MATTHIESEN, WICKERT & LEHRER, S.C.

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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER JUNE 2012

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

*This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. 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 subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on or removed from our e-mail mailing list, please provide their e-mail addresses to Jamie Breen at **jbreen@mwl-law.com**. We appreciate your friendship and your business.*

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MISSOURI SUPREME COURT UPHOLDS SUBROGATION AGAINST BARE EMPLOYER

Lewis v. Gilmore, 2012 WL 2107965 (Mo. 2012)

By Gary L. Wickert

On June 12, 2012, the Missouri Supreme Court came down with a subrogation-friendly ruling involving a workers' compensation carrier's rights to subrogate against a bare employer. Matthiesen, Wickert & Lehrer, S.C. (MWL) represented the subrogated carrier.

The issue in this case was whether a workers' compensation award against an insured employer bars a wrongful death claim against an uninsured employer, where benefits are paid by a statutory employer because the actual employer did not secure workers' compensation coverage. The Circuit Court held that a workers' compensation award against the insured employer bars the wrongful death claim against the uninsured employer. The Supreme Court reversed, holding that § 287.280.1 allows the employee (and subrogated carrier) to proceed in a third-party action against the uninsured (bare) employer.

In this case, Lonnie Lewis died when the tractor trailer in which he was a passenger overturned. The driver of the truck, Nathan R. Gilmore, was operating the tractor trailer in the course of his employment with Buddy Freeman d/b/a R & F Trucking. Freeman operated his tractor trailer pursuant to a contract with DOT Transportation. Freeman did not carry workers' compensation insurance. DOT did carry workers' compensation insurance. Staci M. Lewis, Lonnie Lewis' widow, and McCartney M.E. Lewis filed a claim for workers' compensation against Freeman and DOT. They also filed a wrongful death action against Freeman and Gilmore. The Circuit Court stayed the wrongful death action until a determination was made by the Department Of Labor And Industrial Relations as to whether Lonnie Lewis' death occurred out of and in the course of his employment.

An Administrative Law Judge entered an award in favor of Lewis' dependents. The ALJ found that Lewis was an employee of Freeman, but that Freeman did not carry workers' compensation insurance even though he legally was required to do so. The ALJ determined that DOT Transportation was Lewis' statutory employer and ordered DOT to pay death and funeral benefits.

After the entry of the workers' compensation award, DOT, represented by MWL, intervened in the Lewis' wrongful death action. The Circuit Court granted summary judgment in favor of Gilmore and Freeman and against DOT, finding that the wrongful death action was barred because the Lewis' party had made an election of remedies when they obtained a workers' compensation award against DOT. The Lewis' party and DOT appealed.

In a case of first impression, the Missouri Supreme Court held that the plain language of § 287.280.1 requires certain employers to carry workers' compensation. When an employer does not carry workers' compensation insurance, the injured employee or his dependents "may elect" one of three options. First, the employee or his dependents may elect to file a civil action against "such employer." The term "such employer" refers to the employer that fails to carry legally required workers' compensation insurance. Second, the employee or his dependents may elect to "recover under this chapter" and pursue a workers' compensation claim. Third, the employee or his dependents may elect to seek payment from the second injury fund.

In this case, the Lewis party elected the first option by filing an action against Freeman to recover damages for Lonnie Lewis' death. It is undisputed that Freeman and DOT Transportation are separate entities and that each had the responsibility to secure workers' compensation insurance. Section 287.280.1 provides that every employer must insure his entire liability. The fact that DOT complied with § 287.280.1 and, therefore, was deemed to be the only statutory employer, did not excuse Freeman from his obligation to carry workers' compensation insurance. To the contrary, the plain language of § 287.280.1 provides that the consequence for an employer's failure to secure workers' compensation insurance is that the employee or his dependents (as well as the subrogated carrier/self-insured employer) may file a civil action against the employer.

Freeman strongly argued that § 287.280.1 must be interpreted in accordance with the Election of Remedies Doctrine. The Election of Remedies Doctrine provides that "if there are two or more inconsistent remedies available, the election to pursue the one is a bar to any suit based upon the other." *U.S. Fidelity & Guar. v. Fidelity Nat'l Bank & Trust, Co.*, 109 S.W.2d 47 (Mo. 1937). The purpose of the Doctrine is to prevent double redress for a single wrong. *Stromberg v. Moor*e, 170 S.W.3d 26 (Mo. App. 2005). Freeman further asserted that Missouri courts apply the Election of Remedies Doctrine to workers' compensation claims without distinction from its application in other areas of law and, as a result, the wrongful death action against Freeman should be barred by the Lewis' receipt of a workers' compensation award against DOT. *Bailey v. McClelland*, 848 S.W.2d 46 (Mo. App. 1993). The Supreme Court found this argument to be without merit. It held that there was no issue regarding an impermissible double recovery because any recovery by the Lewis party in the civil action would be subject to DOT's workers' compensation subrogation rights.

