

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

**QUESTION: What is the current status of *Bureau of Workers' Compensation v Verlinger*, the case considering workers' compensation subrogation, denied claims, and whether insurance companies can be held jointly and severally liable?**

As many of you know, dating back to our discussion of *BWC v Dernier* (*Shop Talk*, 1/24/11), I have attempted to keep you informed of opinions concerning workers' compensation subrogation rights and R.C. 4123.931. Most recently, the Ninth Appellate District decided *BWC v Verlinger* (*Shop Talk*, 1/11/17) in which it affirmed a finding that no right to subrogation existed in the case of a claimant who settled her personal injury claim while it was denied, and before workers' compensation benefits had been paid. Recently, the Supreme Court of Ohio considered the BWC's appeal in that case and reversed the Ninth District (and *Dernier*), in finding that the claimant had violated the subrogation statute, and that she and the insurance companies she settled with were jointly and severally liable to the BWC for the full subrogation amount.

As previously discussed, *BWC v Verlinger*, Slip Opinion No. 2018-Ohio-1481, involved a worker who was injured in a motorcycle accident on August 1, 2011 while in the course of employment. She applied for workers' compensation benefits on August 17, but her application was denied by the BWC on September 6, 2011. She appealed that decision to the Industrial Commission September 22, 2011. While the appeal was pending, the claimant settled her claims with the other driver's insurance company and her own insurance company on December 15, 2011 without notifying the BWC or the Attorney General's Office. On December 23, 2011, a DHO allowed the claim, and she began receiving extensive medical and wage benefits. In July, 2013, the BWC filed suit naming the claimant and the insurance companies as defendants, seeking amounts it had paid and would pay in the future to the claimant. All parties moved for summary judgment, and the trial court granted summary judgment to the claimant, finding that the settlements were reached while the claim was denied and before benefits were paid. On appeal, the Ninth Appellate District affirmed, finding that the injured worker was not "one who is eligible" to receive workers' compensation benefits while the claim was denied, and therefore she was not "qualified to receive benefits". An appeal followed to the Supreme Court of Ohio.

The Supreme Court reversed, holding for the first time that a claimant becomes "eligible to receive benefits" at the time of the injury that occurs in the course of employment and remains eligible unless and until a determination that the claimant is not entitled to benefits has become "final." ("Final" is defined as being no longer subject to appeal, or until the statute of limitations has expired.) In a short and conclusory opinion, the Court found that the claimant was "qualified to be chosen" (eg. "eligible") to receive benefits at the time she settled with her insurers because, only days after settling the claim, the Industrial Commission allowed her claim. Her status did not change at all during that period, and in fact did not change since the date of injury. The Court chose to ignore the lower court's finding that a subrogation interest could not exist until benefits are paid (an argument also adopted in *Dernier*) finding that nothing in the definition requires payments to have been made. Perhaps most questionably, the Court held that "subrogation rights" and "right of recovery" are distinct, with only the latter requiring payment to have been

made. More importantly, the Court found that while it appeared the insurance companies had no knowledge of the workers' compensation claim, they were jointly and severally liable for the full subrogation amount. While noting that it may at times be "unfair" to hold a third-party jointly and severally liable without regard to its own knowledge, this is a policy argument best made to the General Assembly.

*Verlinger* sets a new standard with regard to workers' compensation subrogation matters. Insurers should take care to investigate whether an injury is work-related, or risk joint and several liability even where claims are filed after a settlement has been completed. Examinations under oath (EUO) should discuss whether an incident is work-related. Similarly, employers who have employees who are injured in the course of employment should take note of the need to fully investigate insurance claims and take notice of subrogation rights.

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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