

## SUBROGATION: WHAT IS FAIR AND EQUITABLE?

BY DALLAS D. JONES



Dallas D. Jones

When an employee is injured on the job, he may have several possible sources of recovery. Of course, workers' compensation benefits may be available. But if the employee was injured on the job at the hands of a third party, that negligent party may also be liable. When the third-party case is settled, or a verdict is entered, both the employee and the compensation carrier, because of the carrier's subrogation claim, have an interest in the proceeds. But how is the money divided between the employee and the carrier? In *Turco v. Schuning*, we had the opportunity to present the issue to the Nebraska Supreme Court, and it provided some guidance in determining how to divide a judgment or settlement.

Neb. Rev. Stat. § 48-118.04 provides that in the absence of any agreement between the employee and the employer's insurer, the court must "order a fair and equitable distribution of the proceeds of any judgment or settlement." Unfortunately, the statute does not provide any guidance on what is a "fair and equitable distribution." In *Turco*, the employee argued that in interpreting § 48-118.04, a court should look to the principles of equitable subrogation that are often applied in cases of third-party tort settlements when a health insurer claims a subrogation interest. In those instances, courts apply the so-called "made whole" doctrine. In the leading case of *Blue Cross and Blue Shield v. Dailey*, the Court held that when a person is injured by the negligence of another, the injured person's health insurer has no right to any settlement proceeds until the injured person is fully compensated for his or her injuries, that is, "made whole." The insurer has a claim only to such funds that exceed the amount needed to fully compensate the injured person.

It's easy to see why this view would appeal to injured employees in a workers' compensation context. The trial court in *Turco* agreed with the employee's argument, finding that because the

employee suffered damages in excess of the settlement amount, he was entitled to 100 percent of the settlement proceeds. The workers' compensation carrier was entitled to none of the settlement proceeds.

On appeal, we argued that § 48-118.04 makes no mention of the "made whole" doctrine, only the standard of "fair and equitable distribution." The Nebraska Supreme Court agreed, holding: "Section 48-118 does not mandate that the employee be 'made whole.' Instead, it requires a fair and equitable distribution to be determined by the trial court under the facts of each case." Notably, the Court also held that "[t]he distribution is left to the [trial] court's discretion."

The Court essentially held the statute means exactly what it says, and a district court is free to divide settlement proceeds from a third party between the employee and the employer's insurer in whatever manner it feels is most conducive to a fair and equitable distribution. Despite our request that it do so, the Court refused to provide guidance as to what standards may be applied by a district court judge making such a distribution. The Court's decision indicates that so long as a trial court does not apply the "made whole" doctrine, its division of settlement proceeds will be reviewed using an abuse of discretion standard. This leaves the door open for workers' compensation carriers to argue that a "fair and equitable distribution" requires each party to receive from the total recovery a proportionate share of the tort proceeds based on the net losses suffered by each party.

For employers and workers' compensation carriers, the *Turco* ruling is a positive development. It rejects the claim that the compensation carrier receive nothing until the employee is made whole. For tort carriers, perhaps the most significant impact of the decision will be to give more leverage to workers' compensation carriers in three-way settlement negotiations. At this point, it is not possible to say what standards may be used

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by a district judge to divide a settlement, since what is fair and equitable will vary from case to case and from judge to judge.

For workers' compensation carriers and self-insured employers it would be a good idea to:

- Give notice to tort carriers of your subrogation interest and right to reimbursement when one of these situations arises.
- Always consider making a proportionality argument when trying to persuade the judge what a fair and equitable distribution would be. Though the Nebraska Supreme Court in *Turco* did not adopt proportionality as a uniform standard for dividing settlement proceeds, it did not hold that a district court judge could not consider such arguments in reaching a conclusion.

- Bring to the trial court's attention all sources of recovery available to the employee, including uninsured, underinsurance, short-term or long-term disability, social security disability, etc. The issue is what is fair and equitable and, arguably, receipt of such benefits should be relevant to that determination.
- Be mindful of valid claims by employees for attorneys' fees. If the employee's attorney did most or all of the work necessary to achieve a settlement from the third party, the attorney is entitled to fees for that work, though those fees may not necessarily be a one-third contingency.

For tort carriers, the following reminders are in order:

- Remember that a workers' compensation carrier or self-insured

employer has a right against a tortfeasor that is independent of the right of the injured employee. When pursuing settlement negotiations, remember to get a release from any subrogation interests if applicable.

- The "made whole" argument is no longer a viable argument, which will increase the leverage of workers' compensation insurers and employers in the settlement negotiation process. With a claim for reimbursement, workers' compensation carriers and employers may have a stronger claim to a portion of the settlement proceeds.



