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Pennsylvania Workers' Compensation Bulletin

Thomson, Rhodes & Cowie, P.C. Two Chatham Center, 10th Floor, Pittsburgh, PA 15219 (412) 232-3400

HARRY W. ROSENSTEEL, Editor MARGARET M. HOCK, Editor

Workers' Compensation Third Party Suits

I. Issue

Whether an employer can compel an employee to file suit against a third party tortfeasor?

II. Short Answer

Currently, probably not; however, that answer may change. In 2013, the Superior Court held that no independent cause of action exists with the carrier against a third party tortfeasor. The Supreme Court has granted allowance of appeal from the Superior Court decision.

III. Discussion

Workers' Compensation is the employee's exclusive remedy against his employer for work-related injuries. However an employee can bring suit against a third party when the employee's injuries are the result of the negligence of the third party. 77 Pa. Cons. Stat. § 671. An employer has an absolute right to subrogation for benefits paid to the employee where the injury is caused in whole or in part by the third party. Id. § 671.

In Scalise v F.M. Venzie & Co., Inc., 301 Pa. 315 (1930), the Supreme Court suggested that an employer may institute an action against a third party where the employee chooses not to sue. In that case, the appellee's husband was killed when he fell from defective scaffolding while at work as a decorator. Workers' compensation benefits were paid. The decedent's wife filed suit against the supplier of the scaffolding, who argued that the wife could not sue because any right of action was vested in the employer being that it was subrogated to the amount paid through workers' compensation. Id. at 319. The Supreme Court held that although §319 of the Workers' Compensation Act subrogates the employer to whatever sum he paid the employee, the Act did not contemplate that the sole right to recover against the tortfeasor belongs to the employer. Id. at 320. The Court provided several other options for the employer to enforce its subrogation rights including appearing as an additional party plaintiff, a use plaintiff, or an intervenor, or by notifying the tortfeasor of the employment and the payments made. Id.

The Court further stated: "[t]he employer, moreover, is not to be denied his right of suit because the employee does not sue, but may institute an action in the latter's name." The issue presented was whether the employee (or spouse of the deceased employee) could sue, and not just the employer. The case made clear that not only may the employer sue, but also the employee. Arguably, because the Court stated that the employer was not to be denied the right of suit if the employee did not sue, it also held that the employer could institute suit on its own if the employee did not sue. However, the Court's statement was not pertinent to its holding and was considered to be "dicta."

In 2012, the Superior Court mentioned the holding in Scalise, suggesting that the Court's statement as to the employer's ability to institute suit on the employee's behalf to recover compensation benefits was more than dicta. *See e.g.,* Frazier v. WCAB (Bayada Nurses, Inc.), 616 Pa. 592, 52 A.3d 241 (2012). Yet, the Court only mentioned this holding in a footnote, and noted that the issue in that case did not involve a subrogation claim.

(Continued on page 7)

Inside This Issue...

Commonwealth Court Case Reviews

Natasha Young v. Workers' Compensation Appeal Board (Chubb Corporation and Federal Insurance Company), No. 1432 C.D. 2013, Filed March 10, 2014.

(Subrogation—Where claimant receives benefits pursuant to the Pennsylvania Workers' Compensation Act as a result of an injury, Pennsylvania law applies when determining the employer's right to subrogation, despite Delaware's significant contacts with the underlying third party action.)

Claimant, a Pennsylvania resident, was injured in a motor vehicle accident while in Delaware in the course and scope of her employment. Because the accident occurred in Delaware and because the other driver was a resident of Delaware, the claimant filed a lawsuit against that individual in Delaware.

Her employer accepted claimant's injuries pursuant to a Notice of Compensation Payable and began paying wage loss and medical benefits in accordance with the Pennsylvania Workers' Compensation Act. Claimant and employer ultimately executed a Compromise and Release Agreement wherein claimant agreed to resolve all of her future workers' compensation benefits in exchange for $85,000. In the Compromise and Release Agreement, employer asserted a subrogation lien pursuant to §319 of the Act.

Claimant subsequently settled her third party action against the Delaware driver for $160,000.00, from which her counsel place one third, or $53,333.33 in an escrow account to resolve employer's subrogation lien. The claimant had not, however, requested that employer compromise its lien.

Employer then filed a Review Petition asserting that its lien had not been adequately protected. Employer presented evidence that its lien totaled $219,101.77, $101,381.94 of which employer sought to recover.

