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WORKERS' COMPENSATION

SUBROGATION IN CONSTRUCTION SETTINGS:

IN ALL 50 STATES

American workers' compensation carriers are preoccupied with preventing occupational injuries and deaths - and for good reason and with palpable results. The National Institute for Occupational Safety and Health (NIOSH), the Center for Disease Control's occupational arm which monitors occupational injuries and deaths in the American workplace, reports that over the last 20 years, occupational injuries and deaths are on the decline. However, accidents do happen. For more than 90 years, American insurers have depended, relied and calculated premiums on the expectation that if a third party other than the worker's employer is responsible for the employee's injuries, the compensation carrier will be able to subrogate the loss and shift the ultimate responsibility for paying the loss onto the party responsible for causing the loss in the first place. Employers also rely on subrogation in occupational settings in order to help keep the experience modification factors and retrospective ratings, and consequently their premiums, low. Employers with retrospective rating plans or retention plans literally depend on subrogation to help reflect their true loss history. Unfortunately, our industry has not done enough to sing the praises and designed social benefits of subrogation. Courts and legislatures across our country have begun whittling away at workers' compensation carriers' subrogation rights. Sometimes this is done in the name of "reducing needless litigation" and sometimes it results literally from an ignorance of the philosophical and legal concept underlying subrogation. Perhaps the greatest irony, however, is the fact that states appear to be limiting third party subrogation most severely in construction settings - the area of workers' compensation in which the average level of injury compensation payments is nearly double the level for all other industries combined.

In a noble effort to ensure that construction workers are covered by workers' compensation insurance, one way or another, courts and legislatures are dangerously close to throwing out the baby with the bath water. Efforts to guarantee workers' compensation coverage in construction settings have resulted in a snowballing expansion of the exclusive remedy rule and a marked diminution in third party subrogation opportunities in construction settings. This is most amazing when you consider the fact that the construction industries' share of workers' compensation costs is disproportionately high - nearly three times that of the non-farm-private-sector labor force.[1] Not only does this strange anomaly result in higher premiums and a higher cost of doing business for employers, it has some states moving to monopolistic coverage or state-created workers' compensation insurance, which ultimately affects you and me, the American taxpayer. Until the wheels are put back on the proverbial cart, however, it is important for subrogation professionals, underwriters and claims handlers to understand a carrier's subrogation rights in all 50 states. This article will present a quick overview of current workers' compensation subrogation in construction settings.

Many states have begun passing laws which declare that an owner or contractor who contracts any part of a construction project to a subcontractor is liable for workers' compensation benefits to the employees of any such contractor or subcontractor. These laws then go on to conclude that the owner or contractor who ultimately provides workers' compensation coverage or benefits to the workers of such subcontractor may take advantage of the exclusive remedy rule and is immune from any suit filed by the worker. While this may appease conservative business owners, it also has an extremely squelching effect on the ability of businesses and insurers to subrogate and, ultimately, shift the liability for injuries to the party which actually is responsible for causing them.

With increasing frequency, construction projects are being insured through vehicles known as Consolidated Insurance Programs. A Consolidated Insurance Program (CIP) is commonly known as "wrap-around insurance." A controlled insurance program means that the project owner, or general contractor, buys one policy to cover the entire project. All subcontractors are usually enrolled in the project. If the owner purchases the program, it is known as an Owner-Controlled Insurance Program (OCIP). With an OCIP, everyone working at the project site is covered under one master liability insurance policy. When the project is bid, each contractor subtracts out its line item for liability insurance and the owner receives a portion of the cost of the OCIP premium back in the form of lower construction costs. OCIPs typically provide coverage through substantial completion of construction plus a period of years thereafter, typically ten years. The benefits to the owner are significant because they guarantee that they will have coverage and force the limits they selected for the applicable statute and they can be comfortable that any contractor setting foot on the site is covered.

