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MONTHLY SUBROGATION ELECTRONIC NEWSLETTER APRIL 2006

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

We are proud to announce the launching of our monthly electronic subrogation newsletter and bulletin. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic bulletin, to assist in the dissemination of subrogation developments and the education of recovery professionals. If anyone has co-workers or associates who wish to be placed on our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

WORKERS' COMPENSATION

MISSISSIPPI ALLOWS SUBROGATION IN MED MAL CASES

Until recently, eight states had not yet decided whether or not a worker's compensation carrier could be subrogated to a medical malpractice recovery by an injured worker after a work-related injury was exacerbated by the medical negligence of a treating doctor. On July 26, 2005, however, that number dropped to seven, when a Mississippi Court of Appeals held that a worker's compensation carrier could subrogate in a medical negligence setting.

In 1979, the Mississippi Supreme Court had held that aggravation by a physician of an injury sustained by an employee in the scope of his employment is compensable. *Trotter v. Litton Systems, Inc.*, 370 So.2d 244 (Miss. 1979). On July 26, 2005, the Mississippi Court of Appeals overturned a circuit court's ruling that a surgically induced paraplegia did not arise out of and in the course of employment as defined by § 71-3-3 (b) of the Mississippi Workers' Compensation Subrogation Statute. The trial court held that since it was not a work-related injury, a worker's compensation carrier could not subrogate. In *Mississippi Ins. Guaranty Ass'n v. Brewer*, 2005 WL 1745003 (Miss. App. July 26, 2005), the Mississippi Court of Appeals overturned the circuit court, holding that the employer's obligation to compensate an injured worker for the medical aggravation of a work-related injury also implies the employer's right to receive reasonable notice of, and the opportunity to join in, any third party action between an employee and a negligent healthcare provider which arises out a compensable work-related injury.

The *Brewer* decision, however, did much more than just allow a worker's compensation carrier to subrogate in a medical malpractice setting. In *Brewer*, the worker argued that the worker's compensation carrier should not be able to subrogate because Brewer was not made whole from his medical negligence recovery. Citing the case of *Hare v. State*, 733 So.2d 277 (Miss. 1999),

which stated that the made whole doctrine does apply in Mississippi subrogation, Brewer argued that the carrier should not be able to make any recovery. However, the court in *Brewer* correctly pointed out that *Hare v. State* involved contractual subrogation, and not workers' compensation - statutory subrogation. The court held that the made whole doctrine has no application for a subrogating worker's compensation carrier in Mississippi, and that the carrier had every right to intervene into the medical negligence case filed by Brewer.

This decision now means that only one state - California - denies a workers' compensation carrier the right to subrogate in medical negligence actions. Arkansas, Montana, New Hampshire, South Carolina, South Dakota, Vermont, and Wyoming are undecided on this issue. The rest of the states either clearly do allow or probably will allow, based on precedent, subrogation rights in a medical negligence third party action. For a complete chart and summary on workers' compensation subrogation on all fifty states, contact Jamie Breen at jbreen@mwl-law.com.

HEALTH INSURANCE

8TH CIRCUIT ISSUES FAVORABLE POST-*KNUDSON* DECISION

Until recently, the 8th Circuit remained one of the few circuits which hadn't weighed in on the effect of 2002 *Great-West Life & Annuity Insurance Co. v. Knudson*, 122 S.Ct. 708 (January 8, 2002), U.S. Supreme Court decision on ERISA subrogation. On January 25, 2005, the United States Court of Appeals for the 8th Circuit reviewed a case involving a lawsuit brought by an ERISA Plan against individuals who refused to return monies mistakenly overpaid from a retirement savings account. *North American Coal v. Roth*, 395 F.3d 916 (8th Cir. 2005). The Plan beneficiaries argued that the District Court had no jurisdiction over the action and that any attempt to recover these funds would amount to a legal remedy as opposed to the equitable remedy which is required under *Knudson*.

The 8th Circuit held that the District Court did have subject matter jurisdiction over the action and that the Complaint stated a claim under 29 U.S.C. § 1132(a)(3), which states that a fiduciary may bring a civil action to enjoin an act or practice which violates the terms of an ERISA Plan, or to retain other equitable relief. Specifically, the lawsuit involved a Plan fiduciary seeking to enforce Plan terms and ERISA provisions regarding the segregation of Plan funds while a former spouse secured a qualified domestic relations order in connection with a divorce. The 8th Circuit held that it was proper for the District Court to impose a constructive trust over the overpaid benefits. It also held that the District Court appropriately permanently enjoined the Plan beneficiaries from disposing of or transferring any of the funds still in their possession and control. The 8th Circuit also required the return of such funds as well as a trace of any portion of the funds no longer in the Plan beneficiary's possession or control. However, the District Court's award of restitution of a sum certain, and its finding of personal liability as to the Plan beneficiary, held to constitute a legal remedy not authorized by ERISA.