The WCJ held that employer's right to subrogation is absolute. Claimant's counsel was directed to forward the $53,333.33 form the escrow account to employer and claimant was directed to satisfy the remainder of the lien. The WCJ rejected claimant's argument that Delaware law, not the Act, governed employer's subrogation lien. Claimant appealed to the WCAB, which affirmed the WCJ's decision.

Claimant then sought review by the Commonwealth Court, again arguing that Delaware law, not Pennsylvania law, governed inasmuch as Delaware had significant contacts to the matter, i.e., employer does business in Delaware, the motor vehicle accident occurred there, the third-party tortfeasor was a Delaware resident, and the third-party litigation occurred there.

The Court was not, however, persuaded. The matter at issue was not the underlying motor vehicle accident; but rather, the matter at issue is the determination of the employer's right to subrogation pursuant to the Act.

Here, claimant was a resident of Pennsylvania and, although employer was a New Jersey corporation, it does business in Pennsylvania and holds a Pennsylvania Workers' Compensation insurance policy. Most importantly, claimant chose to avail herself of the Act, employer paid her benefits pursuant to the Act and all litigation concerning claimant's receipt of workers' compensation benefits was in Pennsylvania.

Consequently, the Court concluded that Pennsylvania law applied because it "is the state with the most significant interest in determining the right of an employer to subrogation where it has made payments to an injured employee" pursuant to the Act.

The order of the WCAB was affirmed.

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City of Pittsburgh and UPMC Benefit Management Services, Inc. v. Workers' Compensation Appeal Board (Wright), No. 329 C.D. 2013, Filed May 1, 2014.

(Overpayment—Recoupment—Employer need not overcome a presumption of prejudice every time it wishes to recoup an overpayment of offsetable benefits.)

Claimant, a firefighter, suffered a work injury on February 4, 2004. At the time, he earned $70-80,000.00, annually. Employer, which is self-insured, accepted the injury and paid claimant Heart & Lung benefits equal to his full salary.

On May 30, 2005, claimant elected to take a disability pension, which ended his Heart & Lung benefits and replaced those benefits with workers' compensation benefits. (Heart & Lung benefits are only available if the disability is not permanent.) On June 13, 2005, employer issued a Notice of Compensation Payable. Thus, effective May 30, 2005, claimant began receiving $3,568.00 per month in pension benefits and $690.00 per week in workers' compensation benefits.

On August 5, 2005, employer issued Form LIBC-761, "Notice of Workers' Compensation Benefit Offset," asserting that as of August 8, 2005, claimant's weekly benefits would be reduced to $555.76 because employer was taking a pension offset of $134.24 per week. Employer also informed claimant that he had been overpaid benefits from May 30, 2005 through August 5, 2005, because those weekly payments did not include the offset. The overpayment totaled $1,783.48. Employer advised that $100.00 per week would be deducted from claimant's benefits until the overpayment was recouped. By January 8, 2006, the overpayment had been fully recouped and claimant began receiving weekly compensation at the rate of $555.76.

Almost 3 years later, on December 29, 2008, claimant filed a Review Petition challenging employer's entitlement to any recoupment. The WCJ concluded that whenever an employer seeks to take a retrospective pension offset, there is a "presumption of prejudice" to the claimant that the employer must rebut in order to recoup an overpayment. The WCJ accepted claimant's testimony and found that he was prejudiced by employer's retrospective offset. The recoupment was disallowed and employer was ordered to reimburse claimant the full amount recouped.

Employer appealed to the WCAB, which affirmed holding that employer was required to prove that it had issued claimant a Form LIBC-756, "Employee's Report of Benefits for Offsets," before taking an offset. The WCAB held that the employer's tender of a Form LIBC-756 was a condition precedent to recoupment of an overpayment of benefits in every case. Because employer did not satisfy that condition, the retrospective credit was disallowed.

Employer then petitioned the Commonwealth Court for review.

The Court first noted that Section 204(a) of the Act provides that pension benefits funded by the employer shall be credited against the amount of workers' compensation benefits owed by that employer. The Regulations developed by the Department for the enforcement of §204(a) authorized "recoupment" of benefits overpaid and an "offset for benefits already received." Citing to its decision in Maxim Crane Works v. WCAB, 931 A.2d 816 (Pa. Cmwlth. 2007), the Court noted that an employer's delay in seeking recoupment may bar the employer's right to recovery under the doctrine of laches. Citing to its decision in the case of Muir v. WCAB, 5 A.3d, 847 (Pa.Cmwlth. 2010), the Court noted the employer's duty to notify the claimant of his reporting requirements under §204 of the Act.

