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Workers' Compensation: Alternatives are Limited

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Workers' Compensation: Alternatives are limited

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Early this century, workers' compensation evolved as a more satisfactory method of providing the occupationally injured worker with wage-loss replacement and medical care than was permitted under the tort system and employer's liability laws.

The new method offered the victims of work injuries and diseases a system of "no fault" recovery of wage loss and medical treatment in exchange for complete tort immunity for employers. This was done through the designation of workers' compensation as an "exclusive remedy" for the injured worker.

During the ensuing years workers' compensation was found to be inadequate to provide benefits in situations that were not covered by this remedial legislation. As a result, a gradual erosion of the exclusive-remedy and immunity doctrines began to appear in the decisional law to cover these cases.

The purpose of this discussion is to learn just how far these doctrines have been eroded in order to provide additional remedies for injured workers beyond workers' compensation.

Perhaps the term "erosion" is not precise, for as we shall see, many of the injuries that now can be the subjects of tort claims against the employer simply "fell through the cracks" in the compensation system, and resulted in fact patterns where the worker suffered an injury but has absolutely no remedy. It might be more precise to say that there has evolved a clarification of the exclusive-remedy doctrine, rather than an erosion.

This article will also explore the development of allowable additional recoveries for injured workers through third-party suits for tort damages, directed against non-employer tortfeasors who were actually responsible for the workers' injury.

Pennsylvania statutes and decisional law will be cited wherever such local authority exists. However, workers' compensation is still an

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evolving system on a national basis. Thus, many interesting and innovative developments have occurred in other jurisdictions which will be called to the readers' attention.

PENNSYLVANIA'S EXCLUSIVE-REMEDY DOCTRINE

Even before 1975, when Pennsylvania's compensation law was elective, the exclusive-remedy doctrine limited the liability of the employer. Section 303(a), Act of December 5, 1974, P.L. 782, 77 P.S. 481(a), an amended version of the prior act, now provides that the employer's liability shall be exclusively limited to the provisions of the Act "in place of any and all other liability to the employee."

This limitation is extended by the Act to the employee's legal representatives, husband or wife, parents, dependents, next of kin, or anyone otherwise entitled to damages in any action of law, or otherwise on account of any injury or death as defined in the Act. This is termed the employer-immunity doctrine.

This type of immunity has been confirmed by decisional law. See Steets v. Sovereign Construction Co., 413 Pa. 458, 198 A.2d 590 (1964); Svaus v. Allentown Portland Cement Co., 214 Pa. Super. 595, 252 A.2d 646 (1969).

Immunity from tort liability under the Act is an affirmative defense. Its pleading must be timely or a waiver may result. Turner Construction Co. v. Hebner, 2276 Pa. Super. 341, 419 A.2d 488 (1980).

EXTENSION OF IMMUNITY TO FELLOW EMPLOYEES

Section 205, Act of August 24, 1963, P.L. 1175, 77 P.S., Sec. 72, extended the employer's immunity from common-law action on account of the employee's injury or death to any person who 'was in the same employ as the person disabled or killed, except for intentional wrong." This is termed co-employee or fellow-employee immunity.

In Babich Admx. v. Pavich et al., 270 Pa. Super. 140, 411 A.2d 811 (1979), the court held that a full-time plant physician is immune from a suit alleging that his medical negligence caused or contributed to the compensable death of the worker employed by the same company.

In the recent case of Budzichowski v. Bell Telephone Co., 445 A.2d 811 (1962), the Superior Court held that physicians employed by the telephone company were, for the purpose of determining tort immunity under the Act, "fellow employees" of the injured telephone installer whom they treated. The court further held that the phone company was acting as employer when the alleged negligent treatment was committed by the physicians it employed, and was not acting in a "dual capacity" in providing health care, such as would permit the imposition of tort liability.

The Supreme Court allowed an appeal in this case on September 15, 1982, and affirmed the Superior Court on Dec. 7, 1983.

In the cases just discussed, the employees injured by the negligent actions of the plant physicians still received workers' compensation benefits for the aggravation of their original work injuries caused by the negligent treatment. The effect of the fellow-workers immunity provision was the foreclosure of the workers' right to bring malpractice tort actions against the negligent physicians.

In addition to the cases dealing with treatment by "plant physicians" who were deemed as co-employees, the extension of immunity to fellow employees was judicially approved in Berger v. U.G.I. Corp. and City of Allentown, 285 Pa. Super. 374, 427 A.2d 1161 (1981), where the immunity was applied even when the negligence of one autonomously operated city department causes injury to an employee of a different city department.

If the injury was caused by an intentional personal attack committed by a fellow employee, and is unrelated to the employment, that injury is excluded from compensation coverage under the Act by the specific provisions of Section 301(c) of the Act of October 17, 1972, P.L. 930, 77 P.S. 411. That section excludes from coverage "an injury caused by the act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee, or because of his employment."

Such an excluded injury can give rise to a common-law action by the injured employee for the intentional tort against the tortfeasor, even if he was a co-employee. See McBride v. Hershey Chocolate Co., 200 Pa. Super. 347, 188 A.2d 775 (1963); and Dolan v. Linton's Lunch, 397 Pa. 114, 152 A.2d 887 (1959).

TORT ACTIONS AGAINST EMPLOYER

A. Failure to carry insurance

Under Section 305, Act of December 5, 1974, P.L. 782, 77 P.S. 501, the employee or dependents are given the right to sue the employer in tort or to pursue a workers' compensation claim if the employer does not carry insurance or has failed to qualify as a self-insurer.

To be successful in such a tort action, the employee must establish that the employer was negligent. However, when such an action at law is commenced, Section 201, Act of March 29, 1972, P.L. 172, 77 P.S., Sec. 41, provides that the employer cannot invoke the common-law defenses of contributory negligence, assumption of risk, or the negligence of a fellow servant, unless it is established by the employer that the injury was caused by the worker's intoxication or reckless indifference to danger.

Section 305 does not appear to put the employee to a strict election of remedies, such that a fruitless tort action would bar a subsequent

compensation action. The majority rule appears to be that a choice of what turns out to be a nonexistent remedy is no election at all. There are no Pennsylvania cases on the effect of an election to sue in tort or in workers' compensation, except for a prohibition against a double recovery.

B. Injuries not included in the statute

(1) Occupational diseases not covered:

The cases have determined that common-law liability may be imposed in certain occupational-disease claims, despite the exclusive-remedy doctrine in the Act.

o In Perez v. Blumenthal Bros. Chocolate Co., 428 Pa. 425, 237 A.2d 227 (1968), Claimant was exposed to heavy dust produced in a grinding operation, which, combined with injurious fumes caused by high temperatures in his work place, caused an aggravation of his latent tubercular condition, pulmonary emphysema, and severe bronchitis. Claimant sued in tort and received a verdict. On appeal to the Supreme Court, the employer raised the defense of the exclusive-remedy provision of the Workmen's Compensation Act. The Supreme Court affirmed the verdict, holding that since claimant's diseases were not specifically listed in the Act and did not meet the standards of the omnibus provision in Section 108(n) of the Act, claimant's condition was not covered by the Act and was therefore subject to a tort action.

o In Greer v. U.S. Steel Corp., 475 Pa. 448, 380 A.2d 1221 (1977), the Supreme Court reversed the Superior Court, which had held that since employee's pulmonary fibrosis was within the general purview of the Act, he could not sue in tort. In reversing, the Supreme Court held that claimant could not be deprived of his tort remedy until a factual finding is made that claimant's pulmonary fibrosis was covered by the Occupational Disease Act as an unspecified or unlisted disease, which is peculiar to the Claimant's occupation by its cause and the characteristics of its manifestations — that being the standard applied to unspecified diseases includable under the Act's "omnibus clause." The case was remanded for that purpose.

o In Boniecke v. McGraw Edison Co., 252 Pa. Super. 461, 381 A.2d 1301 (1977), the Superior Court dealt with a case where claimant's pulmonary fibrosis and bronchitis claim had been previously rejected by the referee and the Workmen's Compensation Board as being noncompensable under the Act. The Superior Court held that the earlier rejection by the compensation authorities would not bar the tort claim made by the employee against his employer based on the ground that employer improperly maintained his premises and exposed him to hazards which caused him to contract pulmonary fibrosis and bronchitis. This holding was affirmed by the Supreme Court in 401 A.2d 345 (1979).

