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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.*

In This Issue:

GENERAL SUBROGATION

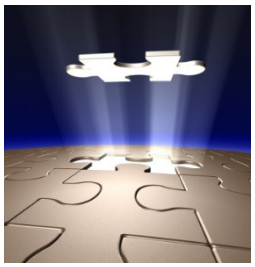
UNDERSTANDING EXPERIENCE MODIFIERS
Can Subrogation Really Affect Your Premiums?

By Gary L. Wickert

For many corporate personnel, the concepts of underwriting and experience ratings remain a clouded mystery, yet they directly affect the amount of insurance premiums a company will pay. Even more mysterious though is what effect, if any, subrogation efforts have on premiums. Everyone can agree that "to get money back" is a good thing. Whether it affects the insured's experience rating and whether or not it will ultimately lead to reduced premiums and savings for a good insurance client is another issue altogether and remains shrouded in the hieroglyphics of modern insurance underwriting. Understanding the correlation between the worthy goals of lower premiums and subrogation recoveries often stimulates subrogation efforts and allows corporate decision makers an opportunity to shape subrogation opportunities which would otherwise be lost, directly affecting the company's bottom line.

The concept of experience ratings should not be a mystery. Experience ratings reward insureds who have a favorable loss history and penalize insureds who have a poor loss history. This is accomplished by the application of a credit (a reduction) or a debit (an increase) to premiums pre-determined by the National Counsel of Compensation Insurance (NCCI). NCCI is an insurance service entity which organizes and compiles information on insurance risk and losses and, depending on the state, keeps statistics on various insureds, thereby enabling it to calculate experience modifiers for different companies and employers. The loss history is compiled on unit statistical cards which are available to insurers and insureds alike. It is prudent for an employer to periodically check its unit statistical card in order to determine if any errors or miscalculations have been made which may detrimentally affect its premiums.

Losses are divided into primary losses and excess losses. Any losses under $5,000 are considered primary losses, while the amount of losses in excess of $5,000 are considered excess losses. Actual and expected primary losses are calculated separately, with each state applying different weighted values and ballast values in order to arrive at an experience modifier which is intended to reflect the true condition of the insured's loss history. Experience modifiers are obtained after dividing actual losses by expected losses. Obviously, if actual losses exceed expected losses, this is a bad thing, and the resulting modifier constitutes a debt or increase to an insured's insurance premium. If actual losses are lower than expected losses, the modifier has the opposite result. For example, if actual losses total $150,000 and expected losses total only $100,000, the experience modifier is 1.5. The higher the experience modifier, the higher the premium is. It is easy to see how any control the insured or insurer has over the experience modifier may directly affect the premium an insured can expect to pay in subsequent years. When a retrospective rating program (retro policy) is in effect, the effect of a good loss history is even more immediate. Generally, an insured's loss history is reviewed and its experience rating is calculated over a three year period. The experience modifier is then issued one year after the three year period has expired. This gives the experience raters a set time during which to evaluate an insured's loss history and an adequate period of time to digest and publish the information.



So, how does subrogation fit into all of this? In theory, subrogation recoveries serve as a debit to actual loss totals and actual primary losses, thereby directly affecting the experience modifier. In short, one or two subrogation recoveries can mean the difference between a debit modifier and a credit modifier. Controlling experience modifiers becomes the key for insureds interested in holding their premiums to an absolute minimum under the experience rating process. Conscientious insureds can obtain copies of experience modifier worksheets and/or unit statistical cards from the insurer and/or NCCI. The key to keeping premiums under control is to have a basic working knowledge of the experience rating process, and to do something about those aspects of experience modifiers over which the insured has some control. Double checking the NCCI figures on the applicable worksheets aggressively seeking subrogation recoveries, maintaining an accurate record of these recoveries, and seeing to it that those recoveries find their way into the experience modifier calculations are the most significant things an insured can do to control premiums. Expected loss rates can be adjusted to reflect significant credits obtained as a result of settlements or recoveries in third-party subrogation cases. Actual incurred losses and actual primary losses should also reflect any subrogation recoveries obtained. These adjustments cannot be made, however, until recoveries are achieved. Recoveries are not achieved until subrogation potential is recognized and action is taken to make the recovery.

In the area of workers' compensation, most insureds respond to a compensable injury to one of their employees by blaming the employee and touting their own safety programs and risk management efforts. My experience has been, after investigating thousands of work-related accidental injuries, that in 9 out of 10 such incidents, the employer believes that by placing contributory negligence on the employee and by absolving itself from any fault in connection with the loss, it is somehow protecting itself from liability. After a work-related injury, insurance professionals must immediately contact the insured and carefully explain to them how, by virtue of having workers' compensation insurance, they are immune from liability, and any assistance they can give in identifying third-party liability and subrogation potential may directly impact the premiums they pay in the future years by reducing the negative effect the loss may have on their experience modifier. By allowing and/or assisting the claimant to pursue a third-party tortfeasor, the employee's dependence on workers' compensation benefits can be drastically reduced or completely eliminated. This behavior on the part of the insured is equally self-destructive in property and casualty claims.