Here, although employer failed to issue claimant a form LIBC-756, the Court found that claimant waived that issue before the WCJ and, therefore, the WCAB erred in finding that the employer's failure to issue that form barred its recoupment of the overpayment.

The Court then focused on whether employer's recoupment of the overpayment was barred by the equitable principles announced in Maxim Crane. The Court acknowledged that claimant received benefits to which he was not entitled and thereby reaped a double recovery, which is precisely what §204 was intended to prevent. While a proposed recoupment may cause a financial hardship, there is not a presumption of prejudice or hardship in every case where an employer undertakes a recoupment.

In Muir, the Court implicitly established that a recoupment of an overpayment that occurred over 6 months or less eliminates the need of the WCJ to inquire into hardship. This is not to say that a WCJ cannot structure a recoupment in a way that minimizes hardship and, in fact, such a structuring is consistent with the humanitarian purpose of the Act.

Employer's recoupment of $100 per week was found to be permissible. The decision of the WCAB disallowing the recoupment of the overpayment was reversed.

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Pennsylvania Uninsured Employers Guaranty Fund v. Workers' Compensation Appeal Board (Lyle and Walt & Al's Auto & Towing Service), No. 1421 C.D. 2013 (Filed May 12, 2014).

(Uninsured Employers Guaranty Fund— An injured employee must notify the Fund that he or she has a claim within 45 days of knowing that the employer is uninsured; when an employee actually has knowledge that the employer is uninsured is a question of fact.)

Claimant, a mechanic, was injured during the course and scope of his employment on July 14, 2008. After seeking medical treatment, claimant was unable to perform his time of injury job and thus, on September 26, 2008, filed a Claim Petition for disability. On October 3, 2008, claimant was informed by the Bureau, via letter, that his employer may not have workers' compensation insurance. On October 7, 2008, claimant mailed a Notice of Claim Against Uninsured Employer to the Bureau, then filed a Claim Petition with the Bureau seeking benefits from employer and the Fund on October 28, 2008. The Fund filed an answer stating that the Claim was barred due to claimant's failure to comply with §1603(b) of the Act's notice requirements.

Section 1602 of the Act established the fund for purposes of paying workers' compensation benefits to claimants whose employers were not insured or self-insured for workers' compensation liability at the time their injuries occurred. Section 1603(b) requires that, in order to obtain benefits from the Fund, a claimant "shall notify the [F]und within 45 days after the worker knew that the employer was uninsured."

The issue here before the WCJ was not whether claimant's notice to the Fund was filed within 45 days of the Bureau's October 3, 2008 letter, but whether the letter was the first point in time in which claimant knew that employer was uninsured. At the hearing, claimant acknowledged being told by employer that employer had no coverage between 1 to 1-1/2 months after the work injury. Employer testified that he informed claimant that employer had no coverage "probably within a matter of three weeks or so" of claimant's work injury. Employer also repeatedly told claimant that he would "take care of the medical bills" and advised him to seek payment through employer's automobile liability insurance provider, and then through the first party benefits provisions of claimant's own automobile insurance carrier. Both companies denied his

claims, sending notice of denials by letters dated July 30, 2008 and August 10, 2009, respectively.

The WCJ denied the Claim Petition as to the Fund , finding that the July 30, 2008 letter from employer's automobile insurance carrier put claimant on notice that employer did not have workers' compensation coverage. Thus, the October 7, 2008 notice filed by the claimant failed to give the Fund timely notice of his claim.

On appeal, the WCAB reversed, holding that the notice requirement is triggered when a claimant actually "knew," not should have known, that the employer lacked coverage. The Fund then appealed to the Commonwealth Court.

Upholding the decision of the WCAB, the Court held that claimant timely notified the Fund of his claim within 45 days of learning that employer was uninsured. The fact that he received a letter from the automobile insurance carrier did not provide claimant with notice of his employer's uninsured status. The Court further cautioned, however, that the WCAB improperly held that, as a matter of law, the claimant could not have known that employer was uninsured until he received notice from the Bureau. When a claimant "knows" is a determination to be made on the facts of each case.