(2) Work injuries that are not covered by the Act:

When work injuries, as distinguished from occupational diseases, are involved, the courts seem to prohibit tort recovery more readily because of the exclusive-remedy feature of the Act.

o In Scott v. C.E. Powell Co., 402 Pa. 73, 166 A.2d 31 (1960), the court held that even though claimant's loss of sense of taste and smell were not included as specific losses under the Act, the exclusive-remedy doctrine barred any tort action against the employer. The court's position was that since any disability and wage loss were compensable even if caused by the loss of smell and taste, the compensability of this injury was within the purview of the Act.

o In Kline v. Verner Co., 453 A.2d 1035 (1982), claimant received injuries to his pelvic region which resulted in priapism, which is medically defined as a persistent abnormal erection. He received disability compensation during the period he could not work, and then sued his employer in tort for negligence, asserting that the loss of use of that particular organ was not among the specific losses of parts of the body enumerated in Section 306(c) of the Act.

The Superior Court rejected his suit, saying that when an employee sustains a work injury compensable under the Act, the amount of compensation depends solely upon the provisions of the Act, and that this kind, and amount, of compensation is claimant's exclusive remedy.

In distinguishing the different treatment accorded occupational diseases, the court said: "The Occupational Disease Act, however, is not analagous. It has application only to those diseases identified therein, and was not intended to bar trespass actions brought upon diseases not covered by the Act."

While there are no Pennsylvania cases on that subject, tort claims for pain and suffering would also be barred, even though not covered by the Act, because of the doctrine of exclusive-remedy.

(3) Injury caused by a third person due to non-work-related animosity:

o In Mike v. Borough of Aliquippa, 421 A.2d 251 (1981), claimant was assaulted by fellow employees because of personal malice. Claimant received workmen's compensation and signed a final release. Claimant then sued employer in tort for failure to maintain a safe work place. A verdict against the employer was sustained on the theory that the employer could have foreseen the violent acts by the co-employees against claimant because of previous altercations and aggressive propensities of the co-employees. The workers' compensation benefits received were credited against the tort verdict to prevent a double recovery.

o In Dolan v. Linton's Lunch, 397 Pa. 114, 152 A.2d 887 (1959), where an employee had been attacked by a fellow employee for personal reasons not connected with his job, his claim for workers' compensation was not covered by the Act. He was therefore free to sue his employer in tort if he could prove an actionable claim against his employer.

(4) Injuries caused by employer operating in a "dual capacity":

Where an employer is also the manufacturer of a defective product which causes injury to the employee, normally workers' compensation would be the exclusive remedy for the employee injured in the course of his employment. Several other states have developed a "dual capacity" doctrine which would hold the employer liable in tort for the manufacture of the defective product that caused the injury.

Since the employee may be able to recover much more in a common-law products-liability action than in a compensation claim, this doctrine is rapidly evolving in the courts. One of the basic arguments made in support of the doctrine is that an employer cannot accept the benefits of two positions and the liabilities of only one. Several cases have also applied this doctrine to a "service" setting, as for example, a hospital which also operates a public clinic.

Here are several of the leading cases, outside of Pennsylvania, supporting the "dual capacity" doctrine:

o Douglas v. E. & J. Gallo Winery, 49 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977). Plaintiff filed a suit against Gallo, his employer, for personal injuries suffered when the scaffolding manufactured by the employer, on which plaintiff was working, collapsed. The court upheld the action, carefully limiting its decision to situations where the product involved was for the sole use of the employer.

o Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 361 N.E. 492 (1976). Here, claimant was a Uniroyal employee who was injured in a work-related auto accident caused by the blowout of a defective tire manufactured by his employer. Claimant's common-law action against his employer for its defective product was allowed on the dual-capacity doctrine.

o Guy v. Arthur J. Thomas Co., 378 N.E. 2d 488 (Ohio 1978), after an original compensable injury as an employee of the defendant-hospital, plaintiff utilized employer's medical services, and then filed an action for malpractice alleging the hospital negligently failed to diagnose her condition, thereby aggravating her injury. Dismissal by the trial court was reversed on appeal.

