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MINNESOTA WORKERS' COMPENSATION SUBROGATION AND EMPLOYER LIABILITY FOR CLAIMS PROFESSIONALS AND RISK MANAGERS

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* Shamus has represented employers and insurers in subrogation, recovery and employer liability matters for nearly 30 years. He works closely with claims representatives, risk managers and attorneys to properly investigate and evaluate work injury situations. Shamus serves as an expert witness and consultant involving workplace security and regularly presents and conducts trainings on subrogation, employer liability and safety and security issues.

MINNESOTA WORKERS' COMPENSATION SUBROGATION

WHAT IS A WORKERS' COMPENSATION SUBROGATION CLAIM?

Subrogation is defined as the assumption by a third party of another's legal right to collect a debt or damages. In Minnesota, the right of subrogation to collect workers' compensation benefits paid to or on behalf of an injured employee is governed by the Third Party Liability section of Minnesota Statute §176.061. This relatively confusing statute has been the subject of significant litigation over the years. It provides a mechanism for the reimbursement of workers' compensation benefits where someone other than the employer or employee (a third party) is at fault for causing the employee's work injuries. If the recovery is large enough and the workers' compensation benefits paid are fully reimbursed (under a statutory formula) the statute also provides a mechanism by which the employer may obtain a credit against future workers' compensation benefits payable.

HOW DO YOU RECOGNIZE A GOOD SUBROGATION CASE?

There is no easy answer to this question and certainly no comprehensive one. Finding an answer is complicated by the fact that many workers' compensation specialists do not have extensive experience evaluating liability claims. Most importantly, a subrogation claim is a liability action which needs to be evaluated from a fault perspective. In order to recognize a good subrogation case you will need to (1) Investigate and (2) Evaluate.

INVESTIGATION: First, you must Investigate. We invite your attention to Red Flag Cases for Subrogation checklist at end. By no means exhaustive, it should be helpful in developing a checklist tailored to your individual situations. Your investigation should obtain more information than provided on the First Report of Injury form, although that is a good place to begint. You should also talk with the employee, all witnesses, the employer and anyone else having knowledge of how the injury occurred. (Avoid taking recorded statements due to their unpredictability and potential for adverse evidence in a liability proceeding).

Your investigation should include a preliminary assessment of: (1) amount of workers' compensation benefits paid and exposure for future benefits; (2) cost of the investigation; (3) estimated litigation costs; and (4) likelihood of prevailing at trial. It makes no sense to spend $10,000 to investigate the possibility of recovering $2,000. In many cases, interviewing the employee may be sufficient. In other cases it may be necessary to have a qualified expert visit the accident scene and evaluate the instrumentalities involved.

The investigation should be cost effective and will usually provide sufficient information for initial evaluation purposes. Remember to wear your liability hat while performing this task. Fault is an important aspect of every subrogation case. In Minnesota, if the employee is 51 percent at fault for the injury there is no subrogation recovery to the employer regardless of how much money is paid. We also suggest cooperation with the employee's attorney if the

attorney will share investigation results with you. However, you should exercise caution about allowing the employee's attorney access to co-employees.

EVALUATION: After the preliminary Investigation, the second step in assessing a subrogation claim is Evaluation. The Evaluation should be made as soon as you have completed the investigation.

In evaluating a claim, the evaluator must recognize the following:

(a) As a general rule, the more parties involved the more protracted and expensive the litigation.

(b) Product liability cases tend to be more expensive than simple negligence cases.

(c) Slip and fall cases (off the employer's premises) are not all poor liability cases and should be evaluated on their individual merits.

(d) Legal responsibility for injuries occurring on construction projects frequently rests with the general contractor who is responsible for the safety of everyone on the job site.

(e) Results in a civil lawsuit are often highly influenced by the personalities of the parties and the witnesses. Because of its derivative nature, the most important personality in the subrogation claim is the employee.

(f) When evaluating a claim you must determine the best and worst case scenarios. After the Investigation and Evaluation of the liability issues, coupled with your determination of the value of the workers' compensation claim, you must make a decision. Do I want to act, or react? We believe there is usually a better return on proactive, aggressive pursuit of subrogation claims, following appropriate Investigation and Evaluation, rather than a reactive or passive approach.

Not every case is suitable for subrogation. A common sense approach when evaluating liability is necessary. The potential for a recovery must be balanced with the costs incurred in obtaining the recovery and the uncertainties of the civil jury system.