This decision is good news for practitioners in the 8th Circuit, because up until this decision we were left with only a modicum of legal guidance with regard to the effect that *Knudson* had on abilities to enforce subrogation and reimbursement rights in that Circuit. Although dealing with retirement benefits, this Circuit's new construction of *Knudson* and its effect on reimbursement rights will go a long way to give subrogation professionals ammunition to insist on protection of their subrogation reimbursement rights in that jurisdiction.

WORKERS' COMPENSATION

MINNESOTA SUPREME COURT LIMITS SUBROGATION RIGHTS

In 2000, the Minnesota legislature amended § 176.061, the Workers' Compensation Subrogation Statute. The amendment gave a carrier the right to recover benefits it has paid "regardless of whether first benefits are recoverable by the employee or the employee's dependents at common law or by statute." This clearly meant that the legislature intended for a subrogated workers' compensation carrier to recover any and all benefits it has paid out, regardless of whether or not the actual worker is entitled to recover these elements of damage in a third party action. However, on February 2, 2006, the Minnesota Supreme Court decided *Zurich American Ins. Co. v. Bjelland*, 2006 WL 710 N.W.2d 64 (Minn. 2006). The court in *Bjelland* was called on to determine the meaning of the amendment to § 176.061, and the court held that a carrier is not automatically entitled to full recovery of benefits paid and payable in the case of a death, is limited to damages recoverable under the Wrongful Death Act.

On November 6, 2001, while driving in the scope and course of his employment with Associated Milk Producers, Inc., Eugene Bodeker was killed in a two-vehicle traffic accident with Donald Bjelland, who ran a stop sign. Under the Workers' Compensation Act, Angeline Bodeker, Eugene's surviving spouse, with no dependent children, was entitled to dependency benefits at fifty percent of Eugene's weekly wage for a period of ten years. Zurich settled the dependency benefits claim for $92,382.95, and paid funeral benefits of $8,255.83 and medical of $3,680.22. The total benefits amounted to $104,319.00. Angeline Bodeker brought a wrongful death action against Bjelland and entered into a *Naig* settlement, which allowed her to settle the third party action solely for non-economic damages, such as pain and suffering, which are not compensable under workers' compensation. The worker's compensation carrier, Zurich American Ins. Co., as was its right, filed a subrogation action against Bjelland to recover the $104,319.00 it had paid. Unfortunately, the value of the wrongful death case, including damages for medical expenses, funeral expenses, and loss of financial support to Angeline Bodeker, was only $48,346.05. Section 176.061 stated that the carrier was subrogated to the rights of the employee and *"has a right of indemnity against a third party, regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute."* The trial court and Court of Appeals ruled that under the 2000 amendment, the carrier was entitled to recover from Bjelland the full amount of workers' compensation benefits paid or payable. The Minnesota Supreme Court heard the case in order to interpret the 2000 amendment to §176.061. Zurich argued that the statute was unambiguous, while Bjelland argued that the amendment did not enlarge the carrier's right to recover from the third party tortfeasor, but rather, it expanded the definition of what types of benefits *are eligible* to be recovered. Looking at the legislative history, the Supreme Court determined that § 176.061was nothing more than mere subrogation of a carrier to the rights of an employee, and therefore, the carrier was limited to recovery of damages available to the employee - in this case, $38,336.05 recoverable under the Minnesota Wrongful Death Act.

This case will have significant ramifications on the subrogation efforts of any workers' compensation carrier where a death has occurred. Despite the reference to *indemnity* within the statute, the Minnesota Supreme Court held that a carrier's right is nothing more than subrogation. How quickly our courts forget about the socialist roots of workers' compensation, which require an employer to pay hundreds of thousands of dollars in medical benefits for an injury for which it was not at fault. Workers' compensation subrogation was intended to ensure recovery of these benefits to the workers' compensation carrier whenever a third party was responsible for causing

the worker's injuries. In some states, such as Wisconsin, a workers' compensation carrier's rights of reimbursement are not even considered to be subrogation. Wisconsin, for example, has declared that § 102.29 of its workers' compensation statute requires the reimbursement of a carrier according to a formula set forth in the statute, indicating that a workers' compensation carrier's rights are **not** subrogation rights. Subrogation professionals in Minnesota should be aware that this new decision in *Bjelland* will strengthen the ability of plaintiffs' attorneys and third party liability carriers to gerrymander and craft *Naig* settlements in such ways as to defeat workers' compensation carriers recovery rights.

ON-LINE SUBROGATION FILE REFERRAL FORMS AVAILABLE AT WWW.MWL-LAW.COM

Subrogation file referral forms are now available on-line making easy referral of your subrogation matters to Matthiesen, Wickert & Lehrer, S.C. for review or recovery action. Separate file referral forms are listed for health insurance subrogation, property subrogation, workers' compensation subrogation, and auto subrogation. They may be found on our website at www.mwl-law.com by clicking on the link entitled "File Referral Forms".

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