The court held that employer-hospital occupied a second or dual capacity as an administering hospital in that it was both employer and treating physician, and that, as a result of its second capacity, it had obligations in tort unrelated to and independent of those imposed on it as an employer.

o D'Angonia v. County of Los Angeles, 613 P.2d 238 (Cal. 1980). The Supreme Court of California dealt with a physical therapist who was employed at a county hospital. Claimant, while a patient, developed gangrene which resulted in amputation of most of her toes and fingers. Claimant received workers' compensation benefits and then sued the county for negligent treatment.

The court allowed the action and stated that the rationale of the dual-capacity decisions is that "if an injury arises from a relationship which is distinct from that of employer and employee and invokes a different set of obligations than the employer's duties to its employee, there is no justification for shielding the employer from liability at common law."

Since then, the "dual capacity" doctrine has been severely limited by the California legislature.

o McDaniel v. Sage, 419 N.E.2d 1322 (Ind. 1981). An employee, being treated at a company infirmary, sued in tort for an injury caused by improper injection by the company nurse. It was held that the nurse's liability arose from her nurse-patient relationship with employee, and not from the employer-employee relationship, which the compensation act was designed to regulate. The court concluded that the nurse was acting as an independent contractor, and that the employee's action against her was not barred by statutory employer-immunity.

o Robard v. Est. of Kantzler, 296 N.W.2d 265 (Mich. 1980). The employee injured his hand in a machine which his employer leased from another corporation of which his employer was the sole officer and shareholder. The employee sued the lending corporation in tort and was met with the defense of co-employee immunity. The court held that employee's tort claim is not barred by the Workmen's Compensation Act because the lending corporation is subject to the same liabilities as any other lessor who provides a defective product, regardless of the intercorporate relationship.

When we consider the Pennsylvania law, we find two cases on the dual-capacity doctrine which appear to be in conflict with each other.

o Tatrai v. Presbyterian University Hospital, 497 Pa. 247, 439 A.2d 1162 (1982). Here, a hospital employee became ill and was sent to the public emergency room for treatment, where the employee was injured through the negligent maintenance of an x-ray table. The Supreme Court held, without mentioning "dual capacity," that the employee could sue in tort and was not barred by the exclusive-remedy doctrine. The concurring opinion allowed the action on the ground that the employee was in the same position in the emergency room as a member of the public, and was owed by the same legal responsibility by the hospital.

o Budzichowski v. Bell Telephone Co., 445 A.2d 811 (1982). Here, the Superior Court held that where the employer had a clinic for its employees, and not for the general public, that an injury or malpractice upon the injured worker at that clinic did not give rise to a tort liability action against the employer because of the exclusive-remedy provisions of the Act. The court specifically mentions the "dual capacity" doctrine but rejects its application in this case. The Supreme Court affirmed the Superior Court on Dec. 7, 1983.

o In another related case, Kohr v. Raybestos-Manhattan, 522 Fed. Supp. 1070 (1981), a panel of U.S. District Judges for the eastern district of Pennsylvania concluded that as a federal court bound by Pennsylvania law, they found no justification for concluding that the appellate courts of Pennsylvania had, or would, adopt the dual-capacity doctrine in a products-liability setting.

