

Sweating The **SMALL STUFF:** Arbitrating Workers' Compensation Subrogation Files

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More than any other area of personal injury subrogation, workers' compensation subrogation is often fraught with traps and pitfalls for the unwary subrogation professional. This is primarily because many subrogation professionals assume that workers' compensation subrogation is fairly similar from one state to the next. Every state allows for workers' compensation subrogation, but that is where the similarities end. In truth, there are few areas in which the laws of each individual state vary more and are applied as differently, as in the area of workers' compensation subrogation. This requires subrogation professionals to have a thorough understanding and ability to recognize tort liability, as well as be familiar with the subrogation laws of 51 different jurisdictions.

To further complicate the complicated, dealing with smaller workers' compensation claims in which an injured worker has not retained third party counsel, presents an even more daunting challenge of

subrogating cost-effectively in smaller, no lost-time subrogation files. The nearly impossible task of cost-effectively subrogating a workers' compensation subrogation claim, which involves only a few thousand dollars in medical benefits but no lost-time, can be much more time consuming and frustrating than subrogating the larger workers' compensation files. The ability to arbitrate small workers' compensation subrogation matters is a poorly understood, yet valuable tool for making sure that subrogation professionals don't sweat the small stuff when it comes to workers' compensation subrogation.

Recognizing the cost savings of filing an arbitration has always been simple to understand. The option to arbitrate workers' compensation subrogation has always been available for subrogation professionals, but it is one avenue that hasn't been fully explored by the industry. There are many more small workers' compensation claims than large ones, and this means that millions of subrogation dollars are left on the table because

they are not cost-effective to pursue. If the workers' compensation carrier and the third party carrier (or self-insured defendant) are both members of Special Arbitration, the workers' compensation carrier may be able to quickly, efficiently and cost-effectively subrogate against the third party tortfeasor, without having to file suit and without the needless hassle of fielding negotiations with a plaintiff's attorney. Article First (Compulsory Provisions) of the Special Rules and Regulations (revised January 3, 2006) states:

Upon settlement of a claim or suit, signatory companies must submit any unresolved disputes to Arbitration Forums, Incorporated (herein after referred to as AF) where:

(c) a workers' compensation carrier or self-insured seeks to recover reimbursement of workers' compensation benefits from an alleged tortfeasor.

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This establishes that a workers' compensation carrier is able to utilize arbitration for recovery for the benefits it has been called upon to pay as a result of injuries caused by the negligence of third parties.

Arbitration Forums' agreements are binding and any dispute that falls within the scope of that agreement is eligible for submission to arbitration. The language above allows for recovery of benefit payments only and does not include damages that will be sought by the injured worker. However, subrogation of workers' compensation benefits will still vary from state to state and your recovery options in arbitration are limited to those specific state statutes. Filing for arbitration does not relieve you of the obstacles of local law or a particular state's laws regarding when, how, and what is legally able to be subrogated for. For this reason, it is up to file handlers to either be knowledgeable on state specific issues, or work hand-in-hand with national recovery counsel to expedite arbitration of these smaller claims. Nowhere in the subrogation world is the adage "power of knowledge" more true than in arbitrating workers' compensation subrogation claims. The definition of "settlement" in Article First, above, clarifies that actual settlements are not required for recovery and any such benefit payments made to or on behalf of an injured worker may be the subject of arbitration.

The first requirement for filing workers' compensation arbitration is that you must meet the membership requirements established under Article Fifth (AF's Function and Authority) in the Special Rules and Regulations:

AF, representing the signatory companies, is authorized to:

(e) invite other carriers, noninsurers, self-insureds, or commercial insureds with large retentions to participate in this arbitration program, and compel the withdrawal of any signatory for failure to conform to the Agreement or the Rules issued thereunder.

Once eligibility has been established either as a signatory member or a company participating with written consent,¹ the filing process can commence. The workers' compensation carrier or self-insured must complete the required application² and contention sheet provided by Arbitration Forums. These forms are available on Arbitration Forums' website at <http://www.arbfile.org>. The filing procedures can be accomplished by downloading the forms and sending them with

evidence attachments to the proper data center. Cases may also be filed through Arbitration Forums' "On-Line" filing process, where the application and contentions are completed on-line and evidence supports are sent via mail.

