

MINNESOTA WORKERS' COMPENSATION SUBROGATION "IN A NUTSHELL"

A. Essential Features of Workers' Compensation Subrogation

1. Generally always involves a situation in which some third-party who is not a part of the employer/employee relationship causes an employee's injury through that third-party's own negligence or fault.
2. Workers' compensation subrogation cases often arise out of motor vehicle accidents, accidents involving products or machines, accidents involving slips and falls on premises owned or maintained by others, construction accidents, and medical malpractice.
3. Minn. Stat. §176.061 is a safety mechanism that allows the employer/workers' compensation carrier to obtain reimbursement from an at-fault party (third-party tortfeasor) for workers' compensation benefits it pays to/on behalf of an employee who is injured by the negligence of the third-party tortfeasor.
4. There are always three (3) parties to be concerned with in every workers' compensation subrogation recovery effort: (1) employee; (2) employer/workers' compensation carrier; (3) third-party tortfeasor.

- a. The injured employee can sue the third-party tortfeasor for civil damages.

The employee can only recover items of damage that the Minnesota Workers' Compensation Act does not compensate for (e.g., pain and suffering, emotional distress, loss of consortium, etc.).

- b. The employer can sue the third-party tortfeasor for reimbursement of workers' compensation benefits it has paid and will have to pay in the future as a result of injuries caused to the employee by the third-party tortfeasor's negligence.
- c. The third-party tortfeasor can sue the employer for contribution toward's the employee's civil damage claim based upon the employer's alleged negligence in causing the employee's injuries (e.g., negligent training, negligent supervision, failure to properly maintain a work machine, modification/removal of guards from a work machine, etc.). This is known as *Lambertson* or "Coverage B" liability.

The measure of an employer/workers' compensation carrier's *Lambertson* liability is the lesser of: (1) an amount arrived at by multiplying the employer's assessed percentage of fault by the gross verdict /damages awarded to the employee after a civil trial, or (2) an amount equal to the employer/insurer's net subrogation recovery after a civil trial.

B. Workers' Compensation Subrogation cases require early investigation that focuses on the following:

1. Causation
2. Respective fault levels of all of the involved parties
3. Civil damages
4. The employee's likely presentation in front of a jury
5. Future workers' compensation benefit exposure

Any appropriate resolution to a workers' compensation case will need to involve a consideration of each of these factors and their interplay with one another.

C. Workers' Compensation Subrogation cases are either tried (civil forum) or settled

1. Trial

- a. Damages are most often allocated by a statutory formula outlined in Minn. Stat. §176.061. *See Annotated Worksheet for Subrogation Recovery under Minn. Stat. §176.061*, in this Quick Reference Guide to Workers' Compensation Subrogation for a full explanation of how the formula operates.
- b. Damages can be allocated equitably through a *Henning* (Judicial) allocation. *See Workers' Compensation Subrogation Terminology*, in this Quick Reference Guide to Workers' Compensation Subrogation.

The idea in either case is to reimburse the employee and employer/workers' compensation carrier a fair amount of money, while preventing the employee from making a double recovery and preventing the employer/insurer from obtaining a disproportionate amount of recovery, as compared to its actual to-date and future workers' compensation benefit exposure.

2. Settlements

- a. Can be less costly than trial
- b. Can result in a greater subrogation recovery than through trial
- c. Have greater predictability in terms of results than trial often does
- d. Have many forms:
 - *Naig*
 - *Reverse-Naig*
 - Assignments (Partial or whole)

- Waive and Walk (*Lambertson*)
- Global

Each of these settlements are defined in the *Workers' Compensation Subrogation Terminology* section of this Quick Reference Guide to Workers' Compensation Subrogation.

D. Recovery

1. As a general rule of thumb, an employer typically obtains, through subrogation, no more than 2/3 of what it has paid in workers' compensation benefits. Actual results can fluctuate lower or higher than this, depending on the individual facts of each case.
2. An employer/workers' compensation carrier's subrogation recovery generally comes in the form of an "all cash" recovery or a "part cash/part future credit" recovery. Future credits can be taken against future workers' compensation benefits payable to the employee, but must be taken incrementally over time, and must take into account the cost of collection for the employee's civil damages. *See Annotated Worksheet for Subrogation Recovery under Minn. Stat. §176.061*, in this Quick Reference Guide to Workers' Compensation Subrogation.