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Charles Greenawalt v. Workers' Compensation Appeal Board (Bristol Environmental, Inc.), No. 1894 C.D. 2013, Filed May 12, 2014.

(Jurisdiction—Where an injury is sustained out of state, §305.2 of the Act governs whether or not the claim is compensable under the Act.)

Claimant, a union laborer working out of a union in Latrobe, Pennsylvania, accepted a job with employer at a job site in New York in September 2009. Initially, claimant stayed at a hotel in New York but employer later obtained lodging for claimant at an apartment complex. Claimant would work throughout the week in New York and return home to Pennsylvania on the weekends. On December 14, 2009 claimant slipped and fell on ice outside of the New York apartment complex as he walked to his car before leaving for the job site, injuring his back and tailbone. Claimant finished his shift that day performing light duty work and continued to perform light duty work until he was laid off in January 2010.

Claimant filed Claim and Penalty Petitions. The WCJ dismissed both, finding that claimant did not prove that jurisdiction in Pennsylvania was proper under §305.2 of the Act. The WCJ specifically found that, at the time of the injury, claimant worked under a contract of hire made in Pennsylvania, for employment principally localized in New York. The WCJ further found that, although claimant had previously worked for employer at various job sites, he did not have a continuous employment relationship with employer such that the prior jobs would constitute a single period of employment.

Claimant appealed, arguing that because he was hired in Pennsylvania, performed training in Pennsylvania, had in the past performed over 30 jobs for employer in Pennsylvania, and the New York job was expected to and did last less than one year, his employment was principally localized in Pennsylvania. Employer argued that, although he had worked several previous jobs for employer, claimant had also worked two other jobs for two different employers over the five month period immediately preceding the job in which he sustained the alleged injury. The WCAB affirmed the WCJ's decision.

The Commonwealth Court noted that, although claimant's injury occurred in New York, §305.2 of the Act permits the invocation of jurisdiction for injuries occurring out of state where: 1) the employee's employment is principally localized in Pennsylvania, 2) he is working under a contract of hire made in Pennsylvania in employment not principally localized in any state; or 3) he is working under a contract of hire made in Pennsylvania in employment principally localized in another state whose workmen's compensation law is not applicable to his employer.

Under the Act, employment is principally localized in Pennsylvania if 1) employer has a regular place of business in the state and employee regularly works at or from that place of business, 2) employee has worked at the employer's place of business but has duties that require him to outside of the state for less than one year, or 3) if the previous two conditions are not met but employee is domiciled and spends a substantial part of his working time in the service of his employer in Pennsylvania. The burden is on claimant to prove that Pennsylvania has jurisdiction for his workers' compensation claim.

The Court found that claimant here did not meet his burden of establishing that Pennsylvania had jurisdiction over his claim. The Court found that the evidence showed that claimant's employment was principally localized in New York, not Pennsylvania. The Court noted that claimant was hired by employer in September 2009 for a job in New York and worked forty hours per week with occasional overtime until his layoff in January 2010. Although he was trained in Pennsylvania for the New York job, he was only compensated for one day of the training and collected unemployment compensation for the duration of the week. The court cited to the rule set forth in Myer v. WCAB (Raytheon Co.), 776 A.2d 338 (Pa. Cmwlth. 2001), that no continuous employment relationship exists where a claimant works for an employer on a per-job basis followed by a break in employment during which he works for a different employer before being re-hired by the original

employer. Accordingly, the Court held that claimant did not have a continuous employment relationship with employer for purposes of determining where his employment was principally localized.

The Court rejected claimant's argument that subsections (i) and (ii) of §305.2(d)(4) required employer to have a place of business in New York in order for his employment to be principally localized in New York, noting that it had previously held that an employer was not required to lease or own property to have a place of business under §305.2. All that is required for an employer to have a place of business in a particular state is for the employer to exercise some right and control over activities at the jobsite in that state. The Court held that because claimant and other employees reported to the job site at which a foreman was present, signed in and out every day, met at a location on the jobsite with desks, lockers, and chair, and performed their duties at the job site, employer had a place of business in New York from which claimant regularly worked. The Court therefore affirmed the decision of the WCAB.

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Walter Wetzel, deceased, c/o Walter Wetzel, III, v. Workers' Compensation Appeal Board (Parkway Service Station), No. 1693 C.D. 2013 (Filed May 27, 2014).