In addition, the mere fact that an Employer Liability claim (discussed below) may be asserted should not deter you from commencing a subrogation action. The Employer Liability claim should be evaluated in terms of its merits and cost to defend the claim. The Employer Liability exposure may be small and/or the defense relatively inexpensive. You may also have a duty to commence an action even where a valid Employer Liability claim may be asserted. This could occur when the Workers' Compensation Reinsurance Association (WCRA) requires you seek a recovery, or when the employer determines to pursue its own statutory claim for increased

premiums from the work injury or otherwise becomes involved in a formal claim or lawsuit. The subrogation claim can also be used as part of a defense strategy to eliminate the Employer Liability exposure.

AGAINST WHOM MAY AN ACTION BE BROUGHT?

Generally, an action may be brought against anyone from whom an employee could recover under a tort (conduct-based) claim or certain contractual causes of action. In some situations the employer is not subrogated to the employee's contractual rights to recover benefits. For example, if an employee has the right against an insurer in the form of no-fault benefits, uninsured motorist coverage, or underinsured motorist coverage, the employer has no subrogation claim.

MUST THE EMPLOYEE BE FULLY REIMBURSED BEFORE THE SUBROGATION RECOVERY?

Section 176.061 provides the employer with the statutory right to recover workers' compensation benefits even though the employee is not fully reimbursed for all damages. In other subrogation situations an injured person must be fully reimbursed before there is any right of subrogation.

WHEN MUST A WORKERS' COMPENSATION SUBROGATION ACTION BE FILED?

The statute of limitations applicable to the employer's subrogation interest is the same limitations period applicable to the employee. One can imagine situations where this general rule would lead to absurd results. A situation could arise where no workers' compensation benefits are paid until two years after the date of the accident. If the applicable statute of limitations is two years the time for commencing an action would have expired. However, in most cases of common law negligence this would not arise because a six year statute of limitations for negligence or contractual breach is applicable. Nonetheless, there are several types of actions where shorter statutes of limitations will apply including medical malpractice, wrongful death, claims arising out of improvements to real property, and intentional torts. There are other claim situations such as with Dram Shop claims and municipal actions that require notice to the prospective defendant within certain short time periods (as little as 120 days after the occurrence).

When in doubt, it is important for the claims representative to obtain legal advice. Notice requirements should be determined and followed in all potential subrogation cases regardless of when the subrogation action itself must be filed. In situations where an employee commences a formal claim and the employer does not intervene or commence its own action until after the statute of limitations expires courts have held the statute of limitations does not run while the employee's action is pending. However, it is wise to commence legal action within the statutory period, or negotiate a tolling (suspension) of the limitation period to avoid dismissal of the claim under applicable law. New subrogation claims that have been effectively

evaluated should be aggressively pursued in order to maximize recovery.

WHAT IS INVOLVED IN A SUBROGATION ACTION?

A subrogation action typically involves the initiation (or threat) of a lawsuit. There are many situations where you will want to take an aggressive approach on the subrogation claim in order to fully protect your interests. This can be done either by intervening in the employee's suit or by commencing a separate lawsuit in the name of the employee or employer. The employer will then be a party to the action and have the right to recover damages before a jury. In certain specialized situations, moreover, you may want to "associate" with the employee's counsel for discovery and/or trial purposes through a Notice of Association which does not confer party status on the employer and can allow for greater flexibility and cost savings.

While the employer's subrogation interest is similar to the employee's, it is not identical. The employer will be interested in proving the past medical and past wage loss damage items while the employee, having already recovered these past items from the employer in the form of compensation benefits, will be more interested in establishing an entitlement to future medical and wage loss expenses. The employee will also have an interest in proving past and future damages for pain and suffering which the employer cannot recover. Because of the divergence in interests between the employer and employee separate counsel is usually required to represent the subrogation claim to ensure the employer's recovery interests are fully protected.

If you have properly investigated the file, located the responsible parties and contacted their insurers with a calculation of damages paid and an appropriate demand letter it is possible to resolve a case without legal assistance. Settlement is handled much the same way you obtain contribution from another employer or insurer for a previous work injury.