WORKERS' COMPENSATION SUBROGATION TERMINOLOGY

Recoverable and non-recoverable damages. Much of the case-law governing workers' compensation subrogation matters speaks of "recoverable" and "non-recoverable" damages. "Recoverable" damages are simply damages that are recoverable or compensable under the Minnesota workers' compensation laws (e.g., vocational rehabilitation benefits, temporary total, temporary partial, permanent total, permanent partial disability benefits, and loss of earning capacity). "Non-recoverable" damages are damages which are not compensable under Minnesota workers' compensation law (e.g., pain and suffering, general disability, embarrassment, disfigurement, mental anguish, loss of consortium, etc.).

"Coverages A&B". The standard workers' compensation insurance policy contains provisions for two types of coverage. Coverage "A" provides coverage for payment of scheduled workers' compensation benefits under the Minnesota Workers' Compensation Act. Coverage "B" provides that the insurer will pay for damages which the insured is obligated to pay because of bodily injury by accident or disease arising out of and in the course of employment. Coverage "B" typically arises where the employer is named as a defendant in a civil action by a third-party tortfeasor. *See Lambertson Liability*, below.

Lambertson Liability. In *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679 (Minn. 1977), the Supreme Court of Minnesota held that a third party can recover contribution against an at-fault employer in an amount proportional to the employer's level of fault/negligence in causing a work-related injury, subject to a maximum amount equivalent to workers' compensation benefits paid and the present value of future workers' compensation benefits payable. *See Wilken v. International Harvester, Co.*, 363 N.W.2d 763 (Minn. 1985).

In 2000, *Minn. Stat.* §176.061 was amended to provide that a liable third-party has a right of contribution against the employer in an amount proportional to the employer's percentage of fault, *but not to exceed the net amount the employer recovers* in subrogation. *See Minn. Stat.* §176.061, Subd. 6 (c)(d).

§176.061, Subd. 6. Where an employee recovers damages from a third-party tortfeasor either through trial or settlement and the proceeds include damages which are recoverable and damages which are non-recoverable in workers' compensation, *Minn. Stat.* §176.061, Subd. 6 is utilized to allocate non-recoverable and recoverable damages and, thereby, distribute the proceeds between the employee/plaintiff (for non-recoverable damages), the employer/insurer (relative to its subrogation interest) and the employee/plaintiff's attorney (relative to her attorney's fees/costs of collection). The formula contained in *Minn. Stat.* §176.061, Subd. 6, mathematically distributes the proceeds of a settlement or verdict to the various parties. Under the formula, the proceeds are first reduced by an amount equivalent to the employee's fault, if any. Next, the formula deducts the reasonable costs of collection, including, but not limited to the employee/plaintiff's attorney's fees. One-third of the remainder is allocated to the plaintiff/employee. All or part of the remainder is then utilized to reimburse the employer/workers' compensation insurer or is given back to the employee and is available to the employer/workers' compensation carrier as a

credit against future workers' compensation benefits due and payable. *Minn. Stat.* §176.061, Subd. 6.

Henning Allocation. Where an employee reaches a settlement with the third-party tortfeasor and the settlement includes amounts recoverable and non-recoverable under workers' compensation, the employee can, at her option, petition the district court to allocate settlement proceeds between recoverable and non-recoverable damages, rather than having the award/settlement allocated pursuant to the distribution formula provided in *Minn. Stat.* §176.061, Subd. 6. Any settlement or award issued will be distributed in the same proportion as compensable versus non-compensable damages bear to the total amount of the settlement/award. *Henning v. Wineman* 306 N.W.2d 551 (Minn. 1981). The election may be made after the defendant tortfeasor and/or employer enter into a global settlement prior to trial (*Henning v. Wineman*, 306 N.W.2d 551 (Minn. 1981)) or immediately after trial (*Drake v. Reile's Transfer & Delivery, Inc.*, 613 N.W.2d 428 (Minn. Ct. App. 2000)). Where the employee elects the Henning allocation, she automatically forfeits her statutory right to 1/3 of the proceeds. Additionally, the employee loses her entitlement to a *Henning* allocation where she fails to provide notice of settlement discussions to the employer/workers' compensation insurer, as required by *Minn. Stat.* §176.061, Subd. 8(a). *Womack v. Fikes of Minnesota*, 61 WCD 574 (Minn. WCCA, September 12, 2001).