Justice Mary Russell agreed with the Freeman's Election of Remedies argument and dissented from the majority decision. Justice Russell believed that the majority's opinion wrongly permits the Lewis' party two remedies for a single injury by allowing that they can obtain a workers' compensation award against the insured statutory employer and also pursue a civil action against the uninsured immediate employer. She feels that § 287.280.1 allows the Lewis' party to pursue two remedies merely because the immediate employer lacked workers' compensation insurance and can be sued in court under the provisions of the statute. She dissented, because she felt that allowing pursuit of two remedies could lead to an impermissible double recovery that the Election of Remedies Doctrine is designed to prevent. She felt that although there were two distinct employers, there was only one injury.

This new ruling paves the way for successful subrogation efforts in cases in which the statutory employer ends up footing the bill for workers' compensation benefits because the actual employer failed to do so.

If you should have any questions regarding this article or subrogation in general, please contact Gary Wickert at **gwickert@mwl-law.com**.

WORKERS' COMPENSATION SUBROGATION

ARIZONA AMENDS WORKERS' COMPENSATION SUBROGATION STATUTE REGARDING AGGRAVATION OF PREVIOUS INJURIES

Arizona has always been a little bit troubling with regard to the interface between aggravated injuries and subrogation. For years, the subrogation rights of a workers' compensation carrier or self-insured employer were limited to situations where an employee was initially injured by the negligence of another person, but not when the worker was later re-injured due to the negligence of another person. Section 23-1023 had previously provided as follows:

> *"If an employee who is entitled to compensation under this chapter is injured or killed by the negligence or wrong of another person."*

On April 11, 2012, Governor Jan Brewer signed into law 2012 House Bill 2368, which overhauled many areas of Arizona's workers' compensation scheme. However, only one aspect of the new amendment affects subrogation. With the new amendment, § 23-1023 now includes the following language:

> *If an employee who is entitled to compensation under this chapter is injured or killed or further aggravates a previously accepted industrial injury by the negligence or wrong of another person…*

In any action arising out of an aggravation of a previously accepted industrial injury, the lien shall only apply to amounts expended for compensation and treatment of the aggravation.

The law in Arizona has always been that an aggravation of a preexisting injury is compensable, regardless of whether or not the preexisting injury was industrial or not. This is because the employer takes the employee as he is, and if a work-related accident aggravates a preexisting bodily condition, producing a further injury as a result, the result of such aggravation is compensable. It does not have to be shown that the work-related accident was the sole cause of aggravation. Rather, it is sufficient if it can be shown to a reasonable medical probability that it was the producing cause. *Nelson v. Industrial Commission*, 536 P.2d 215 (Ariz. App. 1975). Aggravated injuries (both industrial and non-industrial) were technically not subrogable under the statute's prior language. In practice, however, this limitation was occasionally not recognized by trial lawyers and carriers were able to occasionally recover such aggravated payments. However, unlike the subrogation rights of compensation carriers in many other states, it should be noted that even the amended § 23-1023 appears to limit subrogation to "aggravation of a previously accepted industrial injury" as opposed to the aggravation of a non-industrial injury. How

this apparent subrogation loophole will be treated by the courts remains to be seen. It makes sense that if a work-related aggravation of a non work-related injury is compensable, it should be subrogable.

In the end, the subrogation disconnect in Arizona is just more subrogation minutiae to keep an eye on and use as a tool to your advantage. Heinz Bergen once said, “Information is the seed for an idea. It only grows when it’s watered.” The value of the most current cutting-edge subrogation news and information is turning it to your advantage in the handling and negotiation of your subrogation files.

AUTOMOBILE SUBROGATION

THE LAWYER ADVANTAGE IN AUTOMOBILE ARBITRATION

Matthiesen, Wickert & Lehrer, S.C. (MWL) is now offering a new Automobile Arbitration Program. With a staff of outstanding paralegals who have a great deal of expertise and experience in aggressive submission and enforcement of automobile arbitration matters, this new program provides our clients with many advantages of aggressive lawyer representation in arbitration cases – at a reduced fee. For years, we have aggressively handled all types of automobile arbitration, but through our new program, we will be offering this same results-oriented arbitration service at a reduced contingent fee of 25%, plus costs. We hope to be able to help our clients continue to increase their subrogation recoveries by putting the same thorough and aggressive recovery skills and practices which have proven successful with Allstate’s automobile subrogation litigation into play with regard to automobile arbitration. Many arbitrated cases are clearly arbitrated because of a difference of opinion as to liability. With thousands of arbitrations under our belt, MWL is confident that the time and detail which is put into the arbitration submission, including reference and attachment of relevant state statutes and regulations, goes a long way to swaying an arbitrator’s decision and bears a direct relationship to the likelihood of arbitration success.