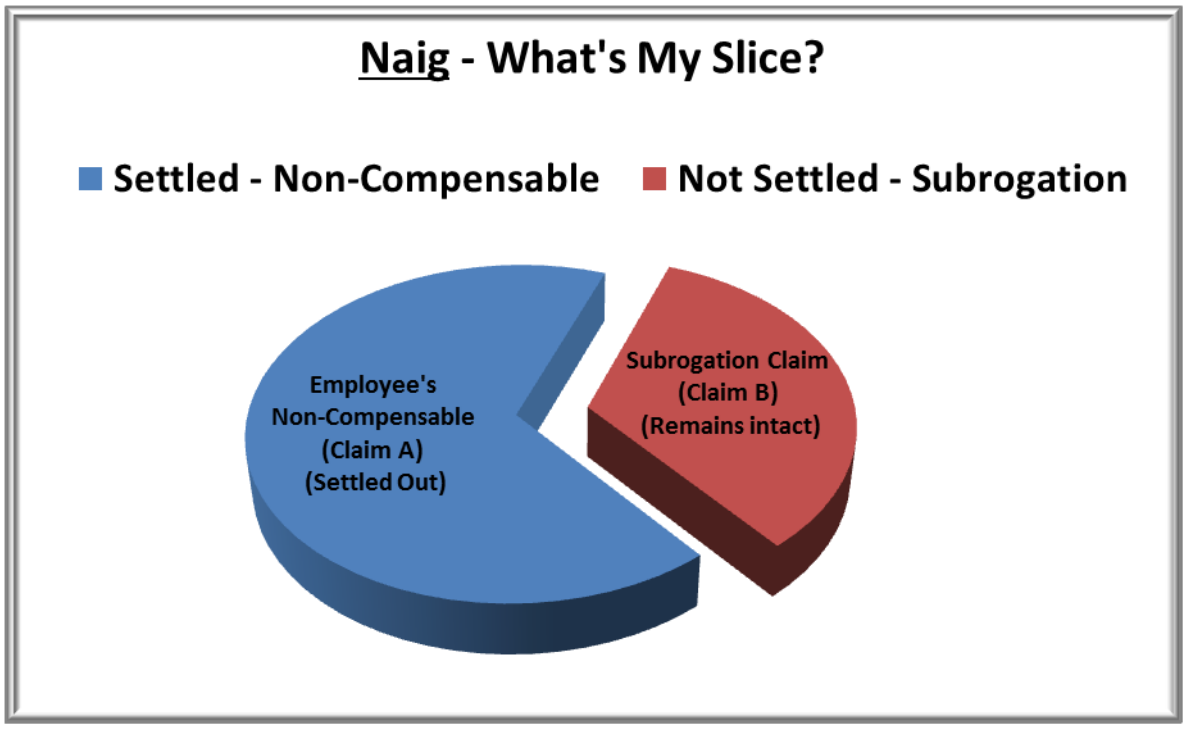
MUST I AGREE TO THE EMPLOYEE'S SETTLEMENT?

The easy answer is "No." You don't have to agree to a third-party settlement based on an employee's determination of how proceeds are to be allocated. You cannot, however, unreasonably or arbitrarily interfere in an employee's settlement. The employee must provide notice of settlement negotiations and afford the employer an opportunity to protect its interest.

WHAT IS A *NAIG* SETTLEMENT?

A *Naig* settlement is simply a settlement where the employee settles the non-compensable portion of the third party liability claim, leaving the employer's subrogation claim intact. The name comes from the Minnesota Supreme Court case of *Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (Minn. 1977). A *Naig* settlement recognizes that the employee's claim consists of two parts: the employee's non-compensable claim and the employer's workers' compensation

subrogation claim:



A *Naig* settlement is merely the settlement of Claim A, leaving Claim B intact.

HOW ARE THE PROCEEDS ALLOCATED IN THE ABSENCE OF A *NAIG* SETTLEMENT?

In the absence of a *Naig* settlement there are two methods for allocating a recovery (through a settlement, verdict or award) between the employee (Claim A) and the employer (Claim B). One method is the statutory formula found in Minn. Stat. §176.061. This is the most frequently utilized method. We provide an example using this formula as well as a Net Recovery analysis at the end.

The second method involves the District Court apportioning the recovery between Claim A and Claim B based upon which portion of the total award represents a recovery of workers' compensation payments and which represents reimbursement of pain and suffering, loss of consortium, and other non-compensable damages under workers' compensation. This latter method is generally referred to as a *Henning* allocation approved by the Minnesota Supreme Court in the case of *Henning v. Wineman,* 306 N.W.2d 550 (Minn. 1981).