Waive & Walk. Waive and walk settlements are entered into between the employer/workers' compensation insurer and the third-party tortfeasor. The employer/workers' compensation carrier waives its subrogation claims in exchange for the third-party tortfeasor's agreement to waive its *Lambertson* liability claim against the employer. The settlements were historically entered into by the employer/workers' compensation insurer as a method by which to avoid potential *Lambertson* liability which could exceed its possible subrogation recovery. By waiving the subrogation claim, the employer/insurer lost the ability to pursue its subrogation claim, but in return, was able to avoid potentially larger *Lambertson* liability exposure by the third-party tortfeasor's release of claims against the employer. Prior to the 2000 statutory amendments, employers/workers' compensation insurers occasionally attempted to unilaterally file a motion with the district court to effectuate a waive and walk without the need to enter into an express agreement with the third-party tortfeasor. The 2000 statutory amendments to *Minn. Stat.* §176.061, Subd. 11 provide for an employer's right to unilaterally avoid contribution exposure by waiving, before selection of a jury, the right to recover workers' compensation benefits paid and payable, thus removing compensation benefits from the damages payable by any third-party. *See Minn. Stat.* §176.061, Subd. 11.

Naig Settlement. In a *Naig* settlement, the employee settles her claim against the third-party tortfeasor for all damages not recoverable in workers' compensation (e.g., pain and suffering, emotional distress, loss of consortium, etc.). The employer/workers' compensation insurer's subrogation claim is left intact. After a *Naig* settlement, the employer/workers' compensation insurer steps into the shoes of the employee to continue the unsettled portion of the employee's tort cause of action (e.g., damages for which the employee has been compensated in workers' compensation). *Naig v. Bloomington Sanitation*, 258 N.W.2d 891 (Minn. 1977).

Tyroll Hearing. A hearing through which post-Naig settlement workers' compensation damages are determined. See *Tyroll v. Private Label Chemicals, Inc.*, 505 N.W.2d 54 (Minn. 1993). In *Tyroll*, the Supreme Court of Minnesota set forth a two-step process for determining the subrogation interest after an employee settles her non-recoverable claims against the third-party tortfeasor, via a *Naig* settlement. The employer must first prove up the employee's common law damages, which involves establishing the nature and extent of the injury, causation, and the reasonableness of the compensation paid. In the second step, a separate proceeding is held before the district court, and the employer/workers' compensation insurer must prove up the amount of workers' compensation benefits paid and payable, with benefits payable being discounted to present value by the court. See *Minn. Stat.* §176.165. Prior to the 2000 statutory amendments, the employer/insurer was allowed subrogation recovery only to the extent that such recoverable and non-recoverable benefits overlapped.

With the 2000 legislative amendments to *Minn. Stat.* §176.061, language was added to Subdivisions 3, 5, and 7, providing that the employer/insurer has a right to recover all benefits it has had to pay to/on behalf of the employee due to the negligence of a third-party, regardless of whether the benefits were recoverable at common law or not. In February 2006, the Minnesota Supreme Court held that Subrogation recovery can be obtained only out of damages recoverable by the employee. See *Zurich American Insurance Company v. Bjelland*, 170 N.W.2d 64 (Minn. 2006).

No-Naig Agreements. An agreement between the employee and employer/workers' compensation insurer, whereby the employee agrees not to enter into a *Naig* settlement with the third-party tortfeasor. Often, such an agreement is entered into in exchange for the employer/workers' compensation insurer's agreement to share in a portion of the employee's expenses in pursuing her claims against the third-party tortfeasor.

