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Worker Compensation
Third Party Recovery Litigation
An Explanation of Attorney Fees

Executive Summary

In Wisconsin, if a worker comp insurer retains its own attorney to pursue recovery against a third party pursuant to Wis. Stats. §102.29, there is no need for it to enter into a separate fee agreement with its attorney. Rather, its attorney should be paid from the statutory "cost of collection" proceeds provided for in the Wisconsin Statutes. The "cost of collection" is automatically deducted by the court from the recovery and should be used to pay both the injured employee's attorney and the worker comp insurer attorney.

Due to potential conflicts of interest, the worker comp insurer should always retain its own counsel, and not rely on the injured employee's counsel for recovery. This is especially true since it should not cost the worker comp insurer any additional fee.

Introduction

In the State of Wisconsin worker compensation law is created and controlled by statute. The scope of the statute (Wis. Stats. ch. 102) includes a detailed procedure for the recovery of payments from liable third parties. It also includes express provisions for how the worker comp insurer's attorney is paid. If a worker comp insurer has a claim against a third party for payments made to an insured's injured employee, the insurer must understand the details of Wisconsin's law.

Third Party Litigation Procedure

While worker comp third party recovery usually is handled by an insurer's subrogation department, it is important to understand that the insurer's claim under Wis. Stats. §102.29 is not a subrogation claim. The insurer's right of recovery is not based on common law subrogation (in which the insurer "stands in the shoes" of the insured). Rather, the §102.29 right of recovery is created, and solely controlled, by Wis. Stats. §102.29. In the case of *Campion v. Montgomery Elevator Co.*, 172 Wis.2d 405 (Wis. App. 1992), the Wisconsin Court of Appeals explained, "A careful reading of sec. 102.29(1), Stats., reveals that the rights granted by the statute *are distinct from subrogation*. Section 102.29(1) provides for *a direct cause of action by an employer* against a third party."

In creating a direct cause of action for the worker comp insurer, Wis. Stats. §102.29 provides for the following:

- The worker comp insurer "has the same right" as the injured worker to pursue a claim against a third party.

- Even if the worker declines to pursue a claim, the worker comp insurer still has the right to pursue the entire claim (both what it paid plus the injured employee's pain and suffering/wrongful death claim).

- Both the worker comp insurer and the injured employee "shall have an equal voice in the prosecution of the claim." Disputes shall be resolved by the court.

Given these provisions, the attorney for the worker comp insurer and the attorney for the injured employee are required (some would say forced) to closely work together and coordinate their litigation strategies. It also is important to note that the worker comp insurer can pursue a recovery claim even if the injured worker does not want to.

Distribution of Settlement Proceeds

When a settlement with the third party is reached, the settlement is considered a single settlement of both the injured employee's claim and the worker comp insurer's claim. Wis. Stats. §102.29(1)(b) includes a formula for how the settlement proceeds are divided. It is critical for worker comp insurers to understand this formula:

- "The reasonable cost of collection" is deducted off the top of the settlement proceeds to pay ***both*** the injured employee's attorney and the worker comp insurer's attorney. While it is up to the court to decide what "the reasonable cost of collection" is, it almost always is interpreted by courts to mean a one-third contingent fee plus out-of-pocket costs.

- The remainder of the recovery (i.e., the total recovery minus the reasonable cost of collection) is divided as follows:
  - One-third to the injured employee;
  - The worker comp insurer received the balance, or is made whole, whichever is less; and
  - If any is left, it goes to the employee.

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Excluded Claims - Why Worker Comp Insurers Should Get Separate Counsel

At a casual glance, it may appear that there is little reason for a worker comp insurer to retain its own counsel. After all, its recovery is guaranteed by the statutory formula. However, a careful review of the law reveals why it is important for the worker comp insurer to not rely on the injured employee's attorney to represent its interest.

The statutory formula applies only to the claims being asserted under Wis. Stats. §102.29. It does not apply to all possible claims that plaintiffs could assert against a third party. For example, the formula does not apply to the following claims:

- A spouses' loss of consortium claim or post-death loss of society and companionship claim.
- An employer's claim against a third party for breach of contract.
- An employee's claim against a third party for any non-tort cause of action.

It is easy to imagine how a conflict of interest could exist when one attorney represents the injured employee, the spouse and the worker comp insurer. If the defendant pays a fixed amount for the resolution of all claims, that payment would have to be divided between the injured employee's tort claim (to which the §102.29 formula would then be applied) and, for example, the spouse's loss of consortium claim (which would be paid to the spouse directly, and not subject to the formula). The employee and spouse would want as much of the settlement as possible attributed to the loss of consortium claim because all of that money would go directly to them -- the formula would not apply and the worker comp insurer would not have a right to claim any of it.