HOW IS THE SUBROGATION INTEREST MEASURED AFTER A *NAIG* SETTLEMENT?

After a *Naig* settlement the employer must still prove the nature and extent of the employee's personal injury damages at trial. Thereafter, the employer is entitled to collect the present value of all workers' compensation payments, past and future, as long as this amount does not exceed the employee's damages as awarded by the jury. In many instances the employer is better off allowing the employee to reach a *Naig* settlement because this allows the employer to make a complete recovery and eliminate paying a share of the recovery to the employee and the employee's attorney.

Following a *Naig* settlement the employer must prove the employee's personal injury case for recovery at trial. This will require the cooperation of the employee and involve additional expense, particularly for medical experts. However, our experience over many years in this area shows that proper Investigation and Evaluation of subrogation claims coupled with effective presentation of the claim to third parties often leads to settlement results that maximize recovery for the employer and its insurer.

The post-*Naig* subrogation interest (Claim B) includes the present value of all workers' compensation payments, past and future. This differs from the pre-*Naig* measure of damages which include a future credit against future workers compensation benefits. After a *Naig* settlement there is no future credit. Instead, the present value of the future payments are collected now rather than waiting for the compensation payments to come due. This requires the trial court to make a determination of the amount of the future compensation payments reasonably likely to occur in the absence of an agreement between the parties on such amounts.

WHAT ARE THE BENEFITS OF A *NAIG* SETTLEMENT?

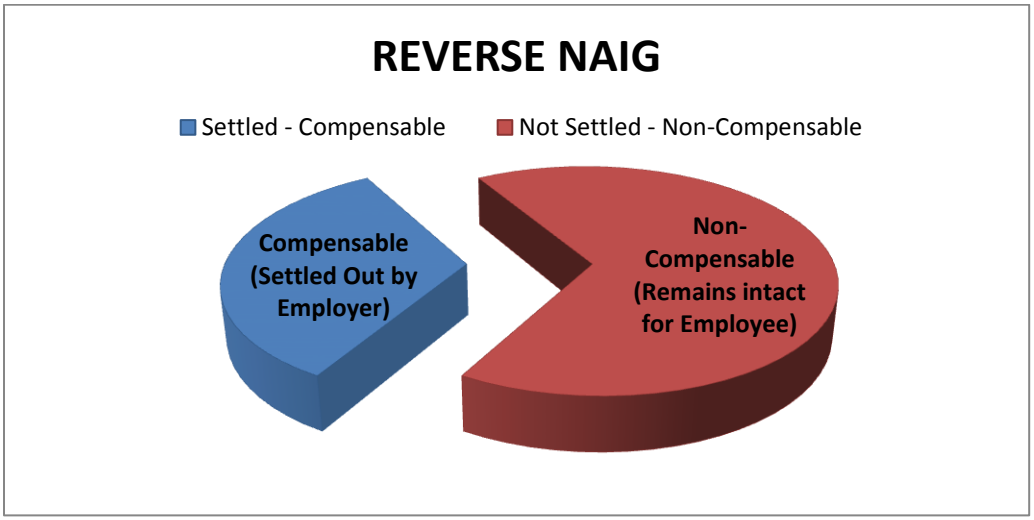
One way you may benefit from a *Naig* settlement is by avoiding the employee's attorneys' fees which can be sizeable and reduce your recovery by upwards of 40% or more. The statutory formula under Minn. Stat. §176.061 subdivision 6 provides the "costs of collection" are to be deducted before the formula is applied. Obviously, the major "costs of collection" are attorneys' fees. Employee attorneys often take the position that they are entitled to a contingent fee out of both the employee's claim (Claim A) and the subrogation claim (Claim B). Accordingly, they attempt to settle the entire claim to collect their fees on both portions. It is important to note that when there is a *Naig* settlement the employee's attorney is owed nothing from the subrogation recovery (Claim B). Caselaw makes clear that the employee's attorney is not entitled to a fee on your recovery if you settle your claim separately before trial. Thus, one important method of maximizing your recovery is to encourage a *Naig* settlement by the employee to facilitating the subrogation recovery by using your own attorney at a lower rate. Further, once there has been a *Naig* settlement there is no Employer Liability exposure, and any such claim becomes merely an offset that cannot exceed your recovery.

