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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Can the BWC be sued for Breach of Contract and unjust enrichment for accepting restitution payments arising from a fraud claim?

Continuing in our line of cases discussing the impact of a finding of fraud, this week we will examine a situation in which a finding of fraud was made and a restitution Order issued, and whether the BWC can be sued for “unjust enrichment” for accepting such restitution when it has already accepted a subrogation payment.

Grubb v Buehrer, 2016-Ohio-4645, arose from an automobile accident on March 26, 2004. The claimant was injured while traveling in a vehicle owned by her employer, and a worker’s compensation claim was filed and allowed for several medical conditions. The claimant filed a personal injury lawsuit against the tortfeasor and various insurance companies, but later dismissed that suit without prejudice. A second suit was filed in 2008, in which the Plaintiff was substituted due to the death of the claimant. The parties ultimately reached a settlement agreement in lawsuit #2, prompting the BWC to file a motion to intervene to enforce its subrogation rights. Eventually, a resolution was negotiated by which the BWC was paid \$88,500 out of the settlement agreement, which the BWC accepted, and a settlement agreement was executed to this effect. At the same time, the BWC was involved in an investigation of the claimant and her attorney for worker’s compensation fraud. The BWC ultimately requested that charges be filed, and a criminal indictment was issued in the Franklin County Municipal Court in 2013, charging the attorney with complicity in the alleged fraud. Ultimately, the attorney agreed to a plea bargain in which she agreed to pay \$14,441.00 in restitution and reimbursement to the BWC. In 2015, the attorney filed a complaint in the Ohio Court of Claims alleging breach of contract and unjust enrichment, alleging that the amount of the criminal restitution order represented the total amount of TTD compensation paid to the claimant as the result of the accident, an amount that the BWC had already received as part of the settlement of lawsuit #2. The BWC filed a motion to dismiss, alleging the claims were barred by the doctrine of *res judicata*. The Court of Claims granted the BWC’s motion, prompting an appeal to the Ohio Court of Appeals, 10th Appellate District.

The 10th District affirmed, finding that the attorney failed to state a claim for relief. The Court rejected the Appellant’s claim that the settlement agreement released all claims between the parties, including any potential restitution claimed by the BWC. The Court agreed with the Court of Claims that the settlement agreement released claims related to the accident, and not to criminal liability for the fraud which took place subsequent to the accident. The BWC was the victim of the criminal act, and not a party to the criminal proceeding. It is not the victim’s interest that are being represented in the criminal case, but rather the people of the State of Ohio, and the grant of restitution is an exercise in traditional discretion over which the victim (i.e. the BWC) had no control. The Court also noted that the appellant could have raised a challenge to the restitution order in her criminal proceeding, but acknowledged that she failed to do so. Finally, the Court noted that while the BWC has investigative powers and the ability to refer

investigative findings to the Attorney General, the BWC does not have the authority to enter an agreement not to prosecute.

Grubb reinforces the position that it is not the BWC that decides to charge claimants with fraud and that agreements to satisfy subrogation liens are not a substitute for restitution. Had the claimant pursued an offset pursuant to Revised Code §2929.28(A), it is likely that the amount of the subrogation could have been considered in restitution, although investigative costs were also involved.

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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