(Course and Scope of Employment—The Act is remedial in nature and will be liberally construed to effectuate its humanitarian objectives when determining if an injured employee sustained injuries while in the course and scope of employment.)

Decedent was a management employee at employer's store. On November 28, 2009, he was struck by a vehicle on employer's premises, ultimately resulting in his death. At the time he was struck by the vehicle, decedent, while brandishing a firearm, left the store to pursue an individual who had unsuccessfully attempted to robe employer's store.

Before the WCJ, several employees testified that there had been prior robbery attempts. The employees also testified, however, that there was a policy prohibiting employees from carrying guns on the premises. Testimony also established that immediately prior to pursuing the would-be their, decedent came into the store before his regular shift to assist with a cash register issue and with stocking shelves. When the attempted robbery failed and the would-be thief left the store, the decedent pursued him. At least one witness saw the decedent point his weapon at the would-be thief, holding the gun to the windshield of that individual's car. In an effort to escape, the would-be thief hit the gas, causing the decedent to fall and to be run over. Decedent's gun was found not far from him on the ground.

The WCJ found that decedent was injured while in the course and scope of his employment. The WCAB reversed, holding that decedent was not furthering employer's business when he left the store in an effort to arrest an individual who had not successfully robbed employer of any property and who was no longer a threat to employer's personnel.

Claimant appealed to the Commonwealth Court. The Court concluded, applying liberal construction to §301(c)(1) of the Act, that decedent did not actively disengage himself from his work responsibilities when he attempted to stop the would-be thief from fleeing the premises. The Court opined that the facts, as found by the WCJ, support the conclusion that decedent's job duties, as a manager, included securing the safety of his fellow employees and the customers who patronized employer's store. Decedent's pursuit of the would-be thief was not so far removed from his job duties as to constitute abandonment of "the course of his employment or…engag[ing] in something wholly foreign thereto."

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Arvilla Oilfield Svcs., Inc. and State Workers' Insurance Fund v. Workers' Compensation Appeal Board (Carlson), No. 1578 C.D., 2013, Filed May 20, 2014.

(Impairment Rating Evaluation—Determination as to maximum medical improvement must be made in accordance with AMA Guides.)

Claimant, an oilfield operator, suffered a work-related injury in the form of a labral tear of the right hip and strains and contusions to the low back and right shoulder when he was struck by heavy tubing in 2004.

In 2009, employer filed a Modification Petition alleging that claimant had fully recovered from the injuries to his low back and right shoulder, but stipulated that claimant had not fully recovered from the hip injury. In support of its petition, employer offered testimony from Dr. Levy, who performed an IME and opined that claimant had preexisting lumbar degenerative disc disease with significant pain complaints. Dr. Levy opined that claimant had fully recovered from his work related right shoulder strain and low back strain and that any ongoing complaints were due to the preexisting disc degeneration. Dr. Levy felt that the claimant had reached MMI.

In opposition to the petition, claimant offered the deposition testimony of his treating physician, Dr. Sciamanda, who began treating claimant in 2008. He diagnosed claimant with lumbar degenerative disc disease, chronic pain, low back spasm, and multiple nonallopathic lesions. Dr. Sciamanda had not seen claimant before his work injury and could only assume that his work injury caused his ongoing pain. He testified that claimant was making progress toward his goal of reduced pain and increased mobility, range of motion, and functionality. Based on the testimony of Dr. Sciamanda, claimant

filed a petition to expand the description of injury to include lumbar radiculopathy and lumbar spondylosis.

During the litigation, employer requested that claimant undergo an IRE which took place in 2010. The IRE physician, Dr. Moldovan, opined that the claimant had a 10% impairment caused by the work injury. Employer thus filed a second Modification Petition based upon the IRE. Dr. Moldovan testified that when he examined claimant, claimant walked with an altered gait and used a cane, and physical examination revealed some discomfort and limitations with the right hip. Nevertheless, Dr. Moldovan opined that the claimant had reached MMI pursuant to the AMA Guides. Dr. Moldovan assigned a 25% impairment to the right hip and lower extremity. Claimant told Dr. Moldovan that he did not have any symptoms in his right shoulder or low back and physical examination of these areas was normal and Dr. Moldovan therefore assigned a 0% impairment rating to these areas.