For Pennsylvania lower-court cases on this subject, see Harris v. Uniontown Hosp., 72 D. & C. 2d 132 (1975) (tort action for negligent treatment of injured hospital employee); and Cherneskie v. Bethlehem Steel Corp., 70 D. & C. 2d 605 (1974) (injured employee forced to return to work before full recovery, and who aggravated injury, was permitted to sue employer in tort)

(5) Claims for other intentional torts against the employer:

The following cases cover a variety of tort actions against employers in several other jurisdictions. These states may not have the same stringent exclusive-remedy and immunity doctrines as does Pennsylvania. Therefore, these cases should be carefully examined in light of the particular statutory language of that state.

o Action based on fraudulent concealment of unsafe workplace: In Johns Manville, et al. v. Contra Costa, etc., 612 P.2d 948 (Cal. 1980), the employer was held liable in a common-law action for aggravation of a worker's disease, upon proof that the employer knowingly ordered the employee to work in an unsafe environment, concealing the risk from him, and, after the employee had contracted an industrial disease (asbestosis), deliberately failed to notify the state, the employer, or doctors treating him of the disease and its connection with his employment.

o Action based on intentional acts by the employer: In Doney v. Tambouratgis, 140 Cal.Rep. 782 (1979), plaintiff was employed as a topless-bottomless dancer in defendant's bar. One night after closing, plaintiff was invited into defendant's office to discuss a customer's complaint. When she arrived, defendant asked her to remove her clothes. She refused, defendant wrestled her to the floor, where they struggled, and defendant assaulted her. Plaintiff brought a tort action, but the employer pleaded that plaintiff's exclusive remedy was in worker's compensation. The court dismissed the defense, and allowed the tort action because plaintiff's injury did not arise in the course of her employment.

o Separate tort claims by relatives: In Ferriter v. Daniel O'Connells' Sons, Inc., 413 N.E.2d 690 (Mass. 1980), the court held that the Workmen's Compensation Act does not bar common-law recovery by the spouse and dependent minor children of an injured employee for their claims against a negligent employer for loss of consortium or familial relationship, or for the mental distress and resulting physical injuries. In this case, the injured worker was also receiving workers' compensation benefits.

In Reed Tool Co. v. Copelin, 610 S.W.2d 736 (Texas 1981), the Texas Supreme Court held that while a spouse cannot recover a consortium claim for gross negligence, or negligence, on the part of the employer, the Workmen's Compensation Act does not destroy an action by the spouse for loss of consortium for employer's intentional act. Because this claim was the spouse's separate property, the husband's acceptance of workers' compensation benefits did not bar spouse's suit for intentional impairment of consortium.

Pennsylvania's immunity doctrine would probably preclude consortium claims.

o Action based on safety inspections or OSHA violations: In Sewell v. Bathely Mfg. Co., 303 N.W.2d 876 (Mich. 1981), the Michigan Supreme Court held that employer's conduct which violated the state occupational safety and health act was actionable only under the Workmen's Compensation Act, no matter how reprehensible the alleged misconduct on the part of the employer might be.

o Claims for malicious prosecution, defamation, and violations of civil rights: In Faley v. Polaroid Corp., 409 N.E.2d 1300 (Mass. 1980), the employee was unjustly accused of assault and rape on a fellow employee and his prosecution was aided by the employer. After acquittal, the employee sued in tort for intentional mental distress (held not actionable because covered by the compensation act), defamation of character (held actionable in tort because it was an injury to reputation irrespective of physical harm), and civil-rights violation (held actionable because it was not an injury covered by the compensation act).

o Wrongful-death statute claims: In Ary v. Missouri Portland Cement Co., 612 S.E.2d 840 (Mo. 1981), the Missouri Court found that workers' compensation benefits were the sole remedy available to the heirs of the claimant who was killed in a mining accident. When the workmen's compensation law is applicable it is the complete surrogate for any other liability of the employer. Not only is the employer released from common-law liability, but other specific statutory liability as well.

o Action based on retaliatory discharge for filing claims: In Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (N.J. 1981), the court held that a worker has a common-law right of action for wrongful discharge based upon an alleged retaliatory firing which followed his filing a workers' compensation claim.

In Frampton v. Central Ind. Gas Co., 297 NE.2d 425, (Ind. 1973), claimant received compensation for her injured arm during her four-month disability. Fifteen months later she realized that she had a claim for 30 percent loss of use and filed a specific-loss claim, which was settled. One month later, she was fired without a given reason. She brought suit for retaliatory discharge, and the case was permitted to go to trial for actual and punitive damages.