Reverse-Naig Settlement. A settlement between the third-party tortfeasor and the employer, whereby the employer/workers' compensation insurer settles its subrogation claim for workers' compensation benefits paid and payable against the third-party tortfeasor. The employee's claims against the third-party tortfeasor for items of damage not compensable under workers' compensation are left intact.

Easterlin Notice. The employee is required to provide the employer/workers' compensation insurer with notice of an intention to settle her claims on a *Naig* basis, within sufficient time to afford the employer/workers' compensation insurer a "reasonable opportunity" to participate in the negotiations and to appear or intervene in any litigation to protect its interests. *Easterlin v. State*, 330 N.W.2d 704 (Minn. 1983). Timeliness of notice is addressed on a case-by-case basis. The notice requirement is to be judged in light of the parties' status at the time of the *Naig* settlement, rather than at the time the failure of notice is discovered. *Risdal v. Independent School District No. 146*, File No. 532-42-7759, unpublished (Minn. W.C.C.A. 2000). Failure to properly notify the employer/insurer of *Naig* settlement negotiations is presumptively prejudicial and, if the employee is unable to rebut the presumption, the employer/workers' compensation insurer is entitled to a credit against future workers' compensation benefits payable against the *Naig* settlement. The employer/workers' compensation insurer retains the right to pursue a subrogation claim against the tortfeasor for amounts not satisfied by the credit.

Global Settlements. Settlements in which the employee, third-party tortfeasor and employer/workers' compensation insurer's various interests are resolved.

Jackson v. Zurich Notice. An employee must notify the employer/insurer of any settlement negotiations or intent to settle all claims (e.g., recoverable and non-recoverable) against the third-party tortfeasor. The notice must be given in sufficient time to afford the employer/workers' compensation insurer a "reasonable opportunity" to participate in the negotiations and to appear or intervene in any litigation to protect its interests. *Minn. Stat.* §176.061, Subd. 8(a); *Jackson v. Zurich American Insurance Co.*, 546 N.W.2d 621 (Minn. 1996). Where an employee fails to properly notify the employer/workers' compensation insurer of a third-party settlement which purports to settle the entire third-party action, the resulting settlement between the employee and third-party tortfeasor is deemed void as against the employer/insurer's right of subrogation. The employer/workers' compensation insurer is entitled to credit a portion of the settlement proceeds against its workers' compensation liability.

Buck v. Schneider Assignment. A settlement between the employee and employer/workers' compensation insurer, wherein the employer/workers' compensation insurer assigns its subrogation rights to the employee. These assignments are often utilized as an inducement to an employee to settle her remaining workers' compensation claims on a full, final, and complete basis. *Buck v. Schneider*, 413 N.W.2d 569 (Minn. Ct. App. 1987).

**ANNOTATED
WORKSHEET
MINNESOTA STATUTE §176.061, SUBD. 6**

SUBROGATION RECOVERY

Factors impacting recovery under the formula:

- A. Gross Recovery \$ _____
 B. Employee Fault % _____ \$ _____
 C. Cost of Collection/Attorney's fees \$ _____

((Cost of Collection Percentage x Gross or Net Recovery (No.'s 1 or 2 below), depending upon whether there is employee fault))

- D. Percentage Cost of Collection

$$\frac{\text{Attorney's Fees, plus costs, if any}}{\text{Total Recovery}} = \$ \underline{\hspace{2cm}}$$

↓
 ((Gross or Net Recovery (Nos. 1 or 2, below), depending upon whether there is employee fault))

- E. Workers Compensation benefits paid to date \$ _____

Allocation under the formula:

1. Gross recovery \$ _____
 2. Reduce gross recovery by employee's fault, if any.

The calculation:

Gross recovery – amount correlating with Employee's % of fault, if any = **Net Recovery**
 \$ _____ – \$ _____ = \$ _____ \$ _____

3. Deduct cost of collection

Statutory Authority:

Deduct the reasonable costs of collection, including but not limited to, attorney's fees and burial expenses in excess of the statutory liability. *Minn. Stat.* §176.061, Subd. 6(a).