The WCJ found that employer proved that claimant had fully recovered from his right shoulder injury and granted the Modification Petition as to those injuries, but found that Dr. Levy did not address claimant's work-related back strain; thus, the petition was denied as to that injury. At the same time, the WCJ rejected the opinion of Dr. Sciamanda that claimant had lumbar radiculopathy and lumbar spondylosis and denied claimant's Review Petition. The WCJ also rejected Dr. Moldovan's opinion that the claimant had reached MMI, instead relying upon the testimony of Dr. Sciamanda and denied the Modification Petition based on the IRE.

Employer appealed and the WCAB affirmed. The issue on appeal to the Commonwealth Court was limited to the denial of the IRE petition. Employer argued that there was not substantial evidence to support the WCJ's finding that the claimant had not reached MMI at the time of the IRE. The Commonwealth Court found that the WCJ erred in relying upon the testimony of Dr. Sciamanda for the following reasons:

1) Dr. Sciamanda did not testify on the issue of MMI and it could not be inferred from his deposition that the claimant had not reached MMI on the date of the IRE. His statement that claimant was making progress but had setbacks at times could support a finding that claimant was not fully recovered, but full recovery is not the inquiry in an IRE.

2) The Court further noted that Dr. Sciamanda last examined claimant three months before the IRE and his testimony could not support a finding that claimant had not reached MMI because the claimant's condition at the time of the IRE is critical.

3) Dr. Sciamanda was treating claimant with palliative care, which is designed to manage the claimant's symptoms rather than to cure or improve his underlying condition. The Court noted that the AMA Guides specifically provide that MMI can be determined if recovery had reached the stage where symptoms can be managed with palliative measures

4) Finally, Dr. Sciamanda was treating claimant for injuries which the WCJ specifically found not to be work-related. Thus, his testimony as to these conditions could not support a finding that claimant had not reached MMI to the *compensable* work injuries.

The Court held that the WCJ had to make a credibility determination based solely on the Dr. Moldovan's testimony and the IRE report and if she chose to reject this uncontroverted evidence, then the WCJ had to adequately explain the reasons for her rejection. The Court noted that her reason had to pertain to impairment and not to claimant's disability or his lack of full recovery which are irrelevant in an IRE proceeding. The Court remanded the case to the Board with instructions to remand the case to the WCJ for further findings of fact relative to Dr. Moldovan's testimony.

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Keene v. Workers' Compensation Appeal Board (Ogden Corp.), No. 1421 C.D. 2010, Filed June 4, 2013.

(Voluntary Withdrawal from Workforce—An employer may not rely solely upon a claimant's failure to seek work to prove voluntary retirement from the workforce.)

In 1989, claimant injured her right knee when she slipped on the step of an airport passenger shuttle that she was operating in the course of her employment. The claimant underwent knee replacement surgery and reached maximum medical improvement. She is able to perform only full-time sedentary work. Claimant has a high school education, and no additional training, education or experience.

After her knee surgery in 1995, claimant applied for suitable jobs, but was not hired. Then, in 2001 or 2002, she worked a light-duty job for employer for two years until that position was eliminated. Subsequently, claimant received no job referrals from employer. However, she applied for jobs with several rental car agencies and Wal-Mart, but was not hired. She continued to search for work in the newspaper and on the Comcast job search website.

On October 9, 2007, employer filed a suspension petition, alleging that claimant had voluntarily removed herself from the work force. After this petition was filed, claimant applied for work as a driver at two rental car companies, but was not hired.

Before the WCJ, claimant testified about her attempts to obtain suitable employment. She testified that she never submitted a retirement statement to employer, but she did acknowledge that she received social security disability benefits. The WCJ accepted claimant's testimony and found that she did not voluntarily remove herself from the workforce. The WCJ denied the Suspension Petition.

On appeal, the WCAB reversed the decision of the WCJ and granted employer's suspension petition. In doing so, the WCAB placed the burden on claimant to prove that she did not leave the workforce voluntarily

by showing that she either is seeking employment or her work-related injury forced out of employment. The WCAB relied on testimony from the claimant that she had not looked for work for two years because the process was depressing.

Claimant appealed to the Commonwealth Court, which reversed the WCAB's decision on May 19, 2011. On December 9, 2013, the Pennsylvania Supreme Court vacated the Commonwealth Court's order and remanded the matter for reconsideration in light of its decision in City of Pittsburgh v. Workers' Compensation Appeal Board (Robinson), 67 A.3d 1194 (Pa. 2013).

