

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
MARCH 2014 AT A GLANCE
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SUBROGATION

- Pennsylvania law and Section 319 of the Act applied to the employer's right to subrogation where the claimant was a Pennsylvania resident and received workers compensation, including moneys paid pursuant to a subsequent Compromise and Release Agreement entered into pursuant to the Pa. WC Act, although the claimant's motor vehicle accident occurred in Delaware and the claimant's third party action was litigated in Delaware.

Pennsylvania was the state with the most significant contacts to the workers' compensation claim because it was the state that regulated the employer's insurance policy under which the employer made workers' compensation payments pursuant the Pa. Act.

This is consistent with case law that states in choice of law cases where a claimant has received workers' compensation, the most significant, and likely determinative, contact is the WC law the parties utilized.

Although the motor vehicle accident occurred in Delaware, the underlying controversy was not about the motor vehicle accident itself but, rather, the dispute was over the nature of Employer's right to recapture the WC monies it paid to Claimant under the Pa. Act.

Claimant choose to avail herself of the Act, Employer has paid her benefits pursuant to the Act, and up until this point all of the litigation concerning Claimant's receipt of WC benefits has been in Pennsylvania and pursuant to the Act.

- In the context of a subrogation lien, the burden is on Claimant to demonstrate that alleged medical payments were not for care rendered to Claimant for the work injury where Employer, upon asserting its subrogation lien, includes payments it asserts were for medical bills for care rendered to Claimant for the work injury.
- An Employer's list of payments, which sets forth each payment in detail as to date paid; payee name; amount paid; and type of payment, such as attorney's fees, ambulance fees, hospital bills, physical therapy bills, etc., constitutes such relevant evidence as a reasonable person might accept as adequate to support the

conclusion, i.e., substantial evidence, that Employer paid these amounts in association with Claimant's WC claim.

- Pursuant to the plain language of Section 319, subrogation is automatic and by its terms, admits no express exceptions, equitable or otherwise. Generally, the right to subrogation is statutorily absolute and can be abrogated only by choice. To establish its right to subrogation, the employer must demonstrate that it was compelled to make payments due to the negligence of a third party and that the fund against which the employer seeks subrogation was for the same injury for which the employer is liable under the Act.

Thus, if Employer has satisfied its burden of proving its entitlement to subrogation and the amount of its lien, equity will not act to limit those rights.

Young v. WCAB (Chubb Corporation and Federal Insurance Company), No. 1432 C.D. 2013 (Decision by Judge Cohn Jubelirer, March 10, 2014) 3/14

IRE

- Pursuant to Section 306(a.2) of the Act, the physician performing IREs must be "active in clinical practice for at least twenty hours per week". Because Section 306(a.2)(1) requires that the IRE be by a physician ... who is active in clinical practice for at least twenty hours per week, an IRE performed by a physician who does not have a "clinical practice" cannot support a modification of a claimant's disability status.

Therefore IRE performed by physician, though chosen and certified by the Bureau to perform IRE's pursuant to the employer's timely request, was invalid where the physician's practice, as of the date of the IRE, solely consisted workers' compensation independent medical examinations, workers' compensation IREs, physical examinations for certification and qualification requirements, utilization reviews and peer reviews. It was not relevant that the Physician maintained an active clinical practice of 20 hours per week when she initially was approved by the Bureau as a certified IRE physician because she no longer maintained an active clinical practice of at least 20 hours per week when the IRE was performed.

- Recognizing that the invalidity of the IRE was not caused by Employer, Employer could therefore be entitled to obtain a new IRE nunc pro tunc, if the invalidation

of IRE deprived it of automatic relief under Section 306(a.2) (1) or otherwise prevented it from obtaining the same relief with a new RE.

- Though the Act does not define “Clinical practice” the Bureau has addressed this issue and defined the term “active in clinical practice” in its impairment rating regulations. Bureau Regulation 123.103 provides that “for the purposes of this subchapter, the phrase ‘active in clinical practice’ means the act of providing preventive care and the evaluation, treatment and management of medical conditions of patients on an ongoing basis.

The Regulations language, “preventive care and the evaluation, treatment and management of medical conditions of patients,” which is both conjunctive and references patients as an essential aspect of the practice, requires that the physician’s work involve some connection to the care or treatment of patients in order to constitute a “clinical practice.”

Clinical Practice mandates that the physician’s practice relate to patient treatment care. This broad requirement may be satisfied by treatment or management of injuries as a panel physician hired by the patient’s employer or workers’ compensation insurer. Evaluation or diagnosis of patients for purposes of recommending or referring for medical treatment by other physicians can likewise constitute clinical practice because it is a part of the treatment and care of patients.

Verizon Pennsylvania Inc., v. WCAB (Ketterer), No. 1188 C.D. 2013 (Decision by Judge Colins, March 12, 2014) 3/14