



2014 Navigating Through Statutes, Insurance Policies, and Regulations

January 15, 2015 – Columbus, OH | January 22, 2015 – Cleveland, OH |

January 29, 2015 – Cincinnati, OH

**Navigating Ohio BWC Subrogation: A Practical Way  
to make sure Your Clients Get Their Fair Share  
from a Third Party Tortfeasor when BWC Pays the  
Bills and Wage Loss**

*Richard Topper, Esq., Columbus, OH*

*Eleana Drakatos, Esq., Columbus, OH*

# **Navigating through Ohio BWC Subrogation: A Practical Way to Make Sure Your Clients Get Their Fair Share when BWC Pays their Medical Bills and Wage Loss**

## **A. Statutes**

1. 4123.93 and 4123.931. Also see R.C. 4123.95 which states that “Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees.” This includes cases involving Ohio BWC subrogation.
2. And yes, the Supreme Court has already determined that the statute is constitutional. See *Groch vs. General Motors Corp.* (Ohio 2008) 117 Ohio St. 3d 192.

## **B. The procedure-You and Your Client’s Liability to Notify and Pay**

1. You must immediately notify Ohio BWC or the self-insured BWC employer about the third party claim. You are under an affirmative obligation to do this. Even if the insurance company or third party agrees to pay and not notify Ohio BWC, your client will be on the hook. See R.C. 4123.931(G) which requires you to notify BWC or the self-insured of the identity of the third party and of any potential settlement. Also see *Ohio BWC vs. Miller and Big G.* (2013 Franklin) 2013-Ohio-2072.

In *Ohio BWC vs. Williams/Motorists Mutual* (2008 Franklin) 180 Ohio App 3d 289, Motorists Mutual Insurance settled an injury claim with the claimant/plaintiff for \$6200.00. No one notified Ohio BWC regarding the third party claim or settlement. In a lawsuit against Motorists’ and the Claimant, Ohio BWC demanded \$12,650.00 in past and future medical benefits even though the Claimant’s settlement with Motorists was less than that amount. The Court determined Ohio BWC was entitled to summary judgment against Motorists and the claimant-plaintiff for its claimed amount See also *Rivers vs. Otis Elevator* (Cuyahoga) 2013-Ohio-3917 in which the Plaintiff was held liable for a \$61,000.00 self-insured workers compensation lien even though she only received a \$15,000.00 third party settlement. Why? She didn’t notify the self-insured comp subrogee regarding her third-party settlement. This result was reached regardless of the fact that she would only owe the self-insured’s share of the net amount if she had notified the self-insured subrogee of the settlement.

Furthermore, the Ohio Supreme Court has determined that a six year statute of limitations applies to a claim to recover subrogation claims against the Claimant-Plaintiff and the Third Party, *Ohio BWC vs. McKinley* 130 Ohio St.3d 156 (Ohio 2011), stating 4123.931 is a statutory right and stating that

2307.05 provides for a six year limitation for rights created by statute. This SOL would apply whether or not the Claimant-Plaintiff brings a case against the third party. See *Corn v. Whitmere* 183 Ohio App.3d 204 (Greene County 2009).

An exception arose in the case of *Ohio BWC vs. Dernier* (2011 Lucas) 2011-Ohio-150. In that case, Ohio BWC denied the claimant's eligibility for benefits. After the BWC denied her claim, the claimant settled her injury case with Western Reserve Insurance. After the settlement with Western Reserve, the claimant won a BWC appeal and became eligible for BWC benefits. The Court stated Ms. Dernier was not obligated to notify Ohio BWC under 4123.931(G), since she was not a "claimant" at the time of the settlement.

**Word to the wise: DO NOT TRY TO GET AROUND THE NOTIFICATION PROVISIONS in 4123.931(G).** This includes UM/UDM claims, intentional tort claims, and claims against municipalities under 2744.01, et. seq. Court of Claims cases are not mentioned in subsection (G).

