JONES, SKELTON & HOCHULI, P.L.C.

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Our Reference Guide covers many areas of Arizona law, highlighting the most common issues associated with civil litigation. This resource is intended to provide a general overview of the subject matter, and is a supplement to the personal service we provide to our clients. It should not be relied upon as the sole source of information, and should not be substituted for competent professional legal advice for a particular situation. Should you have any questions, we encourage you to contact the authors listed at the end of each chapter or any JSH attorney.

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CHAPTER 14: THIRD PARTY RECOVERY IN WORKERS' COMPENSATION CASES

Overview

Under Arizona Workers' Compensation law, an injured worker who makes a claim for workers' compensation benefits may also pursue a claim against the alleged tortfeasor. A.R.S. § 23-1023; ***Moretto v. Samaritan Health Sys.***, 190 Ariz. 343, 347, 947 P.2d 917, 921 (Ct. App. 1997). If the injured worker pursues a third-party recovery, however, the workers' compensation carrier is entitled to a lien for the amount of benefits paid on the worker's behalf. A.R.S. § 23-1023(D). The workers' compensation carrier is entitled to the amount "actually collectable," or "the total recovery less the reasonable and necessary expenses, including attorney fees, actually expended in securing the recovery." A.R.S. § 23-1023(D).

In the event of the employee's death, the employee's dependents may pursue the claim. A.R.S. § 23-1023(A). An injured employee who elects to take workers' compensation benefits does not give up his right to sue the third party tortfeasor. ***Aitken v. Indus. Comm'n***, 183 Ariz. 387, 389–90, 904 P.2d 456, 458–59 (1995).

A workers' compensation insurance carrier or self-insured employer may, under the limited circumstances explained in this section, pursue a claim against the third-party tortfeasor who injured the employee. *See* A.R.S. § 23-1023(B). Additionally, as is also discussed later in this section, the workers' compensation carrier or self-insured employer has certain statutory lien rights against an injured employee's recovery from a third party tortfeasor. *See* A.R.S. § 23-1023(D).

ASSIGNMENT OF CLAIMS TO WORKERS' COMPENSATION PROVIDER

Unless an injured worker (or his eligible dependent) files a tort action against the third-party tortfeasor within one year of the industrial injury or death, any claims the injured party may have against the third-party tortfeasor are assigned to the workers' compensation provider pursuant to Arizona statute. *See* A.R.S. § 23-1023(B). The workers' compensation provider may sue the third-party tortfeasor, settle the claim, or do nothing. ***K.W. Dart Truck Co. v. Noble***, 116 Ariz. 9, 11, 567 P.2d 325, 327 (1977).

The effect of assignment is that the workers' compensation provider is a statutory plaintiff and a necessary party. At that point, the injured employee cannot sue the third-party tortfeasor because the action belongs to the assignee – the self-insured employer or workers' compensation insurance carrier. ***Hills v. Salt River Project Ass'n***, 144 Ariz. 421, 426, 698 P.2d 216, 221 (Ct. App. 1984). This outcome, however, is dependent on the law of the state where the employee receives compensation. For example, in ***Jackson v. Eagle KMC LLC***, an employee who worked for a

Nebraska trucking company received worker's compensation in Nebraska. He sued a truck driving training company that had trained the employee, driver, and owner of the truck in which the employee was injured during a training session in Arizona. 245 Ariz. 544, 545 ¶¶ 2–3, 431 P.3d 1197, 1198 (2019). The Arizona Supreme Court held that Nebraska law applied to the employee's personal injury claims because "[w]hen compensation has been paid[,] the law of the state of compensation should govern in third-party actions including the nature and extent of lien subrogation, and assignment rights." *Id.* at 546 ¶ 9, 431 P.3d at 1199. Further, because Nebraska did not have an automatic assignment statute, the employee still had standing to bring his claims. *Id.* at 547 ¶ 13, 431 P.3d at 1200.