TORT ACTIONS AGAINST INSURANCE CARRIERS

A. Statutory immunity for carriers

Section 305 of the Act of December 5, 1974, P.L. 782, 77 P.S., Sec. 501, which requires every employer to carry insurance, or to be validly self-insured, also provides that "such insurer (carrier) shall assume the employer's liability hereunder and shall be entitled to all of the employer's immunities and protection hereunder...." This section resolves the confusion created in cases involving the direct liability of an insurance carrier in tort claims filed by the employee. See DeJesus v. Liberty Mutual Insurance Co., 439 Pa. 180, 268 A.2d 924 (1970); Brown v. Travelers Insurance Co., 434 Pa. 507, 254 A.2d 27 (1969); Leonard v. Harris Corp. et al., 290 Pa. Super. 370, 434 A.2d 798 (1981); and Doane v. Travelers Insurance Co., 266 F. Supp. 504 (E.D. Pa. 1966).

An insurance carrier has no immunity for the negligence of the providers of medical treatment directed and controlled by the insurance carrier, since this medical treatment is a separate and distinct function of the insurance carrier that does not concern the employer and is not part of the employer's business operations. See Tropiano v. The Travelers Insurance Co. et al., 455 Pa. 360, 319 A.2d 426 (1974). This does not affect the immunity of the employer from tort actions for negligent treatment by plant physicians or a dispensary. (See Budzichowski v. Bell Telephone Co., supra.)

B. Case law on tort actions against insurance carriers

(1) Actions for non-physical-injury torts:

In Reed v. Hartford Acc. & Inc. Co., 367 F. Supp. 134 (E.D. Penna. 1973), a Pennsylvania case, Plaintiff had incurred a compensable injury and made an agreement with the carrier calling for payment of total disability benefits. In October, 1969, the carrier stopped the payments but did not file a petition to terminate or modify the agreement until June, 1971. In November, 1971, a hearing was held, at which medical experts on both sides testified that the plaintiff was still totally disabled.

Plaintiff brought a tort action against the carrier based on four charges: intentional imposition by the carrier of economic duress on plaintiff in order to force a settlement for less than compensation for total disability, conversion of funds set aside for the benefit of the plaintiff, misuse and abuse of process, and breach of the workers' compensation agreement. The court held that the actions for intentional wrongs and breach of agreement were not barred by the exclusive-remedy clause of the compensation act.

(2) Actions alleging that carrier was acting in bad faith:

In Coleman v. American Universal Ins. Co., 273 N.W.2d 220 (Wis. 1979), it was held that where a workers' compensation insurer acts in bad faith in settlement or payment of compensation benefits, a separate tort

is not within purview of exclusivity provisions of workers' compensation law, and a separate tort action for bad faith may be alleged and relief provided by the court. There are no Pennsylvania cases on this subject.

(3) Actions for negligent performance of safety inspections:

In Johnson v. Amer. Mutual Ins. Co., 394 So.2d 1 (Ala. 1981), the Supreme Court of Alabama held that a statute immunizing an insurance carrier and its employees when negligently performing safety inspections is unconstitutional because it deprives an injured worker of his right to due process.

In Leonard v. Harris Corp. et al., 434 A.2d 798 (Pa. 1981), the court held that the injured worker had no common-law remedy against the compensation carrier that negligently conducted safety inspections of the plant and machines where the claimant was injured while working. The court cited Sec. 305 of the Act to support its holding.

(4) Claim for infliction of mental anguish:

In Stafford v. West Chester Fire Ins. Co., 526 P.2d 37 (Alaska 1974), claimant asked for, among other things, damages for conscious infliction of mental injury by the insurance carrier. He alleged that the carrier, through its agents, willfully, deliberately, and maliciously withheld compensation benefits in an effort to discourage him from proceeding for compensation under the Act. The trial court granted summary judgment for defendant on this point, chiefly on the ground that, since the Act contained a specific penalty for delay in making compensation payments, that penalty was the exclusive remedy. The Supreme Court reversed, and remanded the case for trial on this point.