Naig settlements can prompt apprehension in claims professionals. However, proper investigation and file development will leave you in a position to effectively respond and address your subrogation claim situation regardless of whether a *Naig* settlement occurs. In fact, a potential *Naig* settlement may place you in a better position to actively pursue subrogation without waiting for the employee's attorney.

Occasionally, a *Naig* settlement is not a desired result. In some cases the employee or the employee's attorney may be of such value that you want them involved in the lawsuit. For example, there are cases of marginal liability where the employee's personality is important to a favorable liability finding; or liability cases where you are not sufficiently interested in advancing the litigation expenses to pursue your claim alone and the employee's attorney is willing to advance the costs; or cases where there is a significant Employer Liability exposure. This is most likely to occur when expensive experts are required to prove the liability claim. In such cases there are effective strategies which may be employed to deter a *Naig* settlement.

WHAT IS A REVERSE NAIG SETTLEMENT?

Simply stated, a Reverse *Naig* settlement it is the opposite of a *Naig* settlement. In a *Naig* settlement, the employee settles his/her claim with the defendant tortfeasor. In a Reverse *Naig* settlement, the employer settles its subrogation claim (Claim B) with the defendant:



In many instances a Reverse *Naig* settlement is the most effective means the employer has to recover workers' compensation benefits it has paid or will be required to pay in the future to or on behalf of the employee.

A Reverse *Naig* settlement often includes an assignment of the subrogation claim to the defendant as an offset against any damages for which the defendant may be found liable. In addition, while a Reverse *Naig* eliminates any Employer Liability exposure you should always include specific language in any Reverse Naig release which expressly releases the employer

from any existing or potential Employer Liability claims.

WHEN IS A REVERSE-NAIG APPROPRIATE?

A Reverse *Naig* is appropriate whenever you can make a sufficient recovery or avoid exposure in a significant Employer Liability claim. Such a settlement ensures you do not have to expend any more money to obtain your recovery and eliminates the inherent risk of prosecuting the subrogation claim. Individual cases where a Reverse *Naig* might be particularly appropriate include situations where there is weak liability, the Employer Liability exposure is high, and where the money offered is fair and reasonable.

A Reverse *Naig* is also particularly useful when there are limited or low liability insurance limits. In these situations early settlement dialog to facilitate a recovery without a lawsuit is a good approach from the employer's standpoint.

WHEN IS A REVERSE NAIG NOT APPROPRIATE?

A Reverse *Naig* settlement is usually not pursued when the future workers' compensation payments will be large and where the defendant is financially responsible and your liability evaluation is favorable to the employer. This is because a Reverse *Naig* settlement eliminates the employer's future credit for workers' compensation benefits payable in the future to or on behalf of the employee.

However, you may still be able to use a Reverse *Naig* in combination with a close out of the employee's future workers' compensation claim. We have found that employee attorneys are often interested in a small close out of their client's future compensation in return for more money on the liability case. To accomplish this settlement, the defendant must be willing to settle the employee's liability claim (Claim A) and you must be willing to compromise the employer's subrogation claim (Claim B). You will then be in a position to settle with the defendant on a Reverse *Naig* basis while the employee settles on a *Naig* basis.

The settlement documents should reflect the simultaneous close out of the employee's future compensation. A separate stipulation specifying the close out should be submitted to the Workers' Compensation Division for an Award on Stipulation. This stipulation should include a recital of the separate consideration for the close out of the employee's future interest (*e.g.*, the employer compromised its subrogation claim in a certain amount in exchange for the stipulation). The simultaneous settlement of the subrogation and Employer Liability claims along with the settlement of the employee's workers' compensation claim is usually referred to as a "Global" settlement.

CAN THE EMPLOYEE SETTLE THE CASE WITHOUT YOUR PERMISSION?

As long as the defendant or its insurance carrier is provided notice of your subrogation interest the defendant and the employee *cannot* settle the third party liability case in such a manner as to extinguish your subrogation rights. However, if they attempt to do so, you should immediately seek legal counsel.

For example, if a defendant enters into a settlement with the plaintiff for $50,000 without notice to you after notice of your subrogation interest you may be entitled to obtain a share of the $50,000. You may also seek reimbursement from the defendant (and its carrier) for the rest of the subrogation claim not satisfied from the $50,000. Despite the limits of $50,000 you may still be able to collect because the defendant's insurer failed to properly protect its insured in settling for $50,000. In such circumstances the defendant's carrier could also be held liable in bad faith for failure to obtain a settlement of all the claims within its policy limits.