Corporate decision makers and corporate counsel should make it their business to see to it that subrogation is made a priority, that they are given proper credit for subrogation recoveries, and that these recoveries are reflected in experience modifiers which control how large of a premium the insured will be responsible for paying in the coming years. Loss control programs attack loss frequency and are a worthy

goal in connection with any business or insurance program. However, risk management must be taken a step further. It is the insured's responsibility to insist that subrogation potential is being investigated and is being actively and competently acted on. After a successful subrogation venture, it then becomes the insured's obligation to see to it that they are given proper credit for those subrogation recoveries, which might otherwise be lost in the rather confusing and obfuscated world of experience rating.

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

MISSOURI'S CO-EMPLOYEE LIABILITY ROLLER COASTER RIDE

Missouri Legislature Amends § 187.120

By Eric J. Goelz

It looks like the Missouri Legislature is going to have the final say in the long-running seesaw battle between the state courts and the state legislative branch over whether co-employees can be sued as third parties by injured employees and subrogated workers' compensation carriers when the co-employee's negligence results in a work-related injury to a fellow employee.

Missouri employers who provide workers' compensation to their employees are exempt from any and all other liability to the employee or any other person. Mo. Rev. Stat. § 287.120 (1994). Under § 287.120, only those entities having either primary or secondary liability to an employee for workers' compensation benefits are granted immunity from common law liability. The rationale being that because these third parties do not share the burdens of workers' compensation laws, they are not entitled to the benefits. All other potential parties are considered third parties for purposes of a third-party suit. *Sylcox v. Nat'l Lead Co.*, 38 S.W.2d 497 (Mo. App. 1931); *Lamar v. Ford Motor Co.*, 409 S.W.2d 100 (Mo. 1966). For years, § 287.120 read in relevant part as follows:

> ***§ 287.120.*** *(1) Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability whatsoever, whether to the employee or any other person. The term 'accident' as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.* Mo. Rev. Stat. § 287.120 (2007).

The situation involving the liability of co-employees in Missouri is somewhat storied, and understanding its history is illustrative. Prior to the passage of workers' compensation laws, an employer was not liable for injuries to an employee caused by the negligent acts of a "fellow servant." *Bender v. Kroger Grocery & Banking Co.*, 276 S.W. 405 (Mo. 1925). Missouri courts gradually increased the employer's tort liability for these injuries based on the theory that an employer has a non-delegable duty to provide a safe place to work. If a co-employee was negligent in performing the non-delegable duty of an employer, the employer could be held responsible for the resulting injuries to other employees. *Mitchell v. Polar Wave Ice & Fuel Co.*, 227 S.W. 266 (Mo. App. 1921). In 1926, the Workmen's Compensation Act made the employer responsible for providing benefits to injured employees in exchange for the employer receiving immunity against tort claims for the injuries. *Gunnett v. Girardier Bldg. & Realty Co.*, 70 S.W.3d 632 (Mo. App. 2002). Following the common law approach, courts later extended the statutory immunity to co-employees for negligence in performing a non-delegable duty of the employer. *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175 (Mo. App. 1982).

For years, § 287.120 prohibited an action against either the employer or a co-employee, but there were exceptions to this rule. In *Gaertner*, this judicial extension of immunity to co-employees was deemed necessary to "fix" the Act's omission of agency principles in determining liability for workplace injuries unless there was a showing of "something more" than a breach of the employer's duty to provide a safe workplace. *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620 (Mo. 2002). The courts began to realize that an injured worker didn't fully relinquish his rights where there was some affirmative action taken by a co-employee which intensified the risk of injury to the worker and was outside the employer's general responsibility to maintain a safe workplace. The "something more" test required proof that a co-employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. *Id.* A three-prong test was developed and a co-employee was able to be sued if it was shown that:

> *(1) The co-employee/executive officer/owner/supervisor had engaged in an affirmative act. Graham v. Geisz*, 149 S.W.3d 459 (Mo. App. 2004) (an affirmative act is where the employee created a dangerous condition outside of the scope of responsibility to maintain a safe workplace, or where an employee directs other employees to engage in dangerous activities);
>
> *(2) Such an act occurred while the co-employee was acting beyond the scope of the employer's responsibility to generally provide the employee with a safe working environment; and*
>
> *(3) Such an act breached a personal duty of care which the co-employee would personally owe to the employee. Tauchert v. Boatment's National Bank,* 849 S.W.2d 573 (Mo. 1993).

