiaries and non-beneficiaries cannot divide among themselves a lump sum settlement in a manner that prejudices the workers' compensation carrier's subrogation rights. Although the trial judge found that the proposed apportionment was fair and reasonable, the Court of Appeals found that this finding was against the great weight and preponderance of the evidence. The case was remanded back to the trial court for a jury trial to determine the amount of damages to be awarded to each plaintiff.

Similarly, the Massachusetts Supreme Court held in *Eisner v. Hertz Corporation* that a wrongful death settlement was subject to subrogation rights not only for beneficiaries under workers' compensation, but also non-beneficiaries. (*Eisner v. Hertz Corporation* , 407 N.E.2d 1286 (Mass., 1980).) A North Carolina Court of Appeals held similarly in *Montgomery v. Bryant Supply Co.* (*Montgomery v. Bryant Supply Co.* 373 S.E.2d 299 (N.C.App. 1999).)

Although the *Menees* case may be an aberration, the fact that this issue has come up in several other jurisdictions shows that this could be an area of concern for a workers' compensation

insurer.

Pain and Suffering

Another gambit used to defeat subrogation rights is to allocate a portion of the settlement for pain and suffering. The argument essentially is that because workers' compensation benefits do not include monies for pain and suffering, they are outside of the subrogation rights of the insurer. For example, in the Illinois Supreme Court case of *Page v. Hibbard* , the plaintiff and his wife entered into a settlement for $24,000, which was the policy limits for the third-party defendant's insurance coverage. (*Page v. Hibbard* , 518 N.E.2d 69 (Ill. 1988).)

In the settlement, $6,000 of the payment to the husband was for his pain and suffering, which was argued not to be subject to the workers' compensation interests. However, the Illinois Court of Appeals held (as the majority of courts have), that an employer that has paid compensation to an injured employee under the Act is entitled to reimbursement for the entire third-party recovery, even though some or all parts of the compensation for damages are not compensable under the Act, such as pain and suffering.

A much more ingenious ploy was sought by the plaintiff/claimant in *Dearing v. Perry.* (*Dearing v. Perry* , 499 N.E.2d, 268 (Ind.App. 1 Dist., 1986).) In this case, the workers' compensation claimant filed her third-party action against the defendant for *only* pain and suffering and disfiguring scarring. She then settled her case for $50,000. The plaintiff/claimant then argued that the entire amount that she received in the settlement was not subject to the carrier's lien. This Indiana Appellate Court held that the carrier's lien applied to any amounts recovered by an injured employee, no matter what it was called. It rationalized its decision on a

willingness to preclude collusion between the employee and tortfeasor in arbitrarily apportioning the settlement in an attempt to evade the statutory lien. It therefore appears that the “pain and suffering” ploy has not been extremely successful for claimants, but this does not preclude a particularly creative attorney from taking another stab at it with a different wrinkle.

Loss of Consortium

Far more successful than either of the two preceding schemes is the “loss of consortium” allocation ploy. Here, the settlement is apportioned between the claimant and his spouse based on the spouse’s independent claim for loss of consortium. In the *Eisner* case mentioned above, the settlement of the $105,000 called for $5,000 to be paid to the widow for loss of consortium. The Massachusetts Supreme Court held that the insurer was not entitled to reimbursement on this amount since it is an independent cause of action. This decision was probably not difficult for the Court to make, since the $5,000 allocation was reasonable compared to the total settlement of $105,000.

However, the case of *Blagg v. Illinois F.W.D. Trucking Equipment Company* , wherein an injured worker was to receive $100,000, but his wife was to receive $350,000 for her loss of consortium claim, produced a far less favorable result for workers’ compensation carriers. (*Blagg v. Illinois F.W.D. Trucking Equipment Company* , 572 N.E.2d 920 (Ill. 1991).) This maneuvering caused the lien holder to collect only one-fourth of its lien. The Illinois Supreme Court stated that placing the value of the consortium claim at more than three times the value of the claimant’s personal injuries does not appear to be in good faith, and therefore reversed and remanded the case back to the trial court. One has to wonder, however, whether the court would have approved the apportionment

if these claimants were a little less greedy.

In the *Dearing v. Perry* case mentioned above, the spouse was to receive more than half of the settlement for his loss of consortium claim. The Indiana court held that a claim for loss of consortium will be barred only when the injured spouse's claim is completely invalid, and just because a claimant was not fully compensated does not automatically invalidate an apportionment of the settlement to the spouse. The insurer in this case, however, was not part of the settlement negotiating process. Therefore, the court ruled that allowing this to occur would evade the state's statutory lien provision. Since the insurer was not a party to the negotiations, the court found that the entire amount of the settlement was attributable to the workers' compensation claimant.

The Illinois Supreme Court, in the *Page v. Hibbard* case mentioned above, also found that the employer was not entitled to be reimbursed from that portion of the settlement compensating the spouse for loss of consortium. However, since half of the settlement was designated for the loss of consortium claim, the court remanded the case back to the trial court for consideration of whether this amount was proper.

Eyeing the Future

As shown above, the workers' compensation lien holder has to be extremely vigilant in protecting its lien. Although the majority of the courts found that the claimants had ventured into the realm of "bad faith," there are many readily conceivable scenarios wherein the court would be much more willing to abrogate portions of the lien, especially if the claimant/plaintiff was less blatant and greedy. Of particular concern is the loss of consortium ploy, which, if reasonable, is almost a guaranteed way for a

claimant to reduce the payback to the workers' compensation lien holder. It is recommended that employers/insurers retain experienced counsel as soon as it is apparent that a third-party claim is evident. Additionally, the employer/insurer should attempt to intervene in the third-party case to protect its interests, assuming that the jurisdiction allows this.

Bryan Groh is an attorney with Evans & Dixon, L.L.C., an insurance defense law firm serving insurance companies, employers and self-insured entities with workers' compensation and civil liability defense in Missouri, Illinois, and Kansas. He may be reached at 314-621-7755, bgroh@evans-dixon.com .

Back to Breaking News