

From: Don Drinko  
Sent: Wed Sep 07, 2011 4:15 PM  
**Gallagher Sharp Shop Talk: Workers' Compensation**

**Question: What statute of limitations applies to a claim brought by a statutory subrogee under Ohio Revised Code §4123.931(G)?**

Today, the Supreme Court of Ohio answered an important question regarding the rights of the BWC and self-insured employers to enforce claims for subrogation. The question hinged upon whether the current workers' compensation subrogation statute (*R.C. §4123.93, et seq*) provides an "independent right of recovery" for a statutory subrogee, and, if it does, what statute of limitations applies to these claims.

In *Ohio Bur. of Workers' Comp. v. McKinley*, Slip Op. No. 2011-Ohio-4432, a settlement was reached between a claimant and a third-party tortfeasor for an on-the-job injury that occurred on July 13, 2003. The settlement did not make any provision to repay the BWC for its statutory subrogation interest under R.C. §4123.931. On November 4, 2008, the BWC brought suit directly against the claimant and the third-party tortfeasor, seeking to recover the full amount of its subrogation interest. The third-party tortfeasor claimed that the action was barred by the two-year statute of limitations for tort actions. The trial court agreed and dismissed the complaint, prompting the BWC to appeal. The Seventh District Court of Appeals reversed, finding that R.C. §4123.931 creates an "independent right of recovery" for the statutory subrogee (the BWC or a self-insured employer) and that the six-year statute of limitations contained in R.C. §2305.07 was applicable, prompting the third-party tortfeasor to appeal to the Supreme Court of Ohio.

The Supreme Court affirmed, finding that R.C. §4123.931(G) did not create a "typical" derivative subrogation interest, but instead created a new and independent right to recovery. Traditionally, a subrogee's interest is "derivative," which means that the subrogee cannot have greater rights than those possessed by the injured party. If the subrogation interest was derivative, the BWC's claim would be barred by the two-year statute of limitations for the claimant's tort claim. The Court found that the workers' compensation subrogation statute instead created an independent right of recovery. Since subrogation was a statutory right, the six-year statute of limitations applied. The Court further agreed with the Court of Appeals that the statutory subrogee's right is only subrogated in the sense that the statutory subrogee can only recover from the claimant and/or third party if the third party is liable to the claimant in tort.

The *McKinley* decision is an important safeguard for self-insured employers, and will almost certainly encourage a more activist approach from the BWC and self-insured employers against claimants, tortfeasors, and their insurers. The decision strengthens the subrogation statute and ensures that the subrogee will have sufficient time to protect its interests. If you have any specific questions, or would like to discuss this or any other workers' compensation issues, you can contact me or Adam Sadowski from our Toledo office.

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](mailto:ddrinko@gallaghersharp.com)

Adam P. Sadowski  
Gallagher Sharp  
420 Madison Ave., Suite 1250  
Toledo, OH 43604  
Telephone (419) 241-4860  
Direct Dial (419) 241-4864  
Fax (419) 241-4866  
[asadowski@gallaghersharp.com](mailto:asadowski@gallaghersharp.com)