Once the injured employee's claim is assigned to the workers' compensation provider, the provider has no duty to the injured employee regarding the claim. ***Hertel v. Home Ins. Co.***, 124 Ariz. 338, 340, 604 P.2d 269, 271 (Ct. App. 1979). The "whole" claim is assigned to the workers' compensation provider by operation of law and the employee has no legal interest in the claim after assignment or after the workers' compensation provider receives payment from the third party. *Id.*

The injured employee also cannot sue a fictitious defendant to attempt to delay the one-year statute of limitations. ***Meyer v. Kelsey-Hayes, Corp.***, 126 Ariz. 165, 166, 613 P.2d 628, 629 (Ct. App. 1980). The workers' compensation carrier or self-insured employer's statutory right of assignment, which comes into existence one year after the employee's injury, is unconditional; and an injured employee cannot delay the workers' compensation provider's right of action against the third party tortfeasor through procedural maneuvering. *See id.*

Pursuant to A.R.S. § 23-1023(B), a workers' compensation carrier or self-insured employer may reassign a third-party tort claim to the injured employee. The interest reassigned is the entire interest as it existed before assignment to the workers' compensation provider by operation of law. Thus, once the employee's claim is assigned to the workers' compensation provider by operation of law, the provider is free to pursue the third party tortfeasor or not, or to reassign the claim to the employee or not. ***State v. Superior Court (Garcia)***, 155 Ariz. 166, 169, 745 P.2d 614, 617 (Ct. App. 1987). For reassignment to be effective, the reassignment must be done expressly. ***Lavello v. Wilson***, 150 Ariz. 235, 240, 722 P.2d 962, 967 (Ct. App. 1985). Reassignment after the two-year Arizona statute of limitations for personal injuries is ineffective. ***Grim v. Anheuser-Busch, Inc.***, 154 Ariz. 66, 70–71, 740 P.2d 487, 491–92 (Ct. App. 1987).

WORKERS' COMPENSATION LIENS AND THEIR LIMITS

A workers' compensation carrier or self-insured employer does not have a lien against an injured worker's uninsured motorist recovery for a work-related injury. That is because the recovery is not from the third-party tortfeasor, as is required by the statute that creates the lien. ***State Farm Mut. Auto. Ins. Co. v. Karasek***, 22 Ariz. App. 87, 89, 523 P.2d 1324, 1326 (1974). A.R.S. § 23-1023(D) specifically provides for a lien only against those "other person[s]" whose negligence caused the injury. A workers' compensation lien is not enforceable against UM or UIM funds, even

when the Guaranty Fund has picked up coverage. ***Martinez v. State Workman's Comp. Ins. Fund***, 163 Ariz. 380, 382–84, 788 P.2d 113, 115–17 (Ct. App. 1990).

An employer or workers' compensation carrier has a statutory lien against a third party recovery only to the extent of compensation, medical, surgical, and hospital benefits paid by the carrier to the injured worker. ***EBI Cos./Orion Group v. Indus. Comm'n of Arizona***, 178 Ariz. 624, 626, 875 P.2d 857, 859 (Ct. App. 1994). However, this does not preclude parties to a settlement from specifying in the settlement agreement that a workers' compensation provider has a lien for a certain amount and that sums paid by the provider are in lieu of wage and medical compensation and benefits, or that benefits are being paid for a specific condition. *Id.*

Because the "recovery" to which the workers' compensation lien applies already takes into account the reasonable and necessary expenses incurred in securing such recovery, the workers' compensation carrier is not required by law to reduce its lien against the "recovery" under the "common fund doctrine." ***Boy v. Fremont Indem. Co.***, 154 Ariz. 334, 337, 742 P.2d 835, 838 (Ct. App. 1987). However, in some cases, it is to the workers' compensation carrier or self-insured employer's advantage to compromise its statutory lien; if the lien is compromised, the carrier or employer guarantees itself at least some recovery and avoids the risk of the injured worker receiving no damages at all at trial. *See id.*

A.R.S. § 23-1023 does not preclude the workers' compensation provider from having a lien on third-party tortfeasor proceeds if the injured employee's employer was also negligent. ***Stroud v. Dorr-Oliver, Inc.***, 112 Ariz. 403, 409, 542 P.2d 1102, 1108 (1975).

