

## EMPLOYER SUBROGATION RIGHTS

When an employee is injured on the job by the negligence of someone other than a co-worker, he has the right to seek recovery from that 3rd party. In addition, the injured employee has the right to seek compensation under the Workers Compensation Act. By operation of statute, the injured worker's employer also has the right to recover against the negligent 3rd party. Whatever amount the employer has paid in compensation, including medical benefits, to the injured employee under the Workers' Compensation Act may be recovered from the negligent 3rd party. This is called the right of subrogation. Subrogation operates to prevent a "double recovery" by an injured employee for a single injury. Receiving both Workers' Compensation benefits and obtaining a verdict or settlement for money damages for the same injury against a guilty 3rd party is considered an unfair "windfall" to the injured employee. Statutes were passed allowing employers to recover money they would not otherwise have paid to the employee but for the negligent actions of a 3rd party.

Subrogation simply means that one "stands in the shoes" of the injured employee. Employers are entitled to pursue, in court or through settlement negotiations, part or all of the Workers' Compensation benefits paid to the injured employee, from the negligent third party. This can be done in conjunction with the employee's case, or independently by the employer in a separate legal action. If, for whatever reason, the employee fails to pursue an action against a negligent 3rd party, the employer's subrogation rights allow it to initiate its own lawsuit against that 3rd party.

If the injured employee does elect to pursue an action against the negligent 3rd party on his own, a lien is automatically created on behalf of the employer. The lien amount is equal to the amount of compensation paid to the injured employee by the employer or its insurer. Any verdict or settlement amount the employee recovers from the negligent 3rd party must be reimbursed to the employer or its insurer, up to the amount of the lien. Any amount in excess of the lien may be retained by the injured employee.

If the injured employee and/or his attorney do not honor the employer or insurer's lien after being paid by the negligent third party, the employer has legal remedies against the injured employee, in-

cluding the option of taking an off-set against future benefits to be paid to the injured employee. That means the employer will be able to reduce future benefits by the amount claimed in its lien. If no future benefits are due, the employer may bring a civil action to enforce the lien against the injured employee or his attorney who recovered against the negligent 3rd party. Either way, the employer has the ability to prevent a double recovery by the injured employee and may recover part or all of the compensation benefits paid.

Until 2004 however, the full extent of those rights were not fully or clearly enunciated. State courts interpreted the statute, as then written, as imposing a "notice requirement" upon the employer in order to exercise the right of subrogation. As interpreted by the Virginia Supreme Court in *Yellow Freight Systems, Inc. v. Courtaulds Performance Films, Inc.* 266 Va. 57, 580 S.E.2d 812 (2003), an employer was required to file a pleading in the court in which the injured employee's lawsuit was pending prior to a judgment being rendered, or a dismissal order entered if the case was settled, notifying the parties of its intention to pursue recovery of compensation already paid or due the injured employee. This reading of the statute required a



very pro-active approach by the employer to protect its right of subrogation, and often resulted in employees obtaining a double recovery in contravention of the statute's original intent.

The Virginia General Assembly enacted legislation in 2004 to address this situation, amending §65.2-309 of the Virginia Code in such a manner so that the filing of a claim with an employer by an injured employee under the Workers Compensation Act automatically creates a lien on behalf of the employer on all amounts paid to the injured employee by a 3rd party tortfeasor, whether by settlement or verdict. Language in the statute specifically cited by the Yellow Freight decision

was deleted and replaced with a more forgiving construction, relaxing the necessity for employers to timely assert subrogation rights by intervening in the injured employees lawsuit in order to perfect a lien. Now, whether an employer asserts its lien rights before or after a verdict or settlement has been reached between an injured employee and a 3rd party, it still may recover some or all the amounts paid to the injured employee.

Any settlement reached by an employer directly with a 3rd party is subject to the approval of the injured employee and the Virginia Workers' Compensation Commission. The overriding policy of the Act is to allow the injured employee a single recovery for the injury,

and to reimburse an employer for expenses incurred as a result of 3rd party negligence.



*KALBAUGH, PFUND & MESSERSMITH, P.C. wishes to thank our clients and friends for allowing us the opportunity to earn your business. If you are not currently a client of our firm and would like more information on our progressive and aggressive approach to the practice of law, please call or e-mail Bill Pfund at 804-320-6300 or bill.pfund@kpmllaw.com. We also invite you to visit our website at [www.kpmllaw.com](http://www.kpmllaw.com) for valuable information and links.*

This publication is intended for general information only and is not intended to serve as legal advice. For legal questions the reader should consult legal counsel to determine how applicable law relates to specific facts or situations. While all articles are thoroughly researched, no warranty is given for their accuracy.

ADDRESS SERVICE REQUESTED

Serving Virginia, Washington, D.C., and Metro Maryland.