OCIPs do pose some difficulties. All policy forms are manuscripted and are heavily negotiated, which can be expensive and time consuming. OCIPs are complicated policies with extremely long time horizons and each participant (usually contractors) must be enrolled into the policy. This can be time consuming and occasionally confusing. One area of coverage which may or may not be included into OCIP is workers' compensation. Frequently, workers' compensation is included in the OCIP. When workers' compensation is rolled into an OCIP, it is recommended that each party to the project waive their rights of subrogation against the other parties on the project. OCIPs have been around since the turn of the century. The American Institute of Architects took a stand against additional insured statuses when it revised its General Conditions form in 1997 and pushed a policy somewhat comparable to the OCIP policy known as the Project Management Protective Liability policy (PMPL). However, as of 2000, only one insurer was providing the PMPL policy and that is CNA Insurance Company.[2]

The idea behind an OCIP policy is to provide exclusive remedy immunity to certain contractors and subcontractors on the construction site. Nevada is one of the few states which actually has legislated the effect which an OCIP will have on third party workers' compensation subrogation. More are sure to follow, however, and a closer look is called for.

Under Nevada law, when an employer accepts the Industrial Insurance Act and an employee receives compensation thereunder, the employer is fully and completely insulated from all other liability accounts of the injury.[3] In theory, if an employer is a participating employer within the Industrial Insurance Act, it is relieved from tort liability to an employee who is injured in the course and scope of his employment on a construction project.[4] Notwithstanding other Nevada statutes which deal

with the subject of "statutory employers" and "statutory employees," it may be argued that the principal contractor and any other subcontractors or entities who are included in the OCIP, are "in the same employ" as a worker injured on a construction site and, therefore, cannot be sued because the employee's exclusive remedy is the benefits he received under the OCIP workers' compensation policy.[5]

A principal contractor is not liable for payment of any benefits to any injured worker if the contract between the principal contractor and the independent contractor provides that the latter will maintain such coverage, proof of such coverage is provided to the principal contractor, the principal contractor is not engaged in any construction project, and the independent contractor is not "in the same trade, profession, or occupation as the principal contractor."[6] However, in an OCIP, the principal contractor has agreed to provide coverage and will be liable for such compensation benefits. The term "contractor" is synonymous with "builder."[7] A "contractor" is defined under Arizona law as follows:

"A contractor is any person, except a registered architect or a licensed professional engineer, acting solely in his professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to, offers to undertake to, purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, instruct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, developmental improvements, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. Evidence of the securing of any permit from a governmental agency or the employment of any person on a construction project must be accompanied by the Board or any court of this state is prima facie evidence that the person securing that permit or employing any person on a construction project is acting in the capacity of a contractor pursuant to the provisions of this Chapter.[8]"

A contractor includes a subcontractor or specialty contractor, but does not include anyone who merely furnishes materials or supplies without fabricating them into, or consuming them in the performance of, the work of a contractor. A contractor includes a construction manager who performs management and counseling services on a construction project for a professional fee.[9] A contractor is required to obtain a license from the State of Nevada, which evidences a degree of experience, financial responsibility, and general knowledge of the building, safety, health and lien laws of the State of Nevada.[10] A principal contractor who is unlicensed still qualifies as a statutory employer of an independent contractor and its employees, so long as it is in the same trade, business, profession or occupation as the independent enterprise.[11]

The exclusive remedy rule in Nevada appears to be set forth into two separate statutes.[12] Section 616A.020 provides in subsection 1 that workers' compensation is the exclusive remedy for an injured worker, except as set forth in Chapters 616A to 616D. The exclusive remedy statute also appears to extend the exclusive remedy rule which is provided to a principal contractor, with respect to any injury sustained by an employee of any contractor in the performance of the construction contract, to every architect, land surveyor or engineer who performs services for the contractor, the owner, or any "such beneficiary interested persons."[13] This statute also specifically says that the exclusive remedy provided by this section applies to the owner of a construction project who provides an OCIP pursuant to § 616B.710, to the extent that the program covers the employees of the contractors and subcontractors who are engaged in the construction of the project.[14] In Nevada, all employers, including principal contractors, may take advantage of the exclusive remedy rule. However, § 616B.603 now provides an exception to the general rule that principal contractors are statutory employers.[15] This section sets forth that a person is not an employer if he enters into a contract with another person or business which is an independent enterprise, and he is not in the same trade, business, profession or occupation as the independent contractor.[16] However, this exception does not apply when the principal contractor is licensed pursuant to Chapter 624.[17]