FUTURE CREDIT

In addition to a lien, a workers' compensation carrier or self-insured employer is entitled to a future credit on the net recovery of a third-party tort claim. ***Hartford v. Indus. Comm'n***, 178 Ariz. 106, 110, 870 P.2d 1202, 1206 (Ct. App. 1994). The future credit applies to workers' compensation benefits as well as medical, disability, and death benefits. *Id.*

A.R.S. § 23-1023(D) requires the workers' compensation carrier's or self-insured employer's written approval if the settlement between the injured employee and the third-party tortfeasor is "less than the compensation and medical, surgical and hospital benefits" provided by the workers' compensation provider. *See also* **Grijalva v. Ariz. State Compensation Fund**, 185 Ariz. 74, 76, 912 P.2d 1303, 1305 (1996). Even where a worker has requested but not received benefits because his or her claim for compensation was denied, he or she cannot settle without prior approval from the workers' compensation provider. ***Macaluso v. Indus. Comm'n***, 181 Ariz. 447, 448, 891 P.2d 914, 915 (Ct. App. 1994). A settlement without notice could result in forfeiture of workers' compensation benefits unless the claimant is able to establish that his settlement with the third party tortfeasor was reasonable. ***Bohn v. Indus. Comm'n***, 196 Ariz. 424, 427, ¶ 17, 999 P.2d 180, 183 (2000). Further, under ***Hartford*** the workers' compensation carrier is entitled to a future credit equal to the amount of the net settlement. 178 Ariz. at 110, 870 P.2d at 1206.

Consequently, the injured worker must exhaust the future credit before they can seek to re-open the workers' compensation claim for benefits.

RECOVERABLE MEDICAL EXPENSES

In ***Anderson v. Muniz***, 21 Ariz. App. 25, 515 P.2d 52 (Ct. App. 1973), the court of appeals addressed the amount of medical expenses a plaintiff can recover at trial against a third-party tortfeasor when a workers' compensation carrier or self-insured employer provides workers' compensation benefits. The plaintiff was injured while working and the workers' compensation provider paid his medical expenses at rates contractually agreed upon between it and the employee's medical providers—rates lower than those billed others. Plaintiff sued a negligent third party. At trial, the court ruled that the plaintiff's doctors could testify that they "ordinarily" would have charged more for their services than what they accepted from the workers' compensation provider. The court of appeals, however, held that the plaintiff could only recover the doctors' actual charges. *Id.* at 29, 515 P.2d at 56.

The court later distinguished *Anderson* in ***Lopez v. Safeway Stores, Inc***., 212 Ariz. 198, 129 P.3d 487 (Ct. App. 2006). Lopez slipped and fell while entering a Safeway store and sustained various injuries. She sued Safeway. Before trial, Safeway moved to prohibit Lopez from presenting evidence of the amounts Lopez's health care providers charged for their care, which far exceeded the amounts the providers actually accepted due to a contract with Lopez's insurance company. Citing *Anderson*, Safeway argued Lopez should only be able to claim the amount the health care providers actually accepted in full satisfaction of the services rendered. The court held that under the collateral source rule, the injured plaintiff could claim the full amount of the health care providers' billed charges, regardless of whether her insurance company contracted to pay them at lower rates. It distinguished *Anderson* as follows:

> There, the State Compensation Fund paid the plaintiff's healthcare providers the 'actual amount charged' by each of them. *Id*. at 28, 515 P.2d at 55. Thus, as Lopez points out, 'the [Anderson] decision stands for the proposition that a party cannot recover for medical expenses in excess of the amounts actually charged (i.e., billed) by healthcare providers,' because 'the amount billed in that case was identical to the amount paid by the compensation carrier.'
>
> Here, in contrast, the billing charges of Lopez's healthcare providers totaled almost $59,700, even though the providers accepted only $16,837 in full satisfaction of those charges based on reduced rates to which the providers had contractually agreed with Lopez's medical insurance carriers.

Id. at 202 ¶¶ 11–12, 129 P.3d at 491.

The court in ***Aitken v. Industrial Commission*** held that under A.R.S. § 23-1023(D) the workers' compensation carrier may assert a lien against a third-party recovery, "only to the extent that

the compensation benefits paid exceed the [non-party] employers' proportionate share of the total damages fixed by verdict in the [third-party] action." 183 Ariz. at 392, 904 P.2d at 461. Following *Aitken*, the court stated in ***Twin City Fire Insurance Company v. Leija***, 244 Ariz. 493, 494 ¶ 1, 422 P.3d 1033, 1034 (2018), that an injured employee who settles all of their third-party claims is not entitled to a post-settlement trial to determine the percentage of employer fault, solely to reduce or extinguish the insurance carrier's lien.

If you have questions regarding the information in this chapter, please contact the authors.

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