

A Word on MO Comp Subro

By: Christopher T Archer, 2020

First the Statute:

287.150. Subrogation

1. Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person shall be apportioned between the employer and employee or his dependents using the provisions of subsections 2 and 3 of this section.

2. When a third person is liable for the death of an employee and compensation is paid or payable under this chapter, and recovery is had by a dependent under this chapter either by judgment or settlement for the wrongful death of the employee, the employer shall have a subrogation lien on any recovery and shall receive or have credit for sums paid or payable under this chapter to any of the dependents of the deceased employee to the extent of the settlement or recovery by such dependents for the wrongful death. Recovery by the employer and credit for future installments shall be computed using the provisions of subsection 3 of this section relating to comparative fault of the employee

3. Whenever recovery against the third person is affected by the employee or his dependents, the employer shall pay from his share of the recovery a proportionate share of the expenses of the recovery, including a reasonable attorney fee. After the expenses and attorney fee have been paid, the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered if there is no finding of comparative fault on the part of the employee, or the total damages determined by the trier of fact if there is a finding of comparative fault on the part of the employee. Notwithstanding the foregoing provision, the balance of the recovery may be divided between the employer and the employee or his dependents as they may otherwise agree. Any part of the recovery found to be due to the employer, the employee or his dependents shall be paid forthwith and any part of the recovery paid to the employee or his dependents under this section shall be treated by them as an advance payment by the employer on account of any future installments of compensation in the following manner:

(1) The total amount paid to the employee or his dependents shall be treated as an advance payment if there is no finding of comparative fault on the part of the employee; or

(2) A percentage of the amount paid to the employee or his dependents equal to the percentage of fault assessed to the third person from whom recovery is made shall be treated as an advance payment if there is a finding of comparative fault on the part of the employee.

4. In any case in which an injured employee has been paid benefits from the second injury fund as provided in subsection 3 of section 287.141, and recovery is had against the third party liable to the employee for the injury, the second injury fund shall be subrogated to the rights of the employee against said third party to the extent of the payments made to him from such fund, subject to provisions of subsections 2 and 3 of this section.

5. No construction design professional who is retained to perform professional services on a construction project or any employee of a construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project shall be liable for any injury resulting from the employer's failure to comply with safety standards on a construction project for which compensation is recoverable under the workers' compensation law, unless responsibility for safety practices is specifically assumed by contract. The immunity provided by this subsection to any construction design professional shall not apply to the negligent preparation of design plans or specifications.

6. Any provision in any contract or subcontract, where one party is an employer in the construction group of code classifications, which purports to waive subrogation rights provided under this section in anticipation of a future injury or death is hereby declared against public policy and void. Each contract of insurance for workers' compensation shall require the insurer to diligently pursue all subrogation rights of the employer and shall require the employer to fully cooperate with the insurer in pursuing such recoveries, except that the employer may enter into compromise agreements with an insurer in lieu of the insurer pursuing subrogation against another party. The amount of any subrogation recovery by an insurer shall be credited against the amount of the actual paid losses in the determination of such employer's experience modification factor within forty-five days of the collection of such amount.

How it Works:

For accidents after 8-28-93, comparative fault matters. Where comparative fault is assessed (at trial), the following subro rule applies:

$$\text{Subrogation Interest} = \frac{\text{Work Comp. Paid}}{\text{Total Damages}} \times (\text{Third party recovery} - \text{Atty's fees} - \text{Costs})$$

The amount of money the employee gets from the third party after the application of the above is then treated as an advance payment for any further obligations that may still be owed in the comp. case (including medical benefits), although it is reduced (once again) by the percentage of the employee's comparative fault.

For accidents before 8-28-93, or for cases that are not tried and therefore no comparative fault is found by the "trier of fact," (i.e. settled cases), the old Ruediger rule applies which is still outlined in Section 287.150:

$$\text{Subrogation Interest} = \frac{\text{Work Comp. Paid}}{\text{Total recovery}} \times (\text{Third party recovery} - \text{Atty's fees} - \text{Costs})$$

The total amount of money the employee gets from the third party after the application of the above is then treated as an advance payment for any further obligations that may still be owed in the comp. case (including medical benefits).

Notes:

1. The Western District has found that an employer cannot refuse to pay an obligation in the hopes of receiving an offset or credit from the third-party case. Medical treatment and TTD will be required to be paid by the workers' compensation carrier for those obligations that arose prior to the settlement or trial of the third-party case. *McCormack v Stewart Enterprises*, 916 SW2d 219 (Mo. App. W.D. 1995)

2. The "loss of consortium" cases brought by spouses cannot be tagged as subject to the subrogation interest. Be careful if a loss of consortium or other derivative suit is involved. Scrutinize any third-party settlement terms for an inequitable assignment of the proceeds to the spