

## WORKERS' COMPENSATION SUBROGATION RECOVERY AVAILABLE UP TO SIX YEARS IN CERTAIN INSTANCES



By: Mick L. Proxmire

The Ohio Supreme Court recently issued an opinion in *Ohio BWC v. McKinley* confirming that the statute of limitations for the statutory subrogee (the Ohio Bureau of Workers' Compensation or a self-insured employer) is six years. This decision has been hailed as well needed relief to employers and the Bureau from facts that have, unfortunately, occurred too often.

Mr. McKinley was injured in the course of his employment and was granted an allowed workers' compensation claim. He also filed an action against the third party for his injuries. Mr. McKinley later dismissed his third party action. He did, however, provide notice to the Bureau and the Attorney General that he was in settlement negotiations with the third party. Settlement was ultimately achieved without specifically taking into account the subrogated right of the Bureau. The Bureau later brought an action to seek their subrogation recovery. The third party moved to have the case dismissed for failure to bring the claim within the two year statute of limitations for personal injury actions, claiming that the Bureau's right was derivative of Mr. McKinley's rights and, thus, needed to be brought within two years of the injury.

Ohio Revised Code §4123.931 creates "a right of recovery" in favor of the Bureau or a self insured employer against a third party. The constitutionality of this statute had been challenged previously and was held to be constitutional in 2008. However, the subrogation statute does not specifically state the statute of limitations for an action to be brought by the claimant against the third party nor does it state the statute of limitations related to the Bureau's or a self insured employer's assertion of its right against the third party and/or the injured worker. Typically, the statute of limitations for pursuing a tort action by the claimant is two years. Whether the Bureau or the self insured employer, as the statutory subrogee, should have a statute of limitations greater than that of the injured worker was the issue before the *McKinley* court.

In rejecting the contention that the Bureau's right of recovery was derivative of the injured worker's right, and governed by the normal two year statute of limitations, the court found that the subrogation statute created "an independent right of recovery" for the statutory subrogee that was not a typical derivative subrogation recovery. Instead, because the right of recovery was statutorily created the court reasoned that Revised Code §2305.07 applied to workers' compensation subrogation claims and, thus, a six year statute of limitations existed for the Bureau and any self insured employer similarly situated.

The subrogation statute requires the injured worker to place the statutory subrogee on notice of all potential third parties to allow the statutory subrogee to assert its rights in a timely fashion. It is certainly advisable for the statutory subrogee to assert these rights against all parties within two years of the injury and to actively participate in settlement negotiations or any court action should one be filed. However, with the Ohio Supreme Court's decision in *McKinley* the statutory subrogee is now able to exercise their rights to pursue recovery up to six years after the injury should they be excluded from the resolution of the case between the injured worker and the third party.

In addition to the expanded statute of limitations, this decision is significant for two other reasons as well. First, the decision makes clear that the statutory subrogee may bring an action to jointly and severally recover their workers compensation costs from the injured worker and the third party if they are omitted from the settlement agreement or a jury award. Second, and in concert with the above, while the subrogation statute allows for a formula that allocates a proportion of a settlement or jury award to each party when the statutory subrogee is an included participant in the case, this case illustrates how if the statutory subrogee is omitted they then have the right to pursue the full amount of their subrogation interest.

Once thought of as an easy means to recover paid claim costs, *McKinley* demonstrates that Ohio's workers' compensation subrogation statute and the litigation spawned by it remains fraught with pitfalls for the stakeholder. What remains to be decided is whether *McKinley* can be expanded to allow the statutory subrogee to resort to a six year statute of limitations when the injured worker chooses to do nothing with their right of recovery against the third party. For our thoughts on the handling of such a scenario, or to further discuss this emerging area of the law, please feel free to contact any one of our Workers' Compensation Practice Group Members.

### Columbus

Mick L. Proxmire

[mproxmire@reminger.com](mailto:mproxmire@reminger.com)

65 East State St., 4<sup>th</sup> Floor  
Capitol Square  
Columbus, OH 43215  
Phone: 614-232-2629  
Fax: 614-232-2410

### Cleveland

Charles P. Alusheff

[calusheff@reminger.com](mailto:calusheff@reminger.com)

101 Prospect Ave. W.  
1400 Midland Bldg.  
Cleveland, OH 44115  
Phone: 216-430-2130  
Fax: 216-687-1841

### Cincinnati

Shelby M. McMillan

[smcmillan@reminger.com](mailto:smcmillan@reminger.com)

525 Vine Street,  
Suite 1700  
Cincinnati, OH 45202  
Phone: 513-455-4036  
Fax: 513-721-2553

### Toledo

Philip S. Heebsh

[pheebsh@reminger.com](mailto:pheebsh@reminger.com)

One SeaGate,  
Suite 1600  
Toledo, OH 43604  
Phone: 419-245-3752  
Fax: 419-243-7830

### Ft. Mitchell, KY

Mark R. Bush

[mbush@reminger.com](mailto:mbush@reminger.com)

250 Grandview Dr.,  
Ste. 550  
Ft. Mitchell, KY 41017  
Phone: 859-426-3661  
Fax: 859-283-6074

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