

COMP-lications

By John T. Densberger

While all states differ in their attitude towards workers' compensation liens, these liens can produce complications crossing the finish line in third-party litigation.

Dealing with Workers' Compensation Liens and Third-Party Litigation Claims

Bill is completing his route for ABC Enterprises. He does not slow down and does not get over as Yvonne, driving for XYZ Logistics, merges onto the highway. As a result of his actions of not getting over and not slowing down, Bill collides with Yvonne's truck and trailer causing an accident.

Following the accident, all pertinent steps were followed, including exchange of information, police report preparation, and notification of the accident to both ABC Enterprises and XYZ Logistics.

Yvonne has been receiving medical treatment through workers' compensation and being paid for her lost time since the accident.

Yvonne subsequently filed a lawsuit against Bill and ABC Enterprises seeking recovery of damages as a result of the accident allegedly caused by Bill. Insurance coverage is not an issue for the insurance company insuring ABC Enterprises or the workers' compensation carrier of XYZ Logistics.

There is now an issue with the workers' compensation lien in Yvonne's lawsuit against ABC Enterprises and Bill.

This article will investigate a workers' compensation carrier's obligations to recover any subrogation interests in a third-party liability action. This includes a duty to intervene in the third-party lawsuit, whether an employee/plaintiff has an obligation to provide notice to the employer's

workers' compensation carrier of the third-party lawsuit (either settlement or filing of lawsuit), and the impact of the comparative fault theory on the workers' compensation carrier's subrogation recovery, if any. The focus of this article will be split among the states of Iowa, Missouri, and Nebraska. Each state represents a different comparative fault theory, with Iowa being 51% modified, Missouri being pure comparative, and Nebraska being 50% modified.

Duty of the Workers' Compensation Carrier and Employer to Intervene in a Third-Party Lawsuit.

Yvonne has filed a lawsuit in Polk County, Iowa, Jackson County, Missouri, and Douglas County, Nebraska. For each state, presume the accident took place in that state and is a separate and distinct accident from the lawsuits filed in the other states.

Iowa

Iowa workers' compensation law is codified in multiple chapters under the Iowa Code, however, the main chapter is Iowa Code Chapter 85. I.C.A. §85.22 allows an injured worker, or their dependent in the case of death, to seek compensation from the employer through workers' compensation and maintain an action against a third-party tortfeasor for damages. When Yvonne initiates her action against ABC Enterprises in Polk County, Iowa, a copy of the original notice must be served upon



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XYZ Logistics by Yvonne not less than ten (10) days before the trial of the case, however, failure to give such notice shall not prejudice XYZ Logistics' rights of subrogation. Subsection 1 provides XYZ Logistics "shall be indemnified out of the recovery of damages to the extent payment was made, with interest, except for attorney's fees as may be allowed by the District Court." *Id.* This also establishes a lien for XYZ Logistics against the recovery and judgment for compensation for which the employer or insurer is liable. XYZ Logistics must file a Notice of Lien in the Polk County Clerk of the Court's office within 30 days after receiving notice of Yvonne's lawsuit against ABC Enterprises in order to preserve its lien. XYZ Logistics is given a right to intervene under Iowa Code §85.22 and Iowa Rule of Civil Procedure Rule 75. *Daniels v. Hi-Way Truck Equipment, Inc.*, 505N.W.2d 485, 487-88 (Iowa 1993). XYZ Logistics is not, however, given a right to have active participation at trial. The *Daniels'* Court was very clear, the right to intervene in a lawsuit and the right to actively participate in a trial are separate issues and the primary right to control litigation always lies with the injured party.

The only instance in which XYZ Logistics would be able to participate in a trial of the third-party claim would be if there were an inability or unwillingness of Yvonne to adequately pursue the entire claim. Otherwise, XYZ Logistics' workers' compensation carrier's role is limited to seeking satisfaction of its subrogation interest from the sums recovered through the efforts of Yvonne. *Krapfel v. Farm Bureau Mutual Insurance Co.*, 548N.W.2d 877, 880 (Iowa 1996).

Even without intervention, XYZ Logistics' subrogation interests remain intact as long as Notice of Lien has been filed with the Clerk of the Court within 30 days of receiving notice of the lawsuit from Yvonne. Iowa Code §85.22(1).

