

State Specific: Arizona



Arizona Legislature Adds Assignment Language To Workers' Compensation Statute (Again)

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Earlier this year, the Arizona Court of Appeals essentially rewrote § 23-1023, Arizona's workers' compensation subrogation statute.

Prior to its amendment in 2007, this statute provided that the injured employee had only one year after a cause of action accrued to pursue a third-party action. A.R.S. § 23-1023(B). If the employee did not pursue the third-party action within the first year, the claim against the third party was "deemed" assigned to the workers' compensation insurance carrier. *Id.* The pre-amendment statute read:

B. If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insurance carrier or the person liable for the payment thereof, or may be reassigned in its entirety to the employee or his dependents. After the reassignment, the employee entitled to compensation or his dependents shall have the same rights to pursue the claim as if it had been filed within the first year. 2007 Ariz. Legis. Serv. Ch. 116 (H.B. 2194).

After this automatic assignment,

the third-party claim belonged to the workers' compensation carrier. The employee could then pursue the third-party claim only if the carrier reassigned it to the employee, and nothing required the carrier to reassign it.

In 2007, the Arizona legislature passed H.B. 2194, amending § 23-1023, removing the underlined language above, after which the statute read as follows:

B. If the employee who is entitled to compensation under this chapter or the employee's dependents do not pursue a remedy pursuant to this section against the other person by instituting an action within one year after the cause of action accrues, or if after instituting the action, the employee or the employee's dependents fail to fully prosecute the claim and the action is dismissed, all of the following apply:

1. The insurance carrier or self-insured employer may institute an action against the other person.
2. Any dismissal that is entered for lack of prosecution of an action instituted by the employee or the employee's dependents shall not prejudice the right of the insurance carrier or self-insured employer to recover the amount of benefits paid.

The new statutory language firmly establishes the carrier's right to subrogation after the first year if the employee has not already filed suit.

3. If the statute of limitations of the claim is one year after the cause of action accrues, the insurance carrier or self-insured employer may file the action prior to one year after the cause of action accrues.

4. The claim may be prosecuted or compromised by the insurance carrier or the person liable for the self-insured employer or may be reassigned in its entirety to the employee or the employee's dependents. After the reassignment, the employee who is entitled to compensation, or the employee's dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

The Legislature deliberately deleted the words, "the claim against such other person shall be deemed assigned to the insurance carrier," but left intact the phrases "[After the first year] the claim may be prosecuted or compromised by the insurance

carrier... or may be reassigned in its entirety to the employee" and "After the reassignment, the employee... shall have the same rights to pursue the claim as if it had been filed within the first year." It was unclear why the Legislature would retain these phrases which speak to what happens in the second year if the employee didn't file suit in the first year. The answer seems obvious – the cause of action is still automatically assigned to the carrier after the first year. Nonetheless, in an effort to allow the injured employee a cause of action that apparently still requires reassignment from the carrier, the Court of Appeals referred to these changes as "a drafting oversight."

The *Acosta* case involved a March 17, 2010 injury suffered by Alvaro Acosta while employed on a work site at which Kiewit-Sundt was the general contractor. Acosta received workers' compensation benefits from the State Compensation Fund (SCF) and, after a year had gone by, Acosta

sought a reassignment of the third-party claim from SCF, but SCF did not grant him the reassignment. On March 15, 2012, Acosta filed a third-party claim against Kiewit-Sundt, which promptly filed for and was granted summary judgment stating that Acosta was barred from pursuing a third-party claim filed after the first year and without a reassignment from SCF. Acosta then appealed to the Court of Appeals arguing that the 2007 amendment to § 23-1023 had eliminated the automatic assignment to SCF. In reversing the trial court's summary judgment, the Court of Appeals held that Acosta's claim was not deemed assigned to SCF and, therefore, no reassignment was necessary.

In what can only be described as an embarrassing exercise of judicial interpretation, the Court of Appeals explained away the statutory references to "reassignment" as follows:

Whether those terms remain in

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the amended statute because of a drafting oversight, see *State v. Ovind*, 186 Ariz. 475, 478, 924 P.2d 479, 482 (App.1996) (statutory ambiguity “probably the result of an oversight in drafting”), or for some other reason, any inconsistency does not negate the clear deletion of the “deemed assigned” language. *Acosta, supra*.

To the Court of Appeals, it was not clear that under the amended statute, the employee did not have the same rights to pursue a third-party action as he or she did in the first year, unless and until there is a “reassignment” of the claim from the carrier to the employee. It defied logic that a claim clearly subject to “reassignment” wouldn’t have to be assigned in the first place.

In a rare example of legislative lucidity, on April 15, 2014, the Arizona Legislature passed, and Governor Jan Brewer signed, H.B. 2094, which amended § 23-1023 to

add back into the statute the following language:

... If the employee ... [does] not pursue a remedy ... within one year after the cause of action accrues ... THE CLAIM AGAINST THE OTHER PERSON IS DEEMED ASSIGNED TO THE INSURANCE CARRIER OR SELF-INSURED EMPLOYER.

The amended language once again makes clear that if an employee does not file a third-party action within the first year after a work-related injury that right is assigned to the workers’ compensation carrier and all of the following are true:

1. The insurance carrier or self-insured employer may institute an action against the third party.
2. Any dismissal that is entered for lack of prosecution of an action instituted by the employee or the employee’s dependents shall not prejudice the right of the insurance carrier or self-insured employer to

recover the amount of benefits paid.

3. If the statute of limitations of the claim is one year after the cause of action accrues, the insurance carrier or self-insured employer may file the action prior to one year after the cause of action accrues.

4. The claim may be prosecuted or compromised by the insurance carrier or the person liable for the self-insured employer or may be reassigned in its entirety to the employee or the employee’s dependents. After the reassignment, the employee who is entitled to compensation, or the employee’s dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

It is refreshing to see a state legislature respond so promptly to bad law and activist courts. It is also very rare. The new statutory language firmly establishes the carrier’s right to subrogation after the first year if the employee has not already filed suit.

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