Once a carrier has paid workers' compensation benefits, it is up to the claims professional to determine the best course for subrogation resolution. Arbitration Forums will not be able to handle claims in which injured workers are pursuing their own claim, in negotiation with insurance companies or are represented by counsel intent on filing third party actions. Clearly, Arbitration Forums could not make decisions which have binding effect on the worker who is not a member of Arbitration Forums.

We now return to the importance of understanding the jurisdictional issues in which each case will be submitted, and consulting with subrogation counsel in order to most appropriately and effectively frame the application for arbitration.

Some states grant the employee the exclusive right to bring an action within a certain period of time, after which either party has a joint right to bring such an action.³ Many states give the workers' compensation carrier the right to intervene into third party actions filed by the worker while some do not.⁴ In other states, the law requires that a subrogating carrier or an injured worker filing a third party action must join the other in the action as the necessary party to filing suit.⁵ Still other states give the carrier the right to intervene into a third party action, but specifically prevent the worker from forcing the carrier to become a party to the litigation.⁶ There are even states in which it is literally a condition precedent to the worker's right to claim benefits, that he assign the cause of action for third party damages against a third party to the workers' compensation carrier.⁷

Some states give the carrier an exclusive period of time in which to pursue subrogation, but Arbitration Forums may not be able to handle certain matters if the worker is still entitled to pursue a third party for his own personal injury damages. Understanding the parameters of your subrogation rights is a crucial first step in making an informed decision as to how and when to adequately and fully protect your subrogation interests to arbitration.

There are still other matters to consider, such as who may constitute a third party. In some states, subrogation of medical malpractice actions are allowed, while in others they are not.⁸ Some states allow a carrier to subrogate against the benefits of an uninsured and underinsured motorist policy,⁹ while other states do not define an uninsured motorists policy as a "third party" under either the terms of their statute or through interpretation by case law.¹⁰

Further complicating arbitration of workers' compensation claims is the fact that some states require a specific formula to be followed whenever a recovery against a third party is achieved.¹¹ Many states allow for an independent right of recovery, meaning that the workers' compensation carrier can pursue and achieve recovery separate and apart from any action that the injured worker may have at his or her disposal.

Recovery in Special Arbitration for workers' compensation is ideal when:

- Third party tortfeasor is denying your lien
- Claimant will not be pursuing the bodily injury claim and recovery is allowed by state law
- Workers' compensation benefits that were paid are relatively low and it isn't cost-effective to pursue through third party litigation
- The foreign state provides for an independent right of recovery
- Claimant acknowledges that he is not represented and will not be pursuing a third party action

Recovery in Special Arbitration for workers' compensation may be problematic when:

- Claimant is represented by counsel and is either pursuing or planning to pursue a third party action, depending on the state you are in¹²
- Claimant is pursuing an injury claim and by state law, your lien is subject to that recovery
- The foreign state does not provide for an independent right of recovery for the workers' compensation carrier
- The time period in which a carrier has to initiate a third party action has expired and the right to file now belongs to the claimant;
- Future credit concerns overshadow the

carrier's interest in recovery of its lien

Once the case has been submitted to Arbitration Forums,¹³ it will be scheduled for hearing unless coverage issues, affirmative defenses or deferments are raised by the participating parties. These situations can cause a case to be withdrawn or rescheduled. The cases are decided by qualified and certified arbitrators sitting on the arbitration panel under the requirements established within Arbitration Forums' Article Fifth. Most of these cases are submitted to arbitration and argued "on paper" with supporting evidence and documents. However, personal representation is allowed as long as you are in compliance with Rule 3- 7.¹⁴

One of the most important aspects of being successful in arbitration or recovery in general is understanding what you need to prove your case. Recognizing third party liability is obviously the lynch pin because without it, no recovery will be had of any sort. When a workers' compensation file is submitted to arbitration, the panelists will be looking to determine both liability and damages, so sufficient evidence must be sub-

mitted for both. Proving your case in arbitration is done by submitting the evidence needed to support your contentions. This means that you must have "proof" for the statements you are making against the other at-fault party.