Missouri

Regarding the lawsuit in Jackson County, Missouri, XYZ Logistics is provided the right to subrogation under MO. St. §287.150. This section of the Workers' Compensation Act does not confer on XYZ Logistics an unconditional right of intervention in the claim Yvonne has against

ABC Enterprises. *Kinney v. Schneider Nat. Carriers, Inc.*, 200 S.W.3d 607, 610 (MO CT App., WD 2006). Without an unconditional right to intervention, if XYZ Logistics wants to intervene, it must prove it has an entitlement to intervention under Missouri Rule 52.12(a)(2), by satisfying three (3) required elements:

1. They must show an "interest" in the subject of the action in which they attempt to intervene;
2. Show that absent intervention its ability to protect its interests will be impeded as a practical matter; and
3. It must show its interest is not adequately represented by the existing parties.

It would be easy to prove an interest in the subject of the action between Yvonne and ABC Enterprises due to the subrogation interests provided to XYZ Logistics under §287.150.1. However, oftentimes, attempts to intervene are thwarted by an ability of the intervener to prove their interest would be impaired or impeded, and they would not be adequately represented by the existing parties. This is a result of employers in Missouri, who have paid workers' compensation benefits to an injured employee, having multiple options available to them to recover benefits from a third-party tortfeasor. They are not limited to intervention in the third-party lawsuit to recover.

Missouri Courts have further held a workers' compensation insurance carrier may seek to intervene in an employee's lawsuit against a third-party tortfeasor, however, they have "no duty to intervene, and do not waive their right to reimbursement or subrogation by failing to seek to intervene." *Kinney*, 200 S.W.3d at 612 (citing *Doss v. Howell-Oregon Electric Cooperative, Inc.*, 158 S.W.3d 778, 783 (Mo. App. S.D. 2005)).

Without intervention, XYZ Logistics' lien is still protected. Under Missouri law, an employee who sues and recovers damages from a third-party tortfeasor for injuries to the employee holds the amount due to the employer in trust, so as to ensure an employer's right of subrogation is protected pursuant to §287.150. *O'Hanlon Reports, Inc. v. Needles*, 360 S.W.2d 382, 386 (Mo. App. E.D. 1962).

Nebraska

XYZ Logistics is provided the right to subrogation in a third-party claim when a third person is liable for the injury of the employee. Neb. Rev. Stat. §48-118. No statute or case law requires XYZ Logistics to intervene in the third-party claim of Yvonne against ABC Enterprises, however, before bringing her claim against ABC Enterprises, Yvonne must give 30 days' notice to XYZ Logistics of the opportunity to join in the claim or action and be represented by counsel. Neb. Rev. Stat. §48-118.01. Whether XYZ Logistics joins in at the time the claim is filed or files intervention at some point after 30 days' notice, "each party shall have an equal voice in the claim and the prosecution of such suit." *Id.* Any dispute arising between the parties will be decided by the Court before which the case is pending. For XYZ Logistics to proceed with intervention, it must follow the procedures outlined in Neb. Rev. Stat. §25-328, which requires intervention be sought prior to trial commencing.

The right to intervention and the need to intervene by a workers' compensation insurer is state and case dependent.

Does Yvonne Have an Obligation to Provide XYZ Logistics Notice of Her Third-Party Claim Against ABC Enterprises?

Iowa

As noted above, Iowa Code §85.22 provides XYZ Logistics with a subrogation interest in Yvonne's claim against ABC Enterprises. It is clear from Iowa Code §85.22 when an injured employee brings an action against a third party a copy of the Original Notice and Petition shall be served upon the employer by the plaintiff not less than ten (10) days before trial. In this case, failure of Yvonne to provide original notice to XYZ Logistics does not prejudice XYZ Logistics' right to subrogation. It is then XYZ Logistics' obligation to preserve its lien via filing a Notice of Lien in the office of the Clerk of the Court in Polk County, within 30 days of receiving notice from Yvonne.

Additionally, any settlement between Yvonne and ABC Enterprises, or XYZ Logistics and ABC Enterprises, must be with the written consent of the other party. For example, Yvonne has reached a settle-



ment for her claims against ABC Enterprises for \$400,000.00, she must then obtain consent of XYZ Logistics for the settlement to become effective or seek written approval of the settlement by the Workers' Compensation Commissioner. Iowa Code §85.22(3).

Missouri

In Missouri, Yvonne is not required to provide notice to XYZ Logistics regarding her third-party claim. Yvonne is entitled to reach a settlement with ABC Enterprises or take her claim to trial without providing applicable notice to XYZ Logistics. However, if Yvonne settles her claim with ABC Enterprises for a sum less than the workers' compensation benefits paid by XYZ Logistics, this settlement does not eliminate XYZ Logistics' right of subrogation against ABC Enterprises, if the amount of the settlement is inadequate and constitutes a fraud on the employer. *O'Hanlon Reports, Inc.*, 360 S.W.2d at 385.