In City of Pittsburgh, the Supreme Court ruled that the employer has the burden of proving that the claimant voluntarily has left the workplace, and the acceptance of a pension is not sufficient evidence on its own to establish that the worker has retired. Rather, accepting a pension raises a permissive inference that must be considered in the totality of the circumstances. In *City of Pittsburgh*, the Supreme Court further ruled that if the employer produces sufficient evidence to support a finding that the claimant voluntarily has left the workforce, then the burden shifts to the claimant to show that there has been a compensable loss of earning power. If the employer fails to present such evidence, then the employer must show job availability.

On remand, the Commonwealth Court agreed with claimant's argument that employer failed to meet its burden pursuant to City of Pittsburgh. In doing so, the Court relied on the facts that claimant is neither receiving a retirement pension nor has applied for retirement. The Court also stated that claimant's receipt of social security disability benefits of $390.00 per month, by itself, does not prove that she voluntarily removed herself from the workforce.

The Court also noted that claimant's alleged failure to look for work for two years because she found the process depressing, which the WCJ did not find, does not indicate that she would have ignored a job referral made by employer during that time period. Rather, the Court stated that an employer cannot rely solely on a claimant's failure to seek work to prove voluntary retirement from the workforce, because an employer has a duty to make job referrals until a claimant voluntarily retires. Here, the Court found that claimant did look for and has not refused any suitable work. Accordingly, the Order of the WCAB was reversed.

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In 2013, the Superior Court specifically rejected the notion that an employer could institute a suit on behalf of the employee. In Liberty Mutual Ins. Co. v. Domtar Paper Co., 77 A.2d 1282 (Pa. Super. 2013), Liberty Mutual filed suit as "subrogee of George Lawrence," against Domtar Paper asserting that the Domtar's negligence in maintaining its property was the cause of injuries sustained by its employee. Domtar filed preliminary objections arguing that Pennsylvania did not recognize an independent cause of action by a workers' compensation carrier where the injured party did not sue and was not a party to the suit. The Court granted the preliminary objections and dismissed the carrier's claim. On appeal, the Superior Court stated that, although the Supreme Court in Scalise made the statement that the employer is not to be denied the right of suit because the employee does not sue, the Supreme Court did not hold that the Workers' Compensation Act provided insurers with the ability to independently sue third parties. The Court also noted that cases decided after Scalise clarified that workers' compensation carriers do not have an independent cause of action.

For instance, in 1983, the Superior Court visited the issue of whether an employer could institute an action in its own right to recover the amounts paid to its employee through worker's compensation benefits in the case of Reliance Insurance Company v. Richmond Machine Company, 309 Pa. Super. 430, 455 A.2d 686 (1983). In that case, the insurer of the employer sued the defendant arguing that its negligence was the cause of the injury to the employee and therefore the insurer was entitled to indemnification and contribution by the defendants for the amount of workers compensation benefits paid. The Supreme Court held that the action was in reality a subrogation claim under §319 of the Act. It further held that the appellate courts had not construed §319 to provide the employer or its insurer with a cause of action against a third party in its own right. Therefore, it held that for an employer or its insurer to enforce its subrogation rights, it must proceed in an action brought by or on behalf of the injured employee in order to determine the liability of the third party to the employee. The employer could recover the amount it paid in compensation benefits out of an award to the injured employee. The court also referred to Whirley Industries Inc. v. Segel, 316 Pa. Super. 75, 462 A.2d 800, 802 (1983), in which the Court stated that "[t]he subrogation rights of §671 are the sole and exclusive remedy against third party tortfeasors, *i.e.* the employee-victim must sue, and the employer's carrier is subrogated to the employee's claim."

It is not clear whether the Superior Court in Liberty Mutual rejected the statement in Scalise because it was dicta, or if the Court misinterpreted the holding insofar as Scalise seemingly only held that the carrier is not the only party that may sue the third party tortfeasor. In any case, it must be noted that on May 29, 2014, the Supreme Court granted a petition for allowance of appeal in Liberty Mutual. Thus, it remains to be seen whether the Supreme Court will permit an insurer to step into the shoes of the employee to file suit against a tortfeasor in order to recover its claim.

Thomson, Rhodes & Cowie, P.C.
1010 Two Chatham Center
Pittsburgh, PA 15219

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