From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Is a claimant required to notify the BWC or a self-insured employer of third-party settlements made <u>after</u> the BWC denies their claims?

A "claimant" is required by R.C. §4123.931(G) to notify statutory subrogees and the Attorney General of "the identity of all third parties against whom the claimant has or may have a right of recovery. Ohio's "subrogation statute" then allows the BWC or the self-insured employer to step into the shoes of the injured worker to pursue claims against third parties. If the claimant does not notify the subrogee and the Attorney General, the claimant and the third party can be held jointly and severally liable to pay the subrogated interest. Recently, the Ninth District Court of Appeals was asked to consider the extent of this requirement, and applied to a claim which was initially denied.

Bureau of Workers' Compensation v. Verlinger, 2016-Ohio-8029 (9th Dist.), involved a worker injured in a motorcycle accident while traveling to a client's home. Ms. Verlinger's application for benefits was initially denied by the BWC, and she appealed to the Industrial Commission. While the appeal was pending, Ms. Verlinger settled her claims with the other driver's insurance company and her own insurance company. She did <u>not</u> notify the BWC or the Attorney General's office of the settlements. A week later, a District Hearing Officer allowed Ms. Verlinger's claim and she received medical and wage benefits. The BWC then filed suit in Summit County Common Pleas Court seeking the amount it had paid and would pay in the future on Ms. Verlinger's claim. The BWC claimed Ms. Verlinger settled her claims with the insurance companies in violation of R.C. §4123.931(G) because she failed to notify the BWC. The trial court granted summary judgment to Ms. Verlinger, finding that he settlements were issued while the claim was denied, prompting an appeal.

In a 2-1 decision, the Ninth District affirmed the trial court's grant of summary judgment in Ms. Verlinger's favor. The majority began its analysis by defining a "claimant" as "one 'who is eligible to receive compensation, medical benefits, or death benefits under [relevant Chapters] of the Revised Code.'" *<u>Id.</u>, citing R.C. §4123.93(A).* The majority held Ms. Verlinger was not a "claimant" at the time she settled with the third party insurance companies because her application had been rejected by the BWC and she was not "qualified to receive" benefits. In a concurrence, Judge Jennifer Hensal agreed that summary judgment was warranted, but argued that it was because the BWC had not made any payments at the time Ms. Verlinger settled with the third-party insurance companies. In her dissent, Judge Beth Whitmore argued Ms. Verlinger was a "claimant" because she was "eligible" to receive benefits even though her claim was initially denied, but subject to appeal. Judge Whitmore argued that the timing of payments are irrelevant to a determination of whether Ms. Verlinger was a "claimant" under the Revised Code.

Employers faced with subrogation and notification questions should be cautious because there is conflicting case law throughout the state. The *Verlinger* court followed a 6th District Court of Appeals decision (*BWC v. Dernier*,2011-Ohio-150), but a Franklin County Common Pleas Court

judge reached the opposite result based on similar facts (*BWC v. Kidd*, Franklin C.P. No. 07CVH08-10619 (Oct. 1, 2008)).

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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