Missouri law provides extensive protections for an employer such as XYZ Logistics', subrogation rights against a third-party tortfeasor, such as ABC Enterprises. Yvonne is required to hold the amount to XYZ Logistics in trust to ensure

XYZ Logistics' right of subrogation is protected pursuant to MO. Stat. §287.150, if she sues and recovers damages from ABC Enterprises either via trial judgment or settlement. *Id.* at 386.

Nebraska

Under Neb. Rev. Stat. §48-118, specific notice to XYZ Logistics is not required of Yvonne. However, if and when Yvonne brings suit against ABC Enterprises, XYZ Logistics must be made a party to the lawsuit for the purpose of reimbursement of any compensation paid to Yvonne. Neb. Rev. Stat. §48-118.

With this in mind, Yvonne has multiple options. She can include XYZ Logistics as a plaintiff to the lawsuit against ABC Enterprises or add them as a defendant with ABC Enterprises. The sole requirement is for XYZ Logistics to have actual knowledge of the lawsuit in which the third-party claim was asserted. *Austin v. Scharp*, 258 Neb. 410, 417, 604 N.W.2d 807, 812 (1999).

The notification requirement can be waived in writing or waiver may be applied due to unequivocal conduct. The Nebraska Supreme Court has held an unequivocal waiver of notice occurs where the employer has joined as a party to determine the sub-

rogation right in an action commenced by the compensated employee against a third party and the employer entered a voluntary appearance in that action. *Id.* Thus, if, and when, XYZ Logistics files an Answer to Yvonne's Petition or provides Yvonne with written notification of its decision to not join in prosecution, waiver of the notice provision is established.

How Are Workers' Compensation Liens Established and Does the Comparative Fault Theory in Each State Impact Recovery?

Iowa

Iowa law provides: contributory fault shall not bar recovery in any action unless the claimant bears a greater percentage of fault than the combined percentage of fault attributed to all defendants in the case, including third-party defendants and persons who have been released from the claim. Iowa Code §668.3. Under this rule, any damages allowed to the claimant shall be diminished in proportion to the amount of fault attributable to her. *Id.* This is generally referred to as a 51% modified state. Yvonne would be able to recover damages if her percentage of fault does not exceed 51%.

If her fault exceeds 51%, she is entitled to no damages from the Defendants.

Since compensation has been paid by XYZ Logistics to Yvonne, XYZ Logistics, or its insurer, shall be indemnified out of the recovery of damages to the extent of the payment made, with legal interest, except for attorney's fees as may be allowed by the District Court. Iowa Code §85.22(1). This subsection allows for XYZ Logistics, or its insurer, to seek full reimbursement of the amounts paid in indemnity and medical benefits acquired.

Yvonne would be required to satisfy this lien whether following a judgment by a jury or settlement with ABC Enterprises. As noted above, XYZ Logistics is also entitled to judicial interest as outlined in Iowa Code §535.3.

XYZ Logistics can seek full recovery of its lien, less any attorney's fees available to Yvonne's counsel, pursuant to any jury finding or settlement. The statutes governing workers' compensation subrogation do not provide for a reduction in the lien should Yvonne be found partially at fault for the accident. If Yvonne is found to be 51% or more at fault for the accident, she will not recover any damages and there would be no damages from which XYZ Logistics would have a lien.

Missouri

In 1983, Missouri adopted a pure comparative fault theory of recovery. Meaning, Yvonne can recover damages from ABC Enterprises following a trial even if a jury finds her to be 99% at fault in the accident. The amount of damages owed would then be reduced by the percentage of fault assigned to Yvonne. In this example, she would be entitled to 1% of the damages found by the jury if she was assessed to be 99% at fault.

MO. Stat. §287.150.3 establishes how any outcome of a third-party claim, either via settlement or jury verdict, shall be apportioned to the claimant and the employer if applicable. This section typically requires three (3) steps to be completed to determine the amount of recovery for the workers' compensation lien. The first step is to calculate Yvonne's net recovery:

Gross recovery (GR) - attorney's fees (AF) - expenses (E) = net recovery (NR).

After establishing this net recovery number, the second step is to determine the ratio contemplated in the statute.

This is XYZ Logistics' payment (EP) / total amount recovered OR total damages (T) = ratio (R).

The final step is to apply the ratio to the net recovery established in Step 1 to determine a subrogation amount, thus $NR \times R =$ subrogation recovery amount.