This does not mean you may unreasonably or arbitrarily withhold consent to a reasonable settlement. There generally will be some question as to the reasonable value of most claims. Your position in a given instance must be resolved on a case by case basis.

WILL YOUR RECOVERY BE REDUCED BY FEES PAID TO THE EMPLOYEE'S ATTORNEY?

The statute provides that the "costs of collection" are to be deducted prior to dividing the proceeds between the employer and employee. Employees' attorneys generally equate "costs of collection" with their own fees and expenses to obtain a fee for the collection of the employee's share of the recovery. In most cases, once trial starts the employee's attorney will be awarded fees on the employer's recovery.

However, where the employer retains its own attorney the employer may not need to pay fees to the employee's attorney under certain circumstances. Court decisions have held that if the employer settles a separate claim (Reverse ***Naig***) before the start of trial the employee's attorney is not entitled to a fee on the employer's share of the recovery. Courts have not decided whether the employee's attorney would be entitled to fees on the employer's share where the employee has commenced a separate action. The question then arises as to whether the costs and fees of the employer may also be included in the "costs of collection" where the employer has initiated a separate action. It is also important to note that the employer has no duty to advance any of the fees and costs in furthering the employee's claim although in some cases it may be beneficial to work out a cost sharing arrangement with the employee.

CAN YOU INTERVENE IN THE EMPLOYEE'S LAWSUIT

The employer also has the right to intervene in the employee's lawsuit or commence a separate action either before or after the employee's lawsuit. In some cases it is important for the employer to formally intervene early in the litigation to facilitate its ability to make effective

informed decisions. In other circumstances our experience shows that developing an early dialog with the attorneys for the employee and defendant often leads to an informal information exchange and settlement negotiations without the cost of formal intervention or prompting an Employer Liability claim against the employer.

THE EMPLOYER'S SEPARATE CLAIM FOR INCREASED PREMIUMS

In Minnesota, the employer also has a statutory right to recover increased workers' compensation insurance premiums attributable to a third party's tortious conduct. The claim is asserted in the name of the employer as part of the subrogation action or in a separate lawsuit. Any damages recovered under the statute are solely for the benefit of the employer without application of the statutory allocation formula.

Workers' compensation premiums are calculated based on the loss experience of the employer. There are commonly two types of premium calculations: "Prospective" premiums where the insurer bears the risk of losses for a determined price based upon a change in an "experience modifier," and "Retrospective" premiums where the employer bears the risk of losses during the policy period. Premiums are most sensitive to the initial payments on a claim meaning that a subrogation recovery years after a loss may have no little or no effect on the premium. In most cases the amount of the premium attributable to the work injury can be determined through a knowledgeable party or expert.

Defendants and their insurers often have limited or no knowledge about the employer's increased premium claim resulting in uninformed positions when they are asserted. In many situations these parties contend any claims involving the employer must be allocated within the statutory formula without separate settlement consideration. Early dialog with the defendant and its attorney can provide effective information concerning the employer's separate increased premium claim.

The initiation of a subrogation action should include notice and discussion with the employer concerning its potential increased premium claim and how any recovery should be allocated between the subrogation and premium claims, either through a pro rata sharing based upon the amount of each claim or another mutually acceptable arrangement. Analysis of the facts is involved will help avoid potential conflicts particularly in cases where there are large benefit payments or significant Employer Liability exposure.

EMPLOYER LIABILITY AND THE RIGHT TO "WAIVE AND WALK"

WHAT IS AN EMPLOYER LIABILITY CLAIM?

In short, an Employer Liability claim is a demand for the employer to pay (contribute) an amount of money measured by the employer's percentage of fault, if any, not to exceed its net subrogation recovery calculated under the statute.

Under Minnesota law, an injured employee may not sue the employer in a civil liability matter involving the work injury where the employee has elected to receive workers' compensation. However, a third party sued by the employee, such as a manufacturer, can sue the employer for contribution to the extent of its liability for causing the work injury. This claim is generally referenced as an Employer Liability claim, or a *Lambertson* claim, from the seminal case in this area, *Lambertson v. Cincinnati Corporation*, 312 Minn. 114, 257 N.W.2d 679 (1977).