MWL’s new program is actually the result of a high number of new subrogation referrals we have seen in recent months from clients across the country in which arbitrations are lost or decisions are not being paid for a variety of reasons, including simple mistakes or oversights, including:

- Filing suit against the wrong insurance company.
- Confusion of insurance companies. In a growing number of cases, we see situations where, for example, arbitration is filed against York Claims but the correct insurance company name was York Insurance. In another claim, arbitration was filed against Farm Bureau Mutual Insurance which was a member of arbitration, but it should have been filed against Farm Bureau of Louisiana, which is NOT a member of arbitration.
- Filing arbitration where bodily injury litigation claims are pending. This costs us critical time and results in our joining the suit late, which brings with it the risk of the case settling without the subrogated carrier appearing - a death knell to subrogation in many states.
- MWL is called in after the fact where our clients appear to be searching arbitration members and picking the arbitration member that closest resembles the adverse insurance, without correctly identifying the underwriting insurance company.
- Frequent violation of arbitration rules which can bar the applicant.

We have found that by using some fundamental persuasion techniques, the resources available only to a law firm, and a lawyer’s attention to detail, arbitrations which can easily be lost are much more likely to succeed. Some examples of this include:

- Documentation is the key to successful arbitration. Taking the time to run down and attach relevant documentation is increasingly being seen as a critical failure in many of our client's arbitration efforts.
- In the vast majority of cases, where a lawyer-represented applicant faces an unrepresented respondent, the applicant wins.
- Swearing-match cases are almost always determined based on the quality of the submission.
- MWL takes the time to pull and cite all relevant state law regarding automobile equipment violations, rules of the road, contributory negligence, Sudden Emergency Doctrine, Last Clear Chance Doctrine, seat belt defense laws, collateral source rules, and the entire panoply of subrogation laws dealing with Med Pay, PIP, collision, and UIM subrogation, for all 50 states. After all, we wrote the book on the subject.
- Aerial photos of intersections meticulously marked and detailed for the arbitrator depicting the path and final resting point of the vehicles are increasingly powerful tools in tougher arbitration cases.
- Detailed schematics of intersections and accident scenes which depict debris trails, skid marks, etc.

In a recent arbitration enforcement file referred to us, the arbitration was filed against the wrong party – an insurance company who has not issued any policies since 2004. The year of loss was 2009. The address listed for the respondent was the business address for the local Thrifty Rental Car facility. The respondent was also later identified as the wrong party. All of these errors carried over into the contentions portion of the filing. As a result of these errors, no response was filed by the respondent, an award was issued for the petitioner, but the award was not enforceable.

Experience has taught us the value of detailed preparation and documentation in automobile arbitration. There are times when the claims all begin to look alike, but when you peel back the layers and start digging into the documents, we almost always find subtle and, in some cases, substantial differences. One of the most important aspects of the automobile arbitration file is gathering records and tying those records into a cohesive and persuasive submission.

We see daily examples of arbitration failures, such as the ones above, from virtually all of our automobile subrogation clients. While proper preparation and representation of a client in an automobile arbitration can often be as time-intensive as recovering against carriers who are not members of arbitration, we realize that one of the deterrents to allowing your subrogation counsel to wage war for you in the arbitration arena is the attorney's fees. We wanted to eliminate that deterrent, and came up with this reduced-fee program.

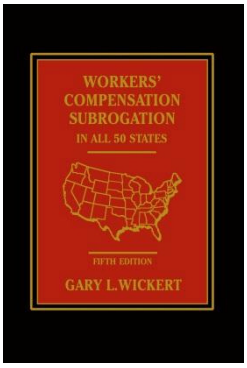
Most arbitrations are decided by non-lawyer arbitrators. This simple fact means that the law and its application to the facts must be spoon-fed and explained in such a way that the arbitrator is able to understand the issues in a favorable light, yet is not talked down to. MWL sets forth your best facts and documents in the actual demand for arbitration. The petitioner has a distinct advantage as the party who is allowed to submit its case first. We strongly emphasize only the strongest arguments and jettison the weaker arguments. The candid and forthright advocacy which is developed through years of litigation experience serves us well in arbitration. Our objective is to leave the arbitrator with a "road map" for the award, tying together the evidence in storybook fashion and supporting each step along the way with documentation, photos, applicable law and state regulations,

and every possible form of "evidence." A common thread running through our submission is the obvious fact that we have taken the time to thoroughly prepare the case. It has an incredibly persuasive effect.