Use of this equation can be seen in *Kerperien v. Lumberman's Mut. Cas. Co.* as there was a dispute with the proper ratio determined by step 2 of the equation. Specifically, the disagreement between the parties was the use of "total damages" because there had been a finding of comparative fault at trial by the jury. *Kerperien v. Lumberman's Mut. Cas. Co.*, 100 S.P.3d 778 (MO.S.C. 2003). In *Kerperien*, Plaintiff filed a negligence action against a third party whose machinery had caused injury to her. This claim was tried and given to the jury for deliberation. The jury awarded damages of \$2,500,000.00 and found the third party's negligence was 75% and Plaintiff's was 25%. The Judge overseeing the case entered a judgment against the defendant for \$1,875,000.00, or 75% of the original jury award. Post-trial motions were filed by the third-party tortfeasor and while those motions were pending, Plaintiff and the third-party tortfeasor reached a settlement of \$1,175,000.00 in full settlement of the claim. It was determined Plaintiff paid attorney's fees of \$470,000.00 and expenses of \$31,505.80. *Id* at 779. In this case, Plaintiff's employer had paid a total of \$116,119.53 in workers' compensation benefits. *Id*.

As noted above, the main point of contention in determining the workers' compensation subrogation interests, was the difference between the total amount recovered or total damages in step 2. The parties agreed the "total damages" was equivalent to \$2,500,000.00 and the "total amount recovered" was equivalent to \$1,175,000.00. The ultimate question was which figure was applied to establish the ratio. The *Kerperien* Court found §287.150 addressed only two situations: where an amount is recovered with finding of comparative fault and where an amount is recovered without finding of comparative fault. *Id* at 781. The Court did not find itself in a position

to rewrite the statute to provide for post-verdict settlements after a determination of comparative fault, when the legislature likely did not contemplate the same. *Id*. The workers' compensation employer in *Kerperien* was attempting to use the total amount recovered to increase its percentage of recovery in the full amount, while the appropriate number to input in the total damages section was the total damages determined by the trier fact or \$2,500,000.00.

The *Kerperien* case provides ample support for finding of comparative fault having an impact on the amount recovered in subrogation by XYZ Logistics.

Nebraska

Nebraska is a 50% modified recovery state. Under Neb. Rev. Stat. §25-21,185.09, any contributory negligence chargeable to a claimant shall diminish proportionately the amount awarded as damages for an injury but shall not bar recovery, except if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought. If this is the case, the claimant shall be totally barred from recovery. Neb. Rev. Stat. §25-21,185.09.

It is important to note, in Nebraska under Neb. Rev. Stat. §48-118.04, a settlement of a third-party claim is void unless it is agreed upon in writing by the employee and the workers' compensation insurer of the employer or, in the absence of such agreement, the Court before which the action is pending determines that the settlement offer is fair and reasonable considering liability, damages, and ability of the third person and his or her liability insurance carrier to satisfy any judgment. Distribution of settlement proceeds, if not agreed upon by the employee and the workers' compensation insurer, or following any judgment issued by a jury or the Court, is determined by the Court upon application, and shall order a fair and equitable distribution of the proceeds of any judgment or settlement. Neb. Rev. Stat. §48-118.04. Prior to 1984, an employer was entitled to a dollar-for-dollar recovery of its subrogation interests, however, the Nebraska Legislature changed the law to what it is today, as a "fair and equitable distribution." The Nebraska Supreme Court has

held multiple times statutory subrogation is applicable and rejected arguments the statute has adopted pure, equitable subrogation. Meaning, the Supreme Court has declined to read into the statute requirement an employee be “made whole,” before any distribution of funds can be made to the employer’s insurer. In *Turco v. Schuning*, the Court explained while the language now set forth in §48-118.04 provided for a fair and equitable distribution, it did not adopt the “made whole” doctrine or adopt any other specific rule for determining how to fairly and equitably distribute the settlement. *Burns v. Nielsen*, 273 Neb. 724, 731, 732 N.W.2d 460, 468 (2007). The

Burns Court further held the phrase “fair and equitable distribution,” as used in §48-118.04 was not intended to permit subrogation interests of an employer or workers’ compensation carrier be subject to equitable defenses. *Id.* The Court explained §48-118 provides: the employer shall be subrogated to the right of the employee against such third persons. *Id.*

As such, any settlement or judgment in Nebraska will need to be either agreed upon for distribution between the workers’ compensation carrier and the employee or filed in the District Court where the claim was tried, or was to be tried, for determi-

nation of a “fair and equitable distribution” by the District Court Judge. While all states differ in their attitude towards workers’ compensation liens, these liens can produce complications crossing the finish line in third-party litigation. It is important to note both the injured party and workers’ compensation carrier have obligations to each other and outside of the workers’ compensation claim. The above outlines differences in the states of Iowa, Missouri, and Nebraska which can be informative as to how these liens are handled throughout the nation.



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