

# Subrogation of Workers' Compensation Claims in *Delaware*

## **Election of Remedies:**

- The claimant may pursue a workers' compensation claim against the employer and sue a third-party. He does not have to choose, or elect, his remedy. A claimant may not sue his employer or a co-employee.

## **Statute of Limitations:**

- The statute of limitations for tort actions is two years from the date the action accrues, usually the date of the incident.

## **Amount of Recovery - Claimant Institutes Third-Party Action:**

- The employer/carrier has a lien against the net proceeds of any third-party action. The recoverable amount of the lien is the net settlement minus a pro-rata share of the costs and an attorney fee payable to the claimant's attorney. The amount recovered by the claimant can be claimed as a credit against future workers' compensation benefits.

## **Amount of Recovery - Claimant Institutes Third-Party Action (cont.):**

- For any PIP eligible benefits, the WC carrier must subrogate directly against the tortfeasor's liability carrier, after the claimant settles. The carrier's subrogation claim is second in priority to the claimant's settlement. If coverage is exhausted in the liability case, then the PIP eligible portion of the lien is extinguished.
- Settlement and release by the claimant of the third party is not a bar to a recovery action by the carrier. Settlement of the third-party case by the claimant prior to payment of workers' compensation is not an election of remedies and the carrier would be entitled to a credit in the amount of the settlement.

## **Amount of Recovery - Employer/Insurer Institutes Third-Party Action:**

- An employer/carrier may institute an action on its own after 260 days and providing notice, if the claimant chooses not to institute a third-party action. Any party with interest may choose to intervene. The carrier may recover its entire lien in this instance, with any balance going to the claimant or dependents.

# Procedure for Workers' Compensation Claims in Delaware

## Petitions:

- Any party may file a petition before the Industrial Accident Board of the State of Delaware (IAB).
- Determine Compensation Due (DCD). A petition filed for a new case when a claim has been denied or compensability not determined, i.e.; there is no Agreement as to Compensation. A hearing shall be scheduled no later than 120 days from the notice of pretrial conference.
- Determine Additional Compensation Due (DACD). A petition filed in an accepted claim for additional benefits such as permanent partial impairment. Also, a petition seeking authorization for surgery or other medical treatment. Hearings are scheduled 180 days from the notice of pretrial conference.
- Petition for Review. Also known as a Termination Petition, is what must be filed to terminate wage loss benefits or amend an agreement for compensation. Absent a voluntary release (Final Receipt) signed by the claimant, this is the only way to stop payment of weekly TTD or TPD benefits. Scheduled 120 days from the Notice of Pretrial conference.
- Special case; medical benefits. Causally related medical benefits subject to the Health Care Practice Guidelines (HCPG) must be submitted to Utilization Review within 15 days of denial. Any party may appeal the UR decision by filing a DACD petition for a de novo review by the IAB within 45 days of receipt of the Utilization Review Determination.
- Petition for Commutation. Used for board approval of a "full and final" settlement.
- A claimant may file a request for an expedited hearing.

## Hearing:

- The IAB has two hearing locations, one in Wilmington for New Castle County cases and one in Milford for Kent and Sussex County cases. Venue is based on the location of the injury.

- Hearings in Wilmington are scheduled at 9:00 a.m. and 1:00 p.m. Hearings. Motions day is Thursday in Wilmington and Wednesday in Dover.

- The parties may subpoena records and serve a Request for Production of Documents on the other side. Expert testimony may be had by deposition or live at the hearing. Fact witnesses generally testify live unless a request is made for a deposition due to their unavailability. Expert testimony is required for medical opinions, unless the parties stipulate to submit the case on the records. Witnesses must be identified and medical reports provided 30 days prior to the hearing. Notice of affirmative defenses must also be provided outside of 30 days. This is called the "30 Day Rule."

- The Board by statute must provide a written decision 2-4 weeks following the hearing. In practice, this is closed to 4-6 weeks. The decision must provide an explanation of the evidence relied upon by the Board to reach its conclusions. A party may file a Motion for Re-argument 10 days after receiving the decision.

## Appeal:

- A party may appeal a decision of the Board to the Superior Court in the County where the injury occurred. A party has 30 days to file the appeal.
- The Appeal to the Superior Court is on the record. The court does not sit as the trier of fact and only reviews the record to determine if sufficient evidence existed to support the Board's conclusion or to determine whether the Board made any errors of law.
- Following decision by the Superior Court, a party may appeal to the Supreme Court of Delaware within 30 days. The Supreme Court may request oral argument.