Cost of collection includes attorney's fees, which generally range between 33% and 35% of the gross/net recovery. Additionally, cost of collection includes the

employee's attorney's costs, if any, and other possible expenses, such as burial expenses.

The Calculation:

a. If no employee fault, the calculation will be:

$$\begin{array}{rcl} \text{Gross recovery} & - & \text{cost of collection} & = & \text{Net Net Recovery} \\ \$ \underline{\hspace{2cm}} & - & \$ \underline{\hspace{2cm}} & = & \$ \underline{\hspace{2cm}} \quad \$ \underline{\hspace{2cm}} \end{array}$$

b. If employee fault, the calculation will be:

$$\begin{array}{rcl} \text{Net recovery (No. 2, above)} & - & [(\text{percentage cost of collection} \times \text{net recovery (\#2)})] & = & \text{Net Net Recovery} \\ \$ \underline{\hspace{2cm}} & - & \$ \underline{\hspace{2cm}} & = & \$ \underline{\hspace{2cm}} \quad \$ \underline{\hspace{2cm}} \end{array}$$

4. Employee's Statutory 1/3 Share

Statutory Authority:

One-third of the remainder shall, in any event, be paid to the injured employee or the employee's dependents without being subject to any right of subrogation. *Minn. Stat.* §176.061, Subd. 6(b).

The Calculation:

$$\begin{array}{rcl} \text{Amount arrived at in No. 3, above,} & \times & 1/3 & = & \text{Employee's statutory 1/3 share} \\ \$ \underline{\hspace{2cm}} & \times & 1/3 & = & \$ \underline{\hspace{2cm}} \quad \$ \underline{\hspace{2cm}} \end{array}$$

5. Balance remaining for subrogation

The Calculation:

$$\begin{array}{rcl} \text{Amount arrived at in No. 3, above} & - & \text{Amount arrived at in No. 4, Above} & = & \text{Balance remaining for subrogation} \\ \$ \underline{\hspace{2cm}} & - & \$ \underline{\hspace{2cm}} & = & \$ \underline{\hspace{2cm}} \quad \$ \underline{\hspace{2cm}} \end{array}$$

6. Employer's Share of the proceeds

Statutory Authority:

Out of the balance remaining, the employer...shall be reimbursed in an amount equal to all benefits paid under this chapter to or on behalf of the employee or the employee's dependents by the employer..., less the product of the costs deducted under clause (a) of (this Section) divided by the total proceeds received by the employee or dependents from the other party multiplied by all benefits paid by the

employer . . . to the employee or the employee's dependents. *Minn. Stat.* §176.061, Subd. 6(c).

The Calculation:

WC paid – [(cost of collection ÷ gross recovery) x WC benefits paid] = Employer's share

\$ _____ – [(\$ _____ ÷ \$ _____) x \$ _____] = \$ _____ \$ _____

Short-cut: WC paid – (% Cost of Collection x WC Paid) = Employer's share

\$ _____ – (_____ X _____) = \$ _____ \$ _____

Note: There may be situations in which the employer/insurer's share of the proceeds by operation of the above-noted calculation will be more than the amount of money actually available for subrogation after the employee's statutory 1/3 share is allocated (No. 5, above) (This often occurs when there is a high percentage of employee fault and/or when the percentage of workers' compensation benefits paid to-date is high, as compared with the total verdict). In those situations, the employer/insurer will receive, as its share of the proceeds, the full amount of the balance remaining for subrogation (No. 5, above) as a cash recovery. There is generally no future credit available. *See Kealy v. St. Paul Housing and Redevelopment Authority*, 303 N.W.2d 468 (Minn. 1981). *See also* No. 7, below.

7. Balance Remaining for employee

Statutory Authority:

Any balance remaining shall be paid to the employee or the employee's dependents, and shall be a credit to the employer . . . for any benefits which the employer . . . is obligated to pay, but has not paid, and for any benefits that the employer . . . is obligated to make in the future. *Minn. Stat.* §176.061, Subd. 6(d).

