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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: At what point does the BWC's right to subrogation under R.C. 4123.931 become enforceable for an allowed claim?

Ohio Revised Code 4123.931 provides the BWC and self-insured employers with the right to subrogation, or the ability to recoup amounts paid in compensation and medical benefits from third parties who are legally responsible for an injury. In 2011, the Ohio Court of Appeals, Sixth Appellate District, decided *Ohio Bur. of Workers' Comp. v. Dernier*, which concluded that no right to subrogation exists when a settlement is reached while a workers' compensation claim is administratively denied but subject to appeal, because the claimant was not "presently eligible to receive benefits" while the claim was denied. Recently, the Sixth District was presented with another case involving similar facts, and the question of whether a claimant (who settled her personal injury claim while a workers' compensation claim was allowed, but before benefits were paid), was a "claimant" under R.C. 4123.931.

Ohio Bur. of Workers' Comp. v. Petty, 2016-Ohio-5753, arose out of an automobile accident that occurred on June 23, 2010. The claimant was injured due to the negligence of Rayford, and the accident occurred in the course and scope of the claimant's employment. The claimant filed a workers' compensation claim on November 7, 2011, and the claim was allowed on November 30, 2011. At the same time, the claimant also filed a personal injury claim against Rayford. On June 25, 2012, the claimant settled her personal injury claim for \$65,000 and signed a release. Claimant's counsel verbally notified BWC of the settlement on July 18, 2012 and followed up with a letter. On June 19, 2013, the BWC paid out a lump sum benefit to the claimant in an amount totaling \$10,849.86. On January 23, 2014, the BWC filed a complaint asserting a claim for subrogation against the claimant and Rayford alleging both were jointly and severally liable for its benefit payments totaling \$11,119.86. The BWC filed a motion for summary judgment, followed by cross-motions on the part of both defendants. Rayford argued that the BWC was not entitled to subrogation because the injured worker was not a "claimant" at the time she executed the release because she was not yet "qualified to be chosen" to receive payment of such benefits. Rayford argued that the BWC did not make a benefit payment until "long after the appellees had entered into a settlement agreement." The BWC contended that it had paid \$100 in medical bills three months before the claimant entered into the lump sum agreement, and therefore, subrogation rights had attached. The trial court ultimately agreed with the defendants and granted summary judgment, prompting the BWC to file an appeal as of right to the Sixth District Court of Appeals.

The Sixth District reversed, finding a genuine issue of material fact as to whether the claimant had actually received benefits at the time of the settlement, and remanded the case. The Court found *Dernier* to be inapplicable, as the claim in *Dernier* had been administratively denied at the time the settlement was reached, and therefore benefits could not have been paid. In the case at bar, the BWC had allowed the claim, and an affidavit submitted by the BWC documented the payment of \$100 in unspecified benefits. The Court also rejected appellees' contention that the

payment was an administrative payment for a review of medical records and was not paid to or on behalf of the claimant, finding that a genuine issue of material fact existed on this issue.

The claimant in *Petty* sought to extend the reasoning of *Dernier* to instances where a claim is allowed but benefits have not yet been paid, an extension that is frankly not supported by the language of the statute. It is highly likely that the BWC and self-insured employers will continue to maintain that whether a claim is allowed or denied should remain the “bright line” test for subrogation.

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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