

CLAIMS JOURNAL

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Workers' Comp Subrogation Against Political Subdivisions Given Last Rites in Pennsylvania

By [Gary Wickert](#) | November 1, 2012

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The states which seem most inimical toward subrogation rights always seem to be struggling with themselves, contorting legislation and case decisions in an inexplicable effort to destroy one of the most effective means society has for holding down insurance premiums – subrogation. Pennsylvania is the poster child for this sort of legal behavior. A recent Pennsylvania Supreme Court case ended a see-saw legal battle over whether a workers' compensation carrier has any rights of subrogation or reimbursement when the injured employee makes a third-party recovery. It didn't end well for subrogation.

In *Frazier v. W.C.A.B. (Bayada Nurses, Inc.)*, 2012 WL 4465855 (Pa. Sept. 28, 2012), Lillian Frazier broke her ankle when a SEPTA-operated bus on which she was a passenger was involved in an accident. She received workers' compensation benefits and filed suit against SEPTA. Her carrier gave notice of its intent to seek reimbursement of the \$47,351.93 in benefits it had paid, pursuant to 77 P.S. § 671. Frazier settled her third-party action for \$75,000, and SEPTA agreed to "defend,

indemnify and hold Claimant harmless” for the workers’ compensation lien. Frazier contested the carrier’s right to reimbursement, citing a portion of Act 44, § 23, which provides:

The Commonwealth, its political subdivisions, their officials and employees acting within the scope of their duties shall enjoy and benefit from sovereign and official immunity from claims of subrogation or reimbursement from a claimant’s tort recovery with respect to workers’ compensation benefits.

Frazier filed a claim petition in the Workers’ Compensation Appeal Board (W.C.A.B.), claiming that Act 44 § 23 prohibited the carrier from any reimbursement whatsoever. The carrier argued that this statute merely prevented it from filing a third-party subrogation action against a political subdivision, but didn’t prevent them from seeking reimbursement directly from Frazier. The Workers’ Compensation Judge (WCJ) agreed with Frazier, and the carrier appealed to the W.C.A.B., which reversed, holding that § 23 only prevented direct subrogation actions against political subdivisions, not reimbursement rights. Frazier appealed to the Commonwealth Court, which affirmed the right of reimbursement. *Frazier v. W.C.A.B.*, 2009 WL 8658374 (Pa. Cmwlth., 2009). The Commonwealth Court relied on the 2009 decision of *Fox v. W.C.A.B. (PECO Energy Co.)*, 969 A.2d 11 (Pa. Cmwlth. 2009), which involved a release of the City of Philadelphia which contained indemnity language similar to that in *Frazier*. Frazier appealed to the Pennsylvania Supreme Court.

On appeal, the Supreme Court focused on the language of § 23 which says that the government shall “benefit from sovereign and official immunity from claims of subrogation or reimbursement from a claimant’s tort recovery.” The Court held that this language is rendered meaningless if a subrogated carrier could merely sit and wait to be reimbursed and the political subdivision had to include in a settlement agreement amounts equal to the subrogation lien. If reimbursement concerns actions between employees and employers, the Court queried what was the legislature’s intent in including the reimbursement clause in Act 44 § 23? The answer, in their view, was demonstrated in situations such as that presented in *Frazier*, where the Commonwealth structures a settlement that does not include workers’ compensation benefits within the agreement, and agrees to defend and hold harmless the claimant for any claims of subrogation or reimbursement. In those circumstances, the carrier cannot seek subrogation or reimbursement of its workers’ compensation benefit payments.

The Supreme Court dealt with two competing interests:

1. The right of subrogation and reimbursement in workers' compensation under 77 P.S. § 671; and
2. The constitutionally provided immunity of the sovereign and its subdivisions, as applied to workers' compensation subrogation under Act 44 § 23.

It determined that § 23 relegated the right of subrogation and reimbursement to the sovereign's immunity through a narrowly tailored exception to a general rule, and reversed the Commonwealth Court.

It remains to be seen whether a right of reimbursement still exists under circumstances where the political subdivision does not indemnify the claimant for workers' compensation liens. If a third-party case is settled without such indemnity and without regard for the carrier's lien, an argument might be crafted that the right of reimbursement still exists. However, I wouldn't hold my breath for too long waiting for those situations because, once again, subrogation always seems to come up with the short end of the stick.

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