Robert T. Gritmit

## "SUDDEN AND ACCIDENTAL" MEANS SUDDEN AND ACCIDENTAL—NOTICE AND THE STATUTE OF LIMITATIONS

BY ROBERT T. GRIMIT

The Nebraska Supreme Court in *Dutton-Lainson Co. v. Continental Ins. Co.* recently had occasion to interpret the "sudden and accidental" exception to the pollution exclusion. At the same time, the Court clarified the statute of limitations with respect to actions against insurance companies as well as the impact of the notice provisions.

In *Dutton-Lainson*, the Court interpreted the pollution exclusion which has an exception for "sudden and accidental" events rather than the new current absolute pollution exclusion. The Court found that both requirements (that is, sudden and accidental) must be met before the exception is operative. Since the pollution discharges in *Dutton-Lainson* were clearly not "sudden," the Court found it

unnecessary to interpret the term "accidental."

While a number of courts throughout the country have found that "sudden" as used in the pollution exclusion exception is ambiguous, the Nebraska Supreme Court chose to follow the other line of cases which held that "sudden" is unambiguous and is to be understood as objectively, temporally abrupt.

There has been some ambiguity in prior Nebraska law with respect to when the statute of limitations against an insurer expires. The rule has been clear that the statute of limitations for breach of a written contract is five years and that the statute of limitations begins to run when the written contract is breached. To the extent there has been any ambiguity in Nebraska law, it is now clear that

the statute of limitations begins to run when the insured pays a judgment arising from a claim arguably covered by the insurance policy or becomes legally obligated to pay damages. In *Dutton-Lainson*, the legal obligation arose with the entry of a consent judgment against *Dutton-Lainson* and suit was timely filed within five years from the date of the consent judgment. For the first time, the Court was dealing with the specific issue of the statute of limitations for breach of contract with respect to the duty to defend. The Court adopted what it described as the clear majority rule in this situation, which is that a claim based upon the insured's failure to defend does not begin to run until the underlying action is resolved as against the insured.

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Finally, another issue of significance in the *Dutton-Lainson* case is the impact of the notice of claim provisions of the policy. Nebraska law has been clear that prejudice is required and that whether prejudice exists requires a review of whether the insurance carrier received notice in time to meaningfully protect its

interests. However, the duty to notify is waived in situations where there is a denial of coverage or other conduct on the part of the insurer which waives its right to insist upon enforcement of the notice provisions. When the insurer's position can reasonably be determined to be a denial of coverage, then there is no basis for the insurance

carrier to insist upon notice. To the extent that an insurance carrier desires to receive further information or notification, a denial of liability or conduct which would reasonably lead the insured to feel that further notice would be fruitless should be avoided.

## ASCERTAINING PERMANENT DISABILITY— ARE THE RULES CHANGING?

BY BRENDA S. SPILKER



Brenda S. Spilker

The general rule in workers' compensation cases used to be that when a claimant reached maximum medical improvement for an injury, permanent disability should be determined. Two recent Nebraska appellate cases have shed additional light on this issue and provided some clarification of this general rule.

The significant holding in the Nebraska Supreme Court case of *Rodriguez v. Hirschbach Motor Lines* is "that a claimant has not reached maximum medical improvement until all the injuries resulting from an accident have reached maximum medical healing." Rodriguez suffered a work-related accident on December 28, 2001, when a load of beer kegs fell, striking him. The trial court found that as a result of the accident Rodriguez suffered depression and injuries to his neck, back, left shoulder and bilateral knees. The court further found that, as of the trial date, Rodriguez had reached his maximum medical improvement for all of the injuries except the bilateral knees, for which he required surgery.

The main issue in dispute was whether the court could make a determination of Rodriguez's permanent impairment and loss of earning capacity for the neck, back, left shoulder and psychological injuries, since Rodriguez had reached maximum medical improvement for these conditions, but not for his knees. Rodriguez argued that it was

premature to determine permanent disability, since he was not at maximum medical improvement for all of his injuries.

The trial judge agreed with the employer, and found that a determination concerning permanent impairment needed to be made for those physical conditions for which Rodriguez had reached maximum medical improvement. At the trial, Rodriguez failed to offer any evidence of permanent disability concerning his neck, back, left shoulder and psychological injuries. The trial judge found that Rodriguez was not entitled to any permanency benefits or loss of earning capacity for these conditions. Since Rodriguez had not yet reached maximum medical improvement for his knees, the court found that a running award of temporary total disability benefits was appropriate.

The Supreme Court reversed the trial court, finding that a claimant's permanent disability cannot be determined until all of the medical conditions have reached a state of maximum healing. The Supreme Court wanted to avoid a situation in which a claimant could potentially be entitled to simultaneous permanent and temporary disability due to the same accident. The Court also recognized its prior holding in *Zavala v. ConAgra Beef Co.*, wherein the Court

held that a scheduled member injury and a whole body injury, sustained in the same accident, could be combined to determine a claimant's loss of earning capacity. Thus, the Court held that the legally-significant date for determining when temporary benefits can cease and a determination be made of permanent disability is when a claimant "has attained maximum medical recovery from all the injuries sustained in a particular compensable accident."