What constituted "beyond the scope" or a breach of the "personal duty" became the subject of much litigation. *Craft v. Scaman,* 715 S.W.2d 531 (Mo. App. 1986); *Biller V. Big John Tree Transplanter,* 795 S.W.2d 630 (Mo. App. 1990); *Tauchert,* supra; *Hedglin v. Stah Specialty,* 903 S.W.2d 922 (Mo. App. 1995); *Pavia v. Childs,* 951 S.W.2d 700 (Mo. App. 1997); *Murry v. Mercantile Bank,* 34 S.W.3d 193 (Mo. App. 2000); *Logsdon v. Killinger,* 69 S.W.3d 529 (Mo. App. 2002).

However, another facet of the Missouri statutes was slowly leading to a landmark 2010 Court of Appeals decision which would come to strip co-employees of all immunity. Prior to 2005, § 287.800 mandated that courts *liberally interpret* the Act to extend benefits to the largest possible class and resolved any doubts as to the right of compensation in favor of the employee. *Schuster v. State Div. of Emp't Sec.*, 972 S.W.2d 377 (Mo. App. 1998). In 2005, the Act was amended to eliminate the requirement of liberal construction, requiring the courts to use principles of *strict construction* in applying all provisions of the workers' compensation statute. Mo. Rev. Stat. § 287.800 (2005). Based on this new requirement of strict construction, the Missouri Court of Appeals in the 2010 decision in *Robinson v. Hooker* confirmed that employee immunity arose from a liberal construction of the Act in *Badami* and based on the new rules of strict construction, needed to be reevaluated. *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010). *Robinson* confirmed that a co-employee is not granted immunity under the Exclusive Remedy Rule merely because he is a co-employee. To be immune, the co-employee would have to fall within the Act's definition of "employer" which is set forth in the statute as follows:

> *(1) Every person, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, using the service of another for pay;*
>
> *(2) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation, or quasi-corporation, or cities under special charter, or under the commission form of government;*
>
> *(3) Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter...* Mo. Rev. Stat. § 287.030.1.

The *Robinson* Court confirmed that a co-employee did not generally fall within this statutory definition of an "employer" as a "person ... using the service of another for pay" and "having five or more employees."

Strict application of the statute compelled them to conclude that co-employees are not entitled to invoke the employer immunity under § 287.120, and an employee retains a right to bring a third party action against co-employees who do not fall squarely within this definition of "employer." Following the decision in *Hooker*, unless a co-employee could be shown to fit within the definition of "employer," the co-employee could be sued as a third party. *Robinson,* supra.

In June 2012, the Missouri Court of Appeals in *Ritter* noted that while *Robinson* declared that the exclusive remedy rule didn't bar a common law negligence claim against an employee, the issue of whether there was a common law duty necessary to give rise to such a common law negligence claim was an entirely different question. *Hansen v. Ritter,* 2012 WL 2498845 (Mo. App. 2012). The Court held that providing a safe place to work is just one of the non-delegable duties an employer owes its employees, a duty which the employer may not escape by delegating the task to someone else, and that a co-employee manager did not owe any personal duty of care to provide a safe workplace to a co-employee. So, while a co-employee might be held liable for an affirmative act of negligence committed against a fellow worker, a co-employee could not be held liable for generally not providing a safe workplace.

However, it didn't take the Missouri legislature long to "remedy" these loopholes pointed out by the *Robinson* Court, which allowed co-employees to become third parties in tort cases arising out of work-related injuries. In 2012, § 287.120(1) was amended, adding the following language:

> *Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.* Workers Compensation--Claims--Exemptions, 2012 Mo. Legis. Serv. H.B. 1540 (Vernon's) (West's No. 45).

It appears that the roller coaster ride in Missouri has finally come to a rest. This new amendment once again clarifies that a co-employee is not considered to be a third party and may not be sued by an injured employee or a subrogated carrier unless the co-employee acts intentionally – purposefully and dangerously causing or increasing the risk of injury. The amendment likely will apply only to causes of action accruing after its effective date, which is 90 days after adjournment of the Missouri legislature's 2012 session.

If you should have a question regarding this article or subrogation in general, please contact Eric Goelz at **egoelz@mwl-law.com.**

UPCOMING EVENTS

November 11-14, 2012 – MWL attended and exhibited at *NASP's 2012 Annual Conference, "Cirque du Subro",* in Las Vegas, Nevada. We thoroughly enjoyed visiting with our clients and friends who attended this conference and we look forward to seeing everyone at the next conference.

January 16, 2013 – Gary Wickert will be presenting a live webinar on *"California Automobile Subrogation"* 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.