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SUPREME COURT OF OHIO UPHOLDS WORKERS' COMPENSATION SUBROGATION STATUTES

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The Supreme Court of Ohio, in *Groch v. General Motors Corp.*, recently upheld the constitutionality of the Ohio workers' compensation subrogation statutes. The subrogation statutes give the Administrator of the Bureau of Workers' Compensation and self-insuring employers the right to reimbursement of workers' compensation benefits paid to an injured employee out of any recovery that the employee subsequently obtains from a third party. This is noteworthy because in 2001, the Supreme Court, in *Holeton v. Crouse Cartage Co.*, held that the previous version of the subrogation statutes were unconstitutional. In 2003, the General Assembly responded to the *Holeton* decision by enacting the current version of the statutes. And, with the *Groch* decision, employers can now expect to recover some or all of their expenses, directly or indirectly, out of the proceeds their employees recover from third parties for their work-related injuries and occupational diseases.

In *Holeton*, the Court found several aspects of the previous version of the subrogation statutes unconstitutional. The previous version required an injured employee to reimburse the Bureau of Workers' Compensation or the self-insuring employer for the estimated value of future benefits at the time that the employee recovered funds from the third party. The *Holeton* Court found that this could result in situations when the Bureau or the employer could be reimbursed for benefits that the employee may not have ultimately

received.

In addition, the previous version of the subrogation statutes distinguished between claims that were tried in court and those that were settled out of court. Funds that an injured employee received out of court would have created a subrogation right in the total amount received in the settlement. However, funds received as a result of a court trial could be segregated by the jury as to funds attributable to the workers' compensation claim and funds attributable to other matters, such as emotional damages. This would have created a benefit to employees who tried their cases instead of settling them, because awards received through trial could be segregated, with the right of reimbursement applying only to the portion of damages that represented workers' compensation or medical benefits.

The current subrogation statutes permit an injured employee to establish a trust account, which the employee may use to reimburse the Bureau or the self-insuring employer periodically for benefits paid after the settlement or damages award. This way, any money remaining in the trust account after the workers' compensation payments have been fully repaid can be returned to the employee. The *Groch* Court held that this option allows an injured employee to avoid reimbursing the Bureau or the self-insuring employer for benefits that the employee may never have received.

The current subrogation statutes also provide for equal treatment of awards received through settlement and those awarded after a trial. The current statutory scheme provides a general formula for dividing the net amount recovered between the injured employee and the Bureau or self-insuring employer, which applies to recoveries reached through both settlement and trial. In a settlement situation, however, the parties can also agree to divide the amount "on a more fair and reasonable basis," request a conference with the Bureau, or participate in alternative dispute resolution.

If an injured employee is not fully compensated, as in the case of an underinsured defendant, the statutory formula results in the employee and the Bureau or self-insuring employer sharing the undercompensation on a pro-rata basis. The *Groch* Court held that this was an equitable result that withstands constitutional scrutiny.

Self-insuring employers should be cognizant of their rights under the subrogation statutes. A self-insuring employer's right to reimbursement is automatic, regardless of whether it is joined as a party in its employee's action against the third party. In addition, a self-insuring employer may pursue legal proceedings against a third party by itself or in conjunction with its injured employee. If a self-insuring employer pursues proceedings against a third party, it must notify its injured employee of those proceedings.

State-fund employers should ensure that the Bureau is made aware of any potential recoveries in their claim from third parties. The Bureau has a “Subrogation Referral Form” available on its website. Amounts that the Bureau recovers can lower a state-fund employer’s premiums.

Additional Information

If you have any questions about the *Groch* opinion, the subrogation statutes, or their impact on your company, please contact Joseph N. Gross at (216) 363-4163 or jgross@bfca.com.

You can review the *Groch* opinion at <http://www.sconet.state.oh.us/rod/docs/pdf/0/2008/2008-Ohio-546.pdf>

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