State Specific: Arizona

Confusion Surrounds Arizona Court Of Appeals' Opinion On Workers' Compensation Statute Amendment

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Third-Party Cause Of Action No Longer Automatically Assigned To Employee After One Year

In a mysterious legal sleight of hand that would make David Copperfield envious, the Arizona Court of Appeals has reinvented the English language by making it possible to reassign something that wasn't assigned in the first place.

In *Acosta v. Kiewit-Sundt*, 2014 WL 250933 (Ariz. App. 2014), the Court 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 and removing the underlined language above. The amended statute now reads 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 court must give effect to each word of the statute – not words that are not in the statute. No clause, sentence, or word is rendered superfluous, void, contradictory or insignificant."

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.
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.*" For what reason would the legislature 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, Mr. 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.

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

> Whether those terms remain in 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.

It is clear that the amended statute specifically and clearly still says, "*[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.*" In interpreting statutes, the courts are bound by the rule that if the language is clear, the court must "apply it without resorting to other methods of statutory interpretation." *Hayes v. Continental Ins. Co.,* 872 P.2d 668 (Ariz. 1996). The court must give effect to each word of the statute – not words that are not in the statute. No clause, sentence, or word is rendered superfluous, void, contradictory or insignificant. *Guzman v. Guzman*, 854 P.2d 1169 (Ariz. App. 1993). Furthermore, the court must assign to the language in the statute its usual and commonly-understood meaning. *State v. Korzep*, 799 P.2d 831 (Ariz. 1990). So, if the statute still says, "*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 can only mean that the employee does not have the same rights to pursue a third-party action as he or she does in the first year, unless and until there is a "reassignment" of the claim from the carrier to the employee.

Although it defies logic that a claim clearly subject to "reassignment" wouldn't have to be assigned in the first place, it remains to be seen whether the Arizona Supreme Court fixes the court's error. This is the strange story of a statute that unequivocally says that a third-party action may be "reassigned in its entirety to the employee" and then further goes on to describe what happens as a result of this "reassignment" but, according to the Court of Appeals, doesn't provide for an assignment in the first place. The seemingly inexplicable is best explained by looking behind the curtains of this sloppily-written amendment.

Taking a look at the legislative history of HB 2194, The Arizona Legislature House Committee on Commerce established that the purpose of the 2007 amendment was "To clarify the obligations of the injured employee/dependents and the insurance carrier or other person required to pay the claim that involves a third party." Arizona House Bill Summary, 2007 Reg. Sess. H.B. 2194. Epic fail. In the January 31, 2007 Commerce Committee hearing minutes, Rep. Ben Miranda inquired about the amendment, "What exactly

"For what reason would the legislature 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..."

will change, as an insurance carrier can already bring an action. He asked if it was *the right to assign the claim* that was being done away with." In an answer that is even less clear than the amendment itself, William Sheldon with the very *SCF* involved in the *Acosta* decision responded, "This legislation is plugging holes so that the self-insured employer and the insurance carrier in some instances cannot go forward."

According to the February 26, 2007 Fact Sheet regarding H.B. 2194, the bill "*Modifies when an insurance carrier or self-insured employer may bring an action… against a responsible third party.*" In a bit of irony that would be strange if not associated with this Bill, the only thing that is clear from the amended statute is that it changes nothing with regard to when a carrier can bring such an action. It further describes the Bill's provisions, in part, as follows:

> "Removes the specification that if the employee or the employee's dependents do not pursue a remedy against another person within one year after the cause of action accrues, the claim is deemed assigned to the insurance carrier."
>
> "Permits an insurance carrier or self-insured employer to institute an action against the other person if the employee or the employee's dependents do not pursue a remedy within one year after the cause of action accrues."

Unfortunately, and notwithstanding the reference above to removing the specification regarding a deemed assignment, nothing I could find sheds light on the mysterious right of the carrier to "reassign" the cause of action to the employee or what such a clause might be referring to, seeing as there is no conceivable reason for the carrier to reassign anything unless it was assigned to it to begin with. I have written to the Bill's sponsor, Rep. Nancy McClain, in an effort to get some general clarification with regard to the intent behind this portion of the Bill.

Until the *Acosta* decision is reversed or overruled, we are all left to scratch our collective heads. It now appears that after the first year, the third-party claim may be prosecuted and/or compromised either by the insurance carrier or the employee. The third-party claim may be pursued by the carrier after one year, but there is no automatic assignment and, apparently, no need for an assignment. *Acosta*, supra. If assigned by the carrier for some inexplicable purpose; however, the claim "may be reassigned" by the carrier to the employee. With that said, the carrier isn't required to reassign a claim that was never assigned in the first place. It is reminiscent of the infamous Seinfeld episode, "*Bizarro Jerry*", referring to the DC Comics' *Bizarro-Earth* concept, where everything is the polar opposite of that on Earth. The *Acosta* decision has left us with Bizarro-Statute.