### **C. The Procedure-After You give Notice**

2. Make the third party or their insurance company aware of the Ohio BWC or self-insured subrogee claim. Let them know that ongoing benefits are being paid and that the BWC lien needs to be paid out of any settlement.
3. Get periodic updates regarding the amount paid by Ohio BWC. You can do this on line by going to the Ohio BWC website and click on "View Claim Documents." The link is:  
<https://www.bwc.ohio.gov/formslogin.aspx?ReturnURL=%2fbwccommon%2fservices%2fClaimDocuments%2fsecure%2fClaimDocuments0.aspx>  
In order to do this, you will need to get your referring attorney's password and user name to access your client's file. If your client does not have an attorney or the attorney will not give the password to you, have your client set up their own access and give you the user name/password to access the docs. By going to "Claim Payment" on the left of the screen, you can access the payments made.
4. Notify Ohio BWC or the statutory subrogee before you reach a final settlement in the case. See R.C. 4123.931. You should tell the third party insurance company that any settlement is contingent on the approval and upon settlement of the Ohio BWC or self-insured subrogation lien. Note: My read of the statute says that the claimant is required to notify Ohio BWC or statutory subrogee of a settlement. However, I don't believe we are required to get their approval of the amount of the settlement. This is the applicable

part of 4123.931(G) upon which I am relying: “No settlement, compromise, judgment, award, or other recovery in any action or claim by a claimant shall be final unless the claimant provides the statutory subrogee and, when required, the attorney general, with prior notice and a reasonable opportunity to assert its subrogation rights.” However, there are arguments to the contrary. To be absolutely safe, get their approval as to the amount.

5. The best thing to do is to get the Subrogee involved in the mediation.
  
6. Many self-insured subrogees will whine and demand that the Claimant-Plaintiff settle the BWC case before they will agree to a settlement or lien amount. There is absolutely no statutory authority for this. In fact, R.C. 4123.931 provides for two types of determinations of the subrogee’s interest. First, this can be determined at trial under 4123.931(D) or a determination in a mediation or declaratory judgment action under 4123.931(B) or (C).
  
7. If you cannot settle the underlying lien claim, but have agreed to a settlement amount with the third party, here is what I would recommend:
  - a. Request a mediation conference under 4123.931 (C). Although this may be an effort in futility and is not, in my belief, a condition precedent to litigation, I have had a court intimate that it is. Therefore, my suggestion is to utilize this procedure.
  - b. In the event of an unsuccessful mediation conference, file a declaratory judgment action against Ohio BWC or the self-insured subrogee for a determination of a proper division between your client and the subrogee under 4123.931(B). Although this action is not set forth in the statute, there is authority for this in the case law.
  - c. Here is the argument that a declaratory judgment action is an accepted method of dispute resolution. See *Groch* above where the Court states: “Furthermore, claimants may have alternatives beyond those specifically recognized in R.C. 4123.931 for demonstrating that a recovered amount is not entirely duplicative, as recognized in decisions of other courts that have considered this issue. For example, in *Fry v. Surf City, Inc.*, 137 Ohio Misc.2d 6, 2006-Ohio-3092, 851 N.E.2d 573, ¶ 24, the court stated that a claimant may bring a separate declaratory judgment action, through which the claimant who settled with a tortfeasor may show that not all of the recovery from the tortfeasor was a double recovery. The court in *Fry* also stated: “In a trial, evidence may be presented and jury interrogatories may be submitted, under Civ.R. 49, to determine what parts of the damages represent [ ] workers' compensation benefits and what parts represent the claimant's unreimbursed interests.” Also see *Jones vs.*

*Greyhound Lines, Inc.* 2012-Ohio-4409 (Franklin 2012); 981 N.E.2d 294, Jurisdiction denied in Ohio Supreme Court. The *Jones* Court stated that declaratory judgment was available as a means of dispute resolution when the parties cannot agree to the amounts to which each party is entitled from a third party claim.

#### **D. The User's Guide on Dividing the Third Party Settlement Between Your Client and the BWC**

1. First, subtract your attorney's fees and case expenses as well as spousal and parental consortium and punitive damage claims from the settlement amount. See 4123.93(E) and 4123.931(A). Why? 4123.93(A) states: "The net amount recovered is subject to a statutory subrogee's right of recovery." 4123.93(E) defines the net amount "Net amount recovered" means the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney's fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery. "Net amount recovered" does not include any punitive damages."

Note: I usually take a full third fee in cases where BWC is involved.

2. Determine the interest of the Ohio BWC or self-insured subrogee. Under 4123.93(D), this includes:" past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses." Scrutinize what the subrogee claims. BWC will try to include medical exams which may not be a legitimate "cost or expense." Unfortunately, the subrogee's claims most like include permanent total awards and loss of limb awards.

The statute does not specify whether Ohio BWC is only entitled to those payments which a plaintiff can prove are a proximate cause of the third party negligence or whether the bureau is entitled only to those medical expenses which can be proved are reasonable and necessary. However, see 4123.931(D)(2)(C) which requires a jury to specify the damages which relate to economic loss. This would imply that BWC is only entitled to that which can be proven is a result of the third party's negligence.