The Third Party Liability section of the Minnesota Workers' Compensation Act §176.061 subdivision 11 provides:

> To the extent the employer has fault, separate from the fault of the injured employee to whom workers' compensation benefits are payable, any nonemployer third party who is liable has a right of contribution against the employer in an amount proportional to the employer's percentage of fault but not exceed the net amount the employer recovered pursuant to subdivision 6, paragraphs (c) and (d). The employer may avoid contribution exposure by affirmatively waiving, before selection of the jury, the right to recover workers' compensation benefits paid and payable, thus removing compensation benefits from the damages payable by any third-party.

In other words, even after paying workers' compensation benefits the employer can still be liable to pay to the full extent of its subrogation interest (the benefits paid to date plus the present value of future benefits reduced by the cost of collection under the statutory allocation formula). The intent of the statute is to prevent the employer benefitting from a subrogation recovery when its actions are a significant cause of the employee's work injury.

HOW DO YOU RECOGNIZE EMPLOYER LIABILITY?

Just like a potential subrogation claim, an Employer Liability claim necessitates active Investigation and Evaluation involving the potential fault of the employer, employee and others involved in the work injury. In Minnesota, like many other jurisdictions, employers have certain non-delegable duties toward its employees that cannot be discharged by directing or employing others to perform them including duties to provide employees a reasonably safe workplace, safe instrumentalities for their work, proper training, sufficient rules and regulations, and to properly supervise and direct the work.

The Employer Liability investigation typically involves reviewing the employer's relevant policies and procedures (*e.g*. Lock Out/Tag Out if machinery is involved), documents and communications, contracts and vendor agreements, and interviewing key employees, among other items. The evaluation is fault-based, not fear-based. Typical Employer Liability situations may involve injuries during construction projects, industrial injuries, occupational disease (asbestos, dust, mold), professional liability or malpractice, and accidents with varying obligations for safety and worksite responsibility. The claims usually include allegations of improper training and supervision, unsafe workplace or product modification or misuse asserted in legal actions for negligence, breach of contract, breach of warranties, strict liability/dangerous instrumentality and contribution or indemnity.

SEPARATE CONTRACTUAL LIABILITY EXPOSURE

The Employer Liability exposure is usually addressed by the Employer's Liability coverage under the employer's workers' compensation policy. However, in addition to typical tort-based Employer Liability claims, employers can also face *contractual* liability exposure through written agreements in which the employer promises to indemnify (pay for) the fault of others. In such circumstances the liability for obligations assumed under contract is typically addressed through the employer's commercial general liability (CGL) insurer. Depending on the nature of the insurance procured this could bring about coordination of coverage issues if both the CGL and Employer Liability defense obligations are activated. Our experience in these matters informs that claims professionals and risk managers as well as attorneys handling these more complicated situations should be cognizant of these possibilities and be ready to effectively address cost efficient means to coordinate these various interests if necessary.

THE EMPLOYER'S INDEPENDENT "WAIVE AND WALK" RIGHT TO AVOID EMPLOYER LIABILITY

Minnesota Statute §176.061 subdivision 11 quoted above also allows the employer to independently waive its workers' compensation subrogation interest to avoid any employer liability for its fault in causing the employee's injury. The commonly used phrase for this process is "Waive and Walk."

The statute codified longstanding industry practice to provide employers with a powerful independent statutory right to completely eliminate any potential Employer Liability exposure. By utilizing the Waive and Walk election employers can avoid circumstances where their actions primarily caused the employee's injury, or where they have an uninsured exposure for an Employer Liability claim asserted against them. To be effective, the employer must elect to Waive and Walk before the jury is selected.

It is important to recognize that the employer's subrogation claim has no bearing on its ability to Waive and Walk. Thus in a situation where the investigation discloses the employer is significantly at fault for causing the employee's injury even an extremely weak subrogation

claim can be waived for the purposes of eliminating the employer's contribution liability. Moreover, even though an employer may at worst "break even" because its Employer Liability exposure is capped at the amount of its subrogation recovery you must still consider the separate costs to pursue subrogation as well as potential business interests and the involvement of the employer in litigation when evaluating whether the subrogation claim should be pursued.

The employer's Waive and Walk right remains a powerful and effective strategy that can be used to avoid Employer Liability, facilitate your subrogation recovery and globally resolve workers' compensation exposure in work injury situations.

CAN YOU STILL PURSUE SUBROGATION WHEN THERE IS AN EMPLOYER LIABILITY CLAIM?