The Calculation:

Balance remaining for subrogation (No. 5, above) – Employer's share (No. 6, above) = Balance remaining for employee

\$ _____ – \$ _____ = \$ _____ \$ _____

Note: There may be no balance remaining. In those cases, e.g., where the amount available for subrogation after the employee receives her 1/3 share is less than or equal to the workers' compensation benefits paid, less the cost of collection, the employer/insurer recovers its full share of the proceeds, under No. 6, above, without the opportunity for a future credit. *See Kealy v. St. Paul Housing and Redevelopment Authority*, 303 N.W.2d 468 (Minn. 1981). On the other hand, where there is a balance remaining after running the calculation in No. 7, the employee

generally receives the balance in cash form and the employer/insurer receives a future credit for the sum, less reduction for costs of collection. *See* No. 8, below.

8. Future Credit

Statutory Authority

Any balance remaining shall be paid to the employee or the employee's dependents, and shall be a credit to the employer . . . for any benefits which the employer . . . is obligated to pay, but has not paid, and for any benefits that the employer . . . is obligated to make in the future. *Minn. Stat.* §176.061, Subd. 6(d).

Nature of the future credit

The future credit is not a pure credit in the exact amount of the balance paid over to the Employee. Rather, it is also subject to a cost of collection discount, requiring the insurer to pay one-third (or the particular percentage of cost of collection applicable to the particular case) of all future compensation benefits until the credit is used up.

Cronen v. Wegdahl Coop. Elevator Assn., 278 N.W.2d 102 (Minn. 1979). Thus, under *Cronen*, for every dollar of benefits paid in the future, the Subdivision 6(d) credit should be reduced by 33% (or the applicable percentage cost of collection derived in the Subdivision 6c calculation). *See Kealy v. St. Paul Housing and Redevelopment Authority*, 303 N.W.2d 468 (Minn. 1981).

As a practical matter, the future credit has an actual net value to the employer/workers' compensation insurer, which is 33% (or the applicable percentage cost of collection utilized in the particular case) less than the gross figure derived through mathematical operation of the formula. For every dollar of future workers' compensation liability incurred, the employer will actually pay the employee 33 cents (or the applicable amount derived from the cost of collection ratio under the formula) and reduce its credit by one dollar.

The literal language of *Minn. Stat.* §176.061, Subd. 6(d), provides that the future credit extends to "any benefits which the employer...is obligated to pay, but has not paid, and for any benefits that the employer...is obligated to pay in the future." *Minn. Stat.* §176.061, Subd. 6(d). The only limitation the Statute places on the future credit is that it may not be applied to interest or penalties. Case law interpreting the Statute appears to acknowledge that the future credit applies to future medical expenses as well as indemnity benefits. *See S.B. Foot Tanning Company, et. al. v. Leo Piotrowski, et. al.*, 554 N.W.2d 413 (Minn. Ct. App. 1996). However, in at least one situation, the Workers' Compensation Court of Appeals has held that an employer or workers' compensation insurer cannot use the future credit to defeat a no-fault insurer's right to reimbursement as against the workers' compensation insurer. *Womack v. Fikes of Minnesota*, 61 W.C.D. 574 (W.C.C.A. 2001).

The Calculation for the “net” value of the future credit

Balance remaining to employee (No. 7, above) – (Balance remaining to Employee (No. 7 above) x % Cost of Collection (No. 2, above) = Net value of Future Credit

\$ _____ – (\$ _____ X \$ _____) = \$ _____

LAMBERTSON LIABILITY CALCULATION

Factor's potentially impacting on liability interest:

- A. Employer fault
- B. Third-party tortfeasor fault
- C. Employee Fault

See *Minnesota Third-Party Liability and Subrogation Practice 2006*, Arthur, Chapman, Kettering, Smetak & Pikala, P.A. Copyright 2006.

The Calculation:

Amount of Verdict x Employer's Comparative Fault = *Lambertson* Liability share

\$ _____ x \$ _____ = \$ _____

Note: At least for dates of injury following the August 2000 statutory amendments, the *Lambertson* liability share calculated above cannot exceed the employer's net subrogation recovery.