3. Determine the Claimant-Plaintiff's interest. This is defined in 4123.93(F) as "Plaintiff's demonstrated and proved damages minus the statutory subrogee's interest." Don't sell this amount short. This amount should include the following:
  - a. *Plaintiff's uncompensated wage loss.* BWC will only pay 2/3 of the wage loss. Therefore, the Plaintiff's uncompensated loss should include the uncompensated 1/3.

- b. *Future income loss.* This is a sum that may be uncompensated, because BWC benefits will not last a Plaintiff's lifetime.
  - c. *Plaintiff's uncompensated loss of benefits.* This will include health insurance, life insurance, sick and vacation benefits, loss of 401(K) contributions, loss of profit sharing, loss of Social Security and Medicare contributions, etc. According to the Bureau of Labor Statistics, this averages 16.56% of the Plaintiff's earnings. If your Plaintiff has extraordinary perks, these need to be added also.
  - d. *Loss of household services.* In a recent case, we had an economist estimate this loss for a 55 year old man to be \$137,000 over the Plaintiff's lifetime.
  - e. *Cost of the Plaintiff's life care plan.* This includes many items that are not paid by BWC such as wheel chair ramps, long term care, house and vehicle adaptations, nursing and home care expenses, etc. Take the life care plan minus the BWC's future estimated medical costs and this will give you the uncompensated future medical care.
  - f. *Plaintiff's past and future non-economic loss* including all the elements set forth in Ohio Jury Instructions.
4. Divide the sums according to 4123.931(B). Simply total the Plaintiff's uncompensated loss and the subrogee's claim. Divide each by the total. This will give you the percentage of each party's claim. Each party then gets their percentage of the net amount.
5. Here's an example. Let's say we are forced to settle with the third party for their insurance policy limits of \$100,000. First thing we do is subtract the one-third attorney's fees and litigation expenses. That leaves \$60,000.

Let's assume that BWC's past and future payouts are estimated at \$100,000. Assume that Plaintiff's past and future uncompensated loss is \$200,000. The total loss is \$300,000. Obviously, there's not enough money to satisfy both parties.

How do we divide the \$60,000? Plaintiff gets  $\frac{2}{3}$  and BWC gets  $\frac{1}{3}$  of the \$60,000, since Plaintiff's uncompensated loss is  $\frac{2}{3}$  of the total loss and BWC's subrogation interest is  $\frac{1}{3}$  of the total loss. Plaintiff gets \$40,000 and BWC gets \$20,000.

6. If you go to trial in a declaratory judgment action to determine the division of proceeds, you should hire an economist and a life care planner to prove the uncompensated loss. Most likely the jury will decide the non-economic portion that will go into the Plaintiff's loss.

## **E. What happens if you go to trial against the third party?**

1. First, I would recommend that you join Ohio BWC and/or the self-insured subrogee in the lawsuit. This way, there is no way the subrogee can contest notice or awareness of settlement under 4123.931(G). It is also good for the subrogee to participate, since they will be able to see first-hand any difficulties in getting less than a full recovery due to comparative negligence issues, absent party issues under 2307.31-2307.38, injury-related proximate cause issues, and issues regarding the necessity of treatment. It is also a good way to make sure the subrogee comes to the table for mediations or other settlement discussions. If you plan to contest any subrogated amounts, you must name the subrogee as a party. See 4123.931(H).
2. What about having Ohio BWC at the table in trial. There are arguments both ways. The upside? Having BWC help you prove the damages and letting the jury know the taxpayer will be repaid out of the verdict. The downside? Having the jury know the Plaintiff has another source of recovery.
3. What about collateral source and *Robinson v. Bates*' issues? In *Ross vs. Nappier*, 185 Ohio App.3d 548 (Ohio App. 11 Dist. 2009), the Court was faced with a myriad of issues regarding what happens when BWC is a part of the trial. In this case, the jury was "saturated" with evidence regarding workers compensation and Ohio BWC's payment of the medical bills according to the appellate court. Even though the trial judge instructed the jury that they were not to consider whether BWC paid the Plaintiff's medical bills, the Appellate Court found the trial judge committed reversible error in not allowing Plaintiff to present evidence that the Plaintiff was obligated to repay BWC for the medical expenses it paid.
4. One necessity at trial is that there must be jury interrogatories which set forth the total non-economic and total economics loss. 4123.931(D). What is confusing is what effect those numbers have on the division of the verdict between the parties, since the division of the proceeds seems to be unaffected by the jury's decision.

F. Just remember: No matter what the BWC lien is, the Plaintiff's slice of the pie should be greater