There is also a presumption of the existence of an employer/employee relationship which must be overcome.[18] It appears that an owner of a project who does not assume an additional status of being a principal employer or contractor, but is simply the owner, can be liable as a third party.[19] However, the exclusive remedy rule does apply to the owner of a construction project who provides workers' compensation coverage for the project by establishing and administering a consolidated insurance program pursuant to N.R.S. § 616B.710, to the extent that the program covers the employees of the contractors and subcontractors who are engaged in the construction of the project.[20] Also, where an owner functions as his own principal contractor, he will be deemed an "employer" under the Industrial Insurance Act.[21] Notwithstanding that, merely being an owner is not sufficient to grant immunity. Such immunity attaches to an employer of labor, not simply the owners of construction projects.[22] However, it appears that if the owner does provide OCIP workers' compensation coverage, the owner will be considered an employer and the exclusive remedy rule will apply, at least to the extent that the program covers the employees of the contractors and subcontractors engaged in the construction of the project.[23] It should be argued by us that the architect, who is not covered under the OCIP workers' compensation coverage, is not "an employer" because he didn't provide workers' compensation benefits through this program and it cannot be considered an "employee" under the Act either.

Arizona subcontractors, independent contractors and their employees are deemed to be employees of the principal contractor.[24] However, this is expressly limited by § 616B.603 if an independent enterprise is not in the "same trade, business, profession or occupation as the independent enterprise."[25] However, this may be limited to non-construction injury cases.[26]

Because no other area of insurance subrogation is more dependent on the vagaries of each state's laws than workers' compensation, it is important to have a basic understanding of how your subrogation rights may or may not be limited within each state, in construction settings.

To view the entire article - visit the NASP website at *www.subrogation.org*, Members Only Section under Resources/Industry Information page.

ENDNOTES

[1] *Workers' Compensation and Other Costs of Injuries and Illnesses in Construction,* § 49 of the Construction Chart Book, Third Edition, September 2002.

[2] *OCIP Coverage -- Confusion Still Reigns,* by Donald Malecki, Rough Notes Magazine, October 2000.

[3] *Santisteven v. Dow Chemical Co.,* 362 F. Supp. 646 (D.C. Nev. 1973), aff'd, 506 F.2d 1216; *Lipps v. Southern Nevada Paving,* 998 P.2d 1183 (Nev. 2000).

[4] *Corrao Constr. Co., Inc. v. Curtis,* 584 P.2d 1303 (Nev. 1978).

[5] *Tucker v. Action Equip. & Scaffold Co., Inc.,* 951 P.2d 1027 (Nev. 1997).

[6] N.R.S. § 616B.639(1)(A-D).

[7] N.R.S. § 624.020(1).

[8] N.R.S. § 624.020(2).

[9] N.R.S. § 624.020(4).

[10] N.R.S. § 624.260(1).

[11] *Oliver v. Barrick Goldstrike Minds,* 905 P.2d 168 (Nev. 1995).

[12] N.R.S. § 616A.020; N.R.S. § 616B.612(4).

[13] N.R.S. § 616A.020(3).

[14] N.R.S. § 616A.020(4).

[15] N.R.S. § 616B.603(1).

[16] *Billmayer v. Newmont Gold Co.,* 963 F. Supp. 938 (D. Nev. 1996).

[17] *Billmayer, supra.*

[18] *Billmayer, supra.*

[19] *Simon Serv., Inc. v. Mitchell,* 307 P.2d 110 (Nev. 1957).

[20] N.R.S. § 616A.020(4).

[21] *Hosvepian v. Hilton Hotels Corp.,* 587 P.2d 1313 (Nev. 1978); *Frith v. Harrah South Shore Corp.,* 552 P.2d 337 (Nev. 1976).

[22] *Ortolano v. Las Vegas Convention Serv.,* 608 P.2d 1103 (Nev. 1980).

[23] N.R.S. § 616A.020(4).

[24] N.R.S. § 616A.210.

[25] N.R.S. § 616B.603.

[26] *Tucker v. Action Equip. & Scaffold Co., Inc.,* 951 P.2d 1027 (Nev. 1997).