THIRD-PARTY ACTIONS

When a compensable injury is the result of a third person's tortious conduct, the Pennsylvania act preserves a right of action against the tortfeasor, since the compensation system was not designed to extend immunity to other than employers or claimant's co-employees.

Section 303(b) of the Act of December 5, 1974, P.L. 782, 77 P.S., Sec 481(b), provides that when employee's injury or death is caused by a third party, his "legal representatives, husband or wife, parents, dependents or next of kin, and anyone otherwise entitled . . . may bring their action at law against such third party . . ." (emphasis added).

Therefore, injured workers can bring tort actions, in addition to their workers' compensation claims, against any other third person whose negligence causes or contributes to their injuries or to the development of their occupational disease.

Such third-party actions can be brought against: (1) manufacturers or sellers of defective or hazardous machinery, services, or other products

used by workers (called products-liability suits); (2) general contractors on jobs where the employee was employed by a sub-contractor; (3) owners of property on which employees are performing work; (4) physicians who are negligent in their treatment (medical malpractice); and (5) manufacturers or sellers of defective or hazardous substances, chemicals or services used in the workplace.

As an example of such a third-party action, the injured worker may sue an equipment manufacturer while using a product which malfunctions, is unsafely designed, or is unsafe because the manufacturer fails to give proper instructions for using the product. The worker must show that the defect existed when the product left the manufacturer's hands and that the defect was the cause of the injury.

One of the key questions in a products-liability lawsuit is whether the manufacturer could have designed his equipment differently, or could have provided additional safety devices to prevent the worker's injury. If he could have done so but failed to do it, the manufacturer can be held liable for the worker's injury.

In connection with injury from toxic substances, the injured worker must establish that the manufacturer or seller of the substance knew, or should have known, of its dangerous effect on health, and that it failed to warn users or handlers of the specific dangers associated with the use of its product.

Of course, the classic third-party actions are against negligent operators of autos who cause injury to a worker while he or she is driving or walking during the course of his employment.

Third-party tort actions must be filed within two years from the date of the injury, or from the time that the injured employee knew or should have known that he suffered from physical harm which was related to his employment.

Needless to say, awards in tort actions can be several times the amount paid in workers' compensation benefits, since damage items include full loss of salary, pain and suffering and mental anguish damages, loss of consortium, and possible loss of future earnings.

SUBROGATION RIGHTS CREATED BY THIRD-PARTY ACTIONS

To avoid double recovery by the injured employee from both workers' compensation and a third-party recovery, Sec. 319 (Act of March 29, 1972 P.L. 159, 77 P.S., Sec. 671) provides that the employer shall be subrogated to the right of the employee or his dependents, against such third party to the extent of the compensation payable, with certain stated proration of attorney's fees and costs. This right applies to either a recovery or compromise settlement. Of course, any excess over the subrogated amount is payable to the employee.

There have been several important decisions concerning the application of the subrogation provisions of Sec. 319, the following of which are deemed significant:

o In spite of the language of the first paragraph of Sec. 319, 77 P.S., Sec. 671, stating that the employer is subrogated, where the workers' compensation carrier has paid benefits, it is the carrier and not the employer who is subrogated to the employee's rights against the third party. Brown v. Travelers Insurance Co., 434 Pa. 507, 254 A.2d 27 (1969); Rehrer v. Service Trucking Company, 112 F. Supp. 24 (D. Del., 1953).

o Where the employee sues a third-party tortfeasor, then the employer (or carrier) is entitled to reimbursement of compensation paid to date, and a credit against future compensation payable, reduced by the employer's pro rata share of legal fees and expenses. Bumbarger v. Bumbarger, 190 Pa. Super. 571, 155 A.2d 216 (1959).

o There is no right to subrogation to the carrier for sums awarded children under the Wrongful Death Act where the widow brings a survival and wrongful-death action against the tortfeasor. The carrier is entitled to subrogation of only the widow's recovery, not the children's, because the children had no separate cause of action against the employer under the Act. Anderson v. Borough of Greenville, 442 Pa. 11, 273 A.2d 512 (1971).

