

From: Don Drinko
Sent: Mon Jan 31 16:05:27 2011
Gallagher Sharp Shop Talk: Workers' Compensation

Question: In the aftermath of *BWC v. Dernier*, what can self-insured employers do to ensure that their R.C. 4123.93, *et seq.*, subrogation interests are being protected?

In the wake of the Sixth Appellate District's January 14, 2011 decision in *BWC v. Dernier* (discussed at length in my January 24, 2011 "Special Edition" of Shop Talk) I have received several calls from self-insured employers and third-party administrators inquiring as to how they can ensure that their subrogation interests are protected. Here are some preliminary thoughts:

- First, it should be noted that the Sixth District's decision in *Dernier* will almost certainly be appealed. The BWC has filed a Motion for Reconsideration concerning its separate right to subrogation against insurance companies under R.C. 4123.931(G), and I expect any final order will be appealed to the Supreme Court of Ohio.
- In the interim, if your TPA or administrator is one that advocates the practice of denying claims as a matter of course, this decision should cause them to re-think that position. I would continue to recommend that all claims be given prompt consideration, but particularly claims involving automobile accidents or other third-party injuries where subrogation interests may potentially apply.
- If a question arises as to whether subrogation rights are potentially in play, I would recommend seeking professional advice from counsel or from the Subrogation Department of your designated representative.
- You should also inquire as to whether controls are in place so that proper notice of a potential subrogation claim is given in a prompt manner. One of the primary issues in *Dernier* was that the liability carrier for the tortfeasor had no notice that a BWC claim had been filed until more than eight (8) months after the policy limits had been paid.
- Industry groups and lobbying organizations should make their representatives aware that the definition of "claimant" in R.C. 4123.93(A) needs to be reconsidered, as the current definition is simply too narrow.

If you have any specific questions, or would like to discuss this or any other workers' compensation issue, I would like to hear from you.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,
Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com
www.gallaghersharp.com