Although the rules of evidence are greatly relaxed in arbitration, the evidence proves your case. Your contentions simply provide a logical structure for how an arbitrator will review your evidence.¹⁵ Article Third (Decisions) states as follows:

The decision of the arbitrator(s):

(a) shall be based on local jurisdictional law consistent with accepted claim practices.

Arbitrators will base their decisions on what is recoverable by state law and statute - again requiring a close working relationship with subrogation counsel. Arbitration of workers' compensation claims is not complicated - the laws underpinning a workers' compensation carrier's right to subrogation certainly are. It is also important that Article Third (Decisions) states that the decision of the arbitrator in a workers' compensation subrogation arbitration:

(c) is neither res judicata nor collateral estoppel to any other claim or suit arising out of the same accident, occurrence or event. The decision is conclusive only of the issues submitted to the panel and only as to the parties of the arbitration. The admissibility of the decision in any other proceeding is not intended, nor should be inferred from this Agreement.

This provision of Article Third (Decisions) can be used to combat arguments by plaintiffs' attorneys that the arbitration should not be allowed because it will adversely affect the injured worker's third party rights. Arbitration decisions do not set a precedent and each decision is inclusive of the issues within that particular filing. This is of extreme benefit given that litigated cases have the potential to produce case law that could impact future claims.

Arbitration of workers' compensation third party claims provide an interesting and often under utilized avenue for assisting subrogation professionals in avoiding sweating the "small stuff" when it comes to smaller workers' compensation liens.

ENDNOTES

¹ See Article Fourth (Non-Compulsory Provisions).

² Arbitration Forum's S-Form.

³ **North Carolina** is such a state. See N.C.G.S.A. § 97-10.2.

⁴ *Fidelity & Casualty Co. of New York v. Bedingfield*, 60 So.2d 489 (Fla. 1952); *Commercial Standard Ins. Co. v. Miller*, 274 So.2d 588 (Fla. 1st D.C.A. 1973).

⁵ **Wisconsin:** Any party with a subrogated interest must be made a party to the litigation. Wis. Stat. § 803.03 (2001);

Colorado: Worker must join carrier as a party plaintiff in any action filed against tortfeasor. *County Workers' Compensation Pool v. Davis*, 817 P.2d 521 (Colo. 1991).

⁶ **Tennessee:** *McCoy v. Wean United, Inc.*, 67 F.R.D. 491 (E.D. Tenn. 1973).

⁷ **Utah:** *Industrial Commission v. Wasatch Grading Co.*, 14 P.2d 988 (Utah 1932).

⁸ For a summary chart of the workers' compensation laws of all 50 states, please contact Jamie Breen of Matthiesen,

Wickert & Lehrer, S.C. at jbreen@mwl-law.com.

⁹ **Arizona, California, Georgia, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Mississippi, Nebraska, Oregon, Pennsylvania, Tennessee, and Washington** do not allow subrogation against uninsured motorists' benefits.

¹⁰ **Arkansas, Indiana, Louisiana, Nevada, New Mexico, and Texas**, are examples of states which allow subrogation against UM/UIM benefits. **North Carolina** allows subrogation for policies issued after October 1, 1999.

¹¹ For a summary treatment of the various differences between states' workers' compensation subrogation laws, see *The Many Faces of Workers' Compensation Subrogation* by Gary L. Wickert at <http://www.mwl-law.com>.

¹² Some states allow a carrier to independently pursue a third party action without the claimant. Most of these states make provisions for joinder. In situations where an argument can be made that the carrier has the right to pursue and settle

independent of the worker (as in **Minnesota's Reverse-Naig** situation), you may be able to utilize arbitration.

¹³ This means proper filing of an application and contentions.

¹⁴ Rule 3-7 provides that a party may present witnesses or attend an arbitration but that insureds or witnesses may not appear without the presence of a company representative. Personal appearances are for the sole purpose of ensuring the arbitrator's understanding of the evidence submitted and are not subject to cross-examination.

Representatives may not be present while the arbitration panel is deliberating.

¹⁵ Rule 3-6 provides that arbitration hearings are informal and that formal rules of evidence do not apply. This opens the door for any type of evidence to be utilized in the process. There is no discovery process and the arbitrator will be able to review any piece of evidence that has been listed and referenced on the contentions sheet. This is a major difference between arbitration and litigation.