o The employer (or its carrier) is obligated to pay a pro rata share of counsel fees and expenses which were incurred in producing the third-party settlement or verdict. The employer must pay the legal fees and expenses on that part of the recovery that reimburses the employer for compensation already paid, or that constitutes a credit for the employer against compensation payable in the future. See Wall v. Conn. Welding & Machine Co., 197 Pa. Super. 360, 179 A.2d 235 (1962); and Solliday v. Hires Turner Glass Company, 187 Pa. Super. 44, 142 A.2d 425 (1958).

o The employer is entitled to be subrogated to the total recovery of the employee against a third party. No allocation of any part of the recovery by agreement or verdict to losses not covered by the Act, such as pain and suffering, can reduce the subrogation interest of the employer in the recovery. Bumbarger v. Bumbarger, 190 Pa. Super. 571, 155 A.2d 216 (1959).

o Although the employer has a subrogation interest in the employee's cause of action against the third-party tortfeasor, only the employee is the proper party to enforce or control the action. See London Lancashire Indemnity Co. of America v. Reid, 156 F.Supp. 897 (E.D. Pa. 1957).

The Pennsylvania No-fault Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, 40 P.S., Sec. 1009.101 et seq., was originally construed as abolishing the subrogation right of the employer under Sec. 319 against a third party in an auto-accident case where non-economic benefits were claimed under the No-fault Act. See Brunelli v. Farrelly, 226 Pa. Super. 29, 402 A.2d 1061 (1979).

However, the Supreme Court has recently held, in Vespeziano v. Insana, 462 A.2d 669 (1983), that where an injured employee received wage-loss benefits under both the No-fault Act and the Workmen's Compensation Act, of which the amount over $31,000 was paid by the workers' compensation carrier, the subrogation claim of the compensation carrier was negated under the No-fault Act only to the extent of those benefits paid by the carrier that constituted contribution toward compensation of the first $15,000 of work loss-sustained.

However, beyond the carrier's contribution toward that first $15,000 of compensation, the subrogation claim for recovery of benefits payable is not affected by the No-fault Act and may be recovered by the compensation carrier. Since the carriers' contribution to the workers' wage loss is generally limited to two-thirds of that loss, the only portion of the subrogation claim which is negated by the No-fault Act amounts to two-thirds of $15,000 or $10,000 on a net basis.

On the effect of the Comparative Negligence Act on the apportionment of liability and damages, between one or more third-party tortfeasors and the plaintiffs employer, the recent case of Heckendorn v. Consolidated Rail Corp. et al., decided on September 15, 1983, by the Supreme Court in 465 A.2d 609, finally puts this question to rest.

In this case, plaintiff worked for the Carnation Company and filed a tort action for injuries against Consolidated Rail Corp. and Evans Products as third parties who caused his injuries. Conrail attempted to join the employer as an additional defendant, citing the Comparative Negligence Act as authority for the joinder.

The common pleas court and Superior Court sustained the employer's preliminary objections under the provisions of Sec. 303(b) of the compensation act. This section specifically prohibits such a joinder.

The Supreme Court affirmed the prohibition of the joinder for these reasons:

- The Comparative Negligence Act does not permit any apportionment between one or more third-party tortfeasors and the employer.

- No involuntary joinder of the employer as either defendant or plaintiff is permitted in an action by an employee against a third-party tortfeasor; and

- The employer's subrogation rights may not be challenged by an allegation that the employer was partially responsible for the worker's injury, and the issue of employer's negligence is irrelevant.

SUMMARY

Since Pennsylvania is considered a strong adherent to the exclusive-remedy and employer's-immunity doctrines, the attempts to erode these doctrines have not met with great success in this state.

The only areas where the decisional law has supported the allowance of tort actions for damages by employees against their employers are the cases concerning certain uncovered occupational diseases, and assaults or other tortious conduct by the employer. As to the "dual capacity" tort actions against the employer, they would seem to be barred in a products-liability situation but may be allowed in a service setting, as characterized by the hospital cases.

Tort actions against co-employees or carriers are generally barred by a statutory extension to them of the immunity doctrine, with certain exceptions for tortious conduct by co-employees based on personal animosity or negligent medical care for insurance carriers.

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