We hope you will want to take advantage of this new Automobile Arbitration Program. It will build on the tremendous relationship we currently have with our clients and supported by our unparalleled knowledge of subrogation law. We know you will be delighted with the results. Cases can be referred in the same way as litigated subrogation matters. Simply indicate that the case is to be arbitrated. We look forward to the opportunity to serve more of your subrogation needs not only in the courtroom, but in the arbitration forum as well.

WORKERS' COMPENSATION SUBROGATION

5th EDITION OF *WORKERS' COMPENSATION SUBROGATION IN ALL 50 STATES* BOOK JUST RELEASED!



The newest edition of our most popular subrogation book – *Workers' Compensation Subrogation In All 50 States* – was released earlier last month. The new edition reflects the rapidly changing laws dealing with workers' compensation subrogation and covers a variety of new statutory and case law which is new on the subrogation scene.

Workers' compensation subrogation continues to change and adapt, as trial lawyers prod its weak points and capitalize on confusing areas of the law. There have been numerous changes in workers' compensation statutes and case law in many states since the last edition. The concept of co-employee liability for acts which are intentional or committed outside of the course and scope of employment has been added in several states.

This edition includes an exhausting survey and detailed explanation of the crazy status of employer contribution in Illinois, which includes a step-by-step exposition of how contractual indemnity and the "*Kotecki* cap" play a role in expanded employer liability in Illinois workers' compensation subrogation cases.

It covers the many nuances of *Naig* and Reverse-*Naig* settlements under Minnesota law, including an analysis of who has what burdens of proof and the effect such a settlement has on the remaining third-party case tried to a jury.

In light of the landmark Missouri Court of Appeals decision in *Robinson v. Hooker*, the liability of co-employees in Missouri and surrounding states have been covered in greater detail.

New case law and explanations were added to the Texas chapter with regard to subrogating against UM/UIM policies, including arguments with regard to the efficacy of UM/UIM exclusionary policy language and the ability to subrogate against a UM/UIM policy actually issued by the same carrier insuring for workers' compensation coverage.

West Virginia completely revised their subrogation statute and created a new statute relating to the "statutory employer" status of primary contractors and subcontractors on construction sites, limiting when and how primary contractors can become legitimate third parties for purposes of subrogation.

Chapter 7, "Contractual Limitations to Subrogation" has been completely overhauled to include new statutes and case law for every state to assist practitioners in determining the law applicable when there is an alleged applicable waiver of subrogation which might otherwise destroy subrogation.

A new Chapter 12 has been added, which focuses on jurisdiction of workers' compensation third-party actions taking a broad look at 28 U.S.C. § 1441, which prohibits removal of cases "arising under" state workers' compensation laws. A carrier now has the ability to prevent cases from being removed from favorable venues in state court to less favorable federal court venues - an attractive option for

plaintiffs' attorneys with whom subrogated carriers can negotiate with for stipulations and concessions on their subrogation interests in exchange for maintaining a case in state court.

This edition also expands on which states do and do not hold workers' compensation to be primary. Combined with more than 100 new case decisions, this 5th Edition is the most complete and up-to-date edition yet. In a nutshell, the 5th Edition of the book contains more new information, chapters, and sections than any edition before it. It remains a valuable weapon in the arsenal of any subrogation professional looking to maintain an edge on trial lawyers pooling their resources to try to reduce or eliminate workers' compensation liens across all jurisdictions. It can be previewed and purchased by clicking **HERE**.

UPCOMING EVENTS

July 12, 2012 – Ryan Woody will be presenting on *2012 Health Subrogation Updates* at the National Association of Subrogation Professional's (NASP) Texas Chapter Meeting in Dallas, Texas. NASP is the world's largest subrogation association. For more information on NASP, please click **HERE**.

July 18-19, 2012 – MWL will be exhibiting at the *32nd Annual National Workers' Compensation and Occupational Medicine Conference* in Hyannis, Cape Cod, Massachusetts. Jamie Breen will be at Exhibit Booth 10 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please click **HERE**.

August 9, 2012 – Ryan Woody will be presenting a live webinar on *"2012 Health Subrogation Updates*" from 10:00 - 11:00 a.m. (CST). This webinar is approved for 1.0 Texas CE credits and is free to clients and friends of MWL. A registration link will soon be on our website homepage, but you can click on the "Register Now" button to the right to register.

November 11-14, 2012 – MWL will be exhibiting at *NASP's 2012 Annual Conference, "Cirque du Subro",* in Las Vegas, Nevada. Jamie Breen will be at Exhibit Booth 103 so stop by our booth if you plan on attending this conference and introduce yourself. For more information on this conference, please go to **www.subrogation.org**.