The second significant decision came from the Court of Appeals in *Grandt v. Douglas County*. Grandt suffered a compensable injury to her back while employed as a nurse for Douglas County. Grandt's employer accepted her claim as compensable and voluntarily initiated benefits, without the filing of a petition. When Grandt reached maximum medical improvement for her back, a vocational counselor was agreed upon to assess her loss of earning capacity and provide vocational rehabilitation services. The vocational counselor found Grandt sustained a 35 to 45 percent loss of earning capacity and recommended a retraining plan. Again, benefits were voluntarily paid for a 40 percent loss of earning capacity.

The dispute arose after Grandt successfully completed her retraining plan. Grandt argued that Douglas County was obligated to continue

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paying permanency benefits at the conclusion of the retraining plan at the 40 percent loss of earning capacity. Douglas County, however, requested that the vocational counselor provide an opinion on Grandt's loss of earning capacity as of the completion of the retraining plan. The counselor found that Grandt's loss of earning capacity after retraining was reduced to 25 to 35 percent. Based upon this opinion, Douglas County unilaterally reduced Grandt's loss of earning capacity benefits to 25 percent for the remaining 300 weeks which were due after the vocational plan had ended.

Grandt argued that the issue of when a determination of a claimant's loss of earning capacity should be made had already been resolved by the Nebraska Supreme Court in *Gibson v. Kurt Mfg.* In *Gibson*, the Supreme Court held that the trial judge was obligated to make a determination of Gibson's loss of earning power at the time of trial and could not delay such a determination until after Gibson completed a vocational rehabilitation plan post trial.

When deciding the *Grandt* case, the Court of Appeals found the *Gibson* case was distinguishable. The distinguishable fact between the two cases was the timing of the trial. In *Gibson*, the trial occurred *before* the claimant participated in a vocational rehabilitation retraining plan. However, in *Grandt*, the claimant had already successfully *completed* the retraining plan when the trial was held.

The Court of Appeals also rejected Grandt's argument that irrespective of when the trial is held, a claimant's loss of earning capacity must be determined when maximum medical improvement is reached. The Court disagreed, noting that "48-121(2) requires only that loss of earning power be calculated after the injury, and the period following vocational rehabilitation fits within that timeframe."

In short, the Court recognized that when making a determination of a claimant's loss of earning capacity, the trial court is allowed to base its determination on the full circumstances which exist at the time of trial. It just so happened that the workers' compensation court was not asked to make a determination of Grandt's loss of earning capacity until after she had already completed the retraining plan. When the case was tried, Grandt had successfully completed her substance abuse counseling degree and was more marketable with her new skills. Because Grandt already had the additional education, it was not speculative to make a determination on her loss of earning capacity post retraining. There was also no gap in benefits, as Grandt received benefits for a 40 percent loss of earning capacity between when she reached maximum medical improvement and the start of the vocational plan.

Employers can take advantage of the *Rodriguez* and *Grandt* opinions when paying benefits. In a case of multiple injuries, for instance, if a claimant is still treating for one injury, but has reached maximum medical improvement for a second injury and has been able to return to work, the employer does not need to pay permanent benefits until the claimant has reached maximum medical improvement for all injuries. Similarly, if a claimant has a body as a whole injury that requires vocational services, the employer can voluntarily pay benefits and agree to a vocational plan. If the claimant successfully completes the vocational plan prior to an adjudication, the employer can develop evidence of the claimant's loss of earning capacity both before and after the vocational plan.

## NOTES FROM THE FIRM

Of course Baylor, Evnen, Curtiss, Grit & Witt, LLP is the traditional law firm you have depended on for so many years. But in the past decades we have consciously grown and kept pace with modern legal issues and modern technology. To communicate our growth, we have re-examined the Baylor Evnen appearance and updated it to reflect our evolution as a firm. The new BE image projects our desire to live in the day while holding close the values that created our success.

Baylor Evnen is proud of our adaptability in meeting clients' evolving legal challenges. We have done it with our depth of full service legal representation. We have done it with our technological support for delivering value and we have done it with our emphasis on intelligent, creative solutions for new problems.

Such an evolution deserves a new logo and fresh color; this newsletter format is a direct product of the past year's efforts. It stands for our commitment to excellence, our depth of full service legal representation, and our legal tradition.

From our heritage as a premier trial firm, we have built up and out with the capacity to represent clients in all kinds of legal matters across Nebraska. The Baylor Evnen legal service is distinctive, technologically advanced, user-friendly and valuable.



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