Another potential conflict arises when the attorney decides what causes of action to assert. If the worker comp insurer can assert both tort and breach of contract claims, it may be advantageous for the insurer (but disadvantageous for the employee) to assert only a breach of contract claim. Because a breach of contract claim is not subject to the §102.29 formula, the injured employee cannot make a claim on any recovery by the worker comp insurer if the only cause of action being asserted is a breach of contract claim.

In order to avoid these potential conflicts, the worker comp insurer should always retain its own counsel who will represent only its interests without conflict. This is especially true since, as explained below, it should not cost the insurer any additional fee.

Attorney Fees - Paid From "Cost of Collection" Proceeds

In Wisconsin, by tradition, "the reasonable cost of collection" taken from the top of the recovery has been given to the injured employee's attorney for his or her fee. The worker comp insurer enters into a separate fee agreement with its attorney whereby its attorney is paid either on an hourly rate basis or receives a percentage of the recovery received by the worker comp insurer.

This arrangement results in an obvious windfall for the injured employee's attorney at the expense of the worker comp insurer. The injured employee's attorney gets paid one-third of the *entire* settlement even though his or her client is recovering only a portion of the settlement. Thus, the settlement proceeds are used to pay the employee's attorney one-third of his client's recovery and one-third of the worker comp insurer's recovery. Then part of the proceeds paid to the worker comp insurer must be used to pay the insurer's attorney.

This arrangement would make sense if the claim being asserted against the third party were a subrogation claim and the two plaintiffs were each pursuing their own common law claims. In such a case, common law prevails and each plaintiff is responsible for their own attorney fees. The employee's attorney would not receive any windfall, as his or her fee would be based only on the employee's recovery.

However, as explained above, a §102.29 worker comp third party liability lawsuit is not a subrogation action and is not controlled by common law. In the case of *Martinez. v. Ashland Oil, Inc.*, 132 Wis.2d 11 (Wis. App. 1986), the Wisconsin Court of appeals held, "We conclude that the trial court properly ruled that sec. 102.29(1) renders common-law subrogation principles inapplicable. Rather, sec. 102.29(1), Stats., is a legislatively created exception to common-law rules of subrogation. The legislature has considered the equities and has balanced the competing interests. We will not interfere with the distribution scheme set forth in sec. 102.29(1) by engrafting common-law principles upon the legislative scheme."

The traditional practice of worker comp insurers entering into a separate agreement to pay attorney fees results in worker comp insurers double paying for attorney fees and is not consistent with the clear statutory language. Wis. Stats. §102.29(1)(c) states:

> If both the employee . . . and the . . . compensation insurer . . . join in the pressing of said claim and are represented by counsel, ***the attorney fees allowed as a part of the costs of collection shall be . . . divided between the attorneys for those parties*** as directed by the court or by the department.

The language cannot be more clear: both attorneys, including the worker comp insurer attorney, are to be paid from the "cost of collection" deducted off the top of the recovery. There is no reason, either in the statute or in the case law interpreting it, why the "cost of collection" should be given entirely to the injured employee's attorney while the worker comp insurer then has to pay a second fee (either contingent or hourly) to its own attorney.

This interpretation of Wis. Stats. §102.29(1)(c) was confirmed by the Wisconsin Supreme Court in the case of *Diedrick v. Hartford Accident & Indemnity Co.*, 62 Wis.2d 759 (Wis. 1974). In that case, the injured employee's attorney objected to the trial court apportioning some of the "cost of collection" to the worker comp insurer's attorney. The Wisconsin Supreme Court held:

> The statute specifically requires the court approving the settlement to determine the attorneys' fees to be allowed where both the injured party and the compensation carrier joined in bringing the claim to court, and then requires the trial court to divide the fees allowed "between such attorneys."
>
> The statute does not provide for payments to the carrier's counsel for services performed either at the request of or on behalf of the employee. It provides for his compensation as a cost of collection by a reasonable fee based on services performed for and on behalf of the carrier.

Conclusion

The bottom line, take-away message is this: if a worker comp insurer is paying its attorney separately from what is provided in the statute, it is paying too much. The worker comp insurer attorney should be willing to accept files on a fee agreement that provides he or she will be paid only from the "cost of recovery" provided for in the statute.