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**Gallagher Sharp Shop Talk: Workers' Compensation - Special Edition**

Many of you have been following a case pending in the Court of Appeals of Ohio, Sixth Appellate District, involving the question of whether Ohio's workers' compensation subrogation statute (R.C. 4123.93, et seq.) is applicable to settlements paid while the current workers' compensation claim is denied, but, an appeal is pending. On January 14, 2011, the Sixth Appellate District entered its decision holding that the BWC was not entitled to assert subrogation rights for payments made while a claim was denied.

By way of background, in *State of Ohio BWC v. Dernier*, Lucas App. No. L-10-1126, 2011-Ohio-150, Dernier was injured in an automobile accident on August 7, 2006. On May 14, 2007, Dernier filed a claim with the Ohio Bureau of Workers' Compensation. On June 1, 2007, Dernier's claim was denied based upon her employer's refusal to certify the claim. On June 6, 2007, Dernier settled her tort claim with the tortfeasor's insurance company for \$100,000, and on June 8, 2007, Dernier filed an appeal from the denial of her workers' compensation claim. Eventually, Dernier prevailed and her workers' compensation claim was allowed. On April 13, 2009, the BWC sued Dernier and the tortfeasor's insurance carrier under R.C. 4123.931, seeking to recover substantial sums paid for the same injuries. The BWC claimed it was a "statutory subrogee," legally entitled to recover jointly and severally from both the "claimant" and the tortfeasor's insurance carrier. The trial court granted motions for summary judgment filed on behalf of Dernier and the insurance carrier, concluding that while Dernier's claim was denied, Dernier was not a "claimant" as defined under R.C. 4123.931(A). The BWC filed an appeal to the Sixth Appellate District, where the issue was briefed, and a decision and judgment entered on January 14, 2011.

The appellate court held in favor of Dernier and the insurance carrier, holding that the BWC had no subrogation rights from the June 6, 2007 settlement. The basis for that ruling was that a "claimant" is defined by statute as a "person who is eligible to receive compensation, medical benefits, or death benefits." The Court found this term to be unambiguous, and refers to a present right to compensation or benefits under workers' compensation. Because the employee's claim had been rejected at the time she settled with the insurance carrier, she had no present right to compensation or benefits and therefore was not a "claimant" under R.C. 4123.931. The Court relied upon Merriam Webster's Collegiate Dictionary in finding that the term "eligible" means "qualified to be chosen." It was undisputed that at the time the employee reached her settlement with the insurance carrier, she was not qualified to receive benefits and, therefore was not a "claimant." The Court also rejected the argument that the imposition of subrogation rights was somehow retroactive as against the insurance carrier. The Court found that when the employee's claim was allowed, any liability from the insurance carrier to the employee had been extinguished by the settlement, and therefore the BWC could not claim a subrogation right against the insurance carrier premised on these provisions.

This is an extremely significant decision, the first reported case of this type, and will likely be appealed to the Supreme Court of Ohio. The situation in *Dernier* is actually quite common, as any employer who refuses to certify a claim, or even to act on it, will have the claim denied. Settlements reached with workers' compensation claimants while their claims are denied or in the process of hearing, will seem to be exempt from the subrogation statute unless and until the claimant is deemed entitled to receive benefits. I think it is also likely that the legislature will have to re-visit the definition of claimant contained in R.C. 4123.931.

I represented the tortfeasor's insurance carrier along with Holly Olarczuk-Smith, of Gallagher Sharp's Appellate Practice Group.

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