The mere fact that an Employer Liability claim may be asserted should not deter you from commencing a subrogation action. The Employer Liability claim should be evaluated in terms of its merits and cost to defend the claim. The liability exposure may be small and/or the defense relatively inexpensive. Furthermore, you may have a duty to commence an action even where a valid Employer Liability claim may be asserted. This could occur when the Workers' Compensation Reinsurance Association (WCRA) requires you to seek a recovery or when the employer determines to pursue its own statutory claim for increased workers' compensation premiums or otherwise becomes involved in a formal claim or lawsuit where the subrogation claim can be used as part of a strategy to eliminate liability exposure.

Having the ability to Waive and Walk also allows employers and their insurers to aggressively pursue subrogation claims through Reverse-*Naig* settlements and, in the right circumstances, recover subrogation without creating a liability situation for the employer. The Waive and Walk right allows flexible and substantive defense investigation and collection of evidence without risking significant liability exposure or impeding the investigation. With appropriate focus and coordination between the employer and insurer, the same law firm can handle both the Employer Liability defense and subrogation interest. Alternatively, the Employer Liability defense can be represented by counsel while you retain control of the subrogation interest through settlement resolution with appropriate dialog with your counsel. In certain factual circumstances, after proper investigation and dialog, a subrogation claim can be initiated and pursued against responsible parties. If evidence is later discovered indicating the employer is at fault for the work injury, the employer can exercise its Waive and Walk rights prior to jury selection to avoid any Employer Liability exposure.

RECENT COURT CASES IMPACTING EMPLOYER LIABILITY CONSIDERATIONS

Recent cases in Minnesota federal and state courts may impact the effect of the employer's Waive and Walk election. Our federal and state courts have taken the position that an employer's Waive and Walk election eliminates its Employer Liability including any liability for contractual indemnification. However, the Minnesota Court of Appeals recently ruled that a

defendant sued in a work injury matter remains liable for the employer's fault even where it is not liable for such fault under Minnesota's Joint and Several Liability statute (*e.g*, where the defendant is found less than 50% at fault).

In such circumstances there may be a question of whether an employer may still face Employer Liability exposure after its Waive and Walk election. We believe the proper answer is "No." Although the defendant may ultimately remain liable to pay damages caused by the employer's fault the employer also retains its express statutory Waive and Walk right to avoid its Employer Liability exposure. The defendant can also request an offset from the court for any duplicative workers' compensation damages to reduce its payment to the employee.

This tension may ultimately be resolved when the Minnesota Supreme Court considers the interplay between the joint and several liability statute and well-established law going back decades protecting employer rights in third party liability work injury settings.

RED FLAG CASES FOR SUBROGATION:

1. Motor Vehicle accidents.

2. Construction Projects

3. Product liability cases involving machinery and chemicals.

4. Occupational Disease (asbestos, dust, mold)

4. Professional Liability (malpractice)

5. Premises Accidents (off the employer's worksite)

6. Third-party actions brought by the employee

7. Cases where medical and indemnity benefits are unusually high

STATUTORY FORMULA ALLOCATION EXAMPLE (§ 176.061, subd. 6)

1. Total settlement or verdict is $75,000.

2. Workers' compensation benefits paid to date are $30,000.

3. Employee's fault is 20%.

4. Defendant's fault is 60%.

5. Employer's fault is 20%.

APPLICATION

Step 1

Verdict	$75,000.00
Less employee's 20% comparative fault	-$15,000.00
Recovery after deducting comparative fault	$60,000.00
Less one-third attorneys' fees and costs (Cost of Collection)	-$20,000.00
Net award	$40,000.00

Step 2

Less statutory one-third to employee	-$13,333.33
Balance remaining for subrogation	$26,666.67

Step 3

Employer's Subrogation Recovery (c) Work Comp paid - [(cost of collection divided by recovery) x Work Comp benefits paid]	
$30,000 - [$20,000/$60,000) x $30,000] =	$20,000.00
Remainder paid to the employee as a Future Credit Deduct subrogation recovery (h) from balance remaining for subrogation (g) $26,666.67 - $20,000 =	$6,666.67
Future Credit reduced by Cost of Collection %	$4,444.40

NET RECOVERY

Total Subrogation Cash to Employer	$20,000.00
Employer Liability	-$15,000.00
Net Cash to Employer	5,000.00
Net Future Credit	$4,440.00
Net Recovery to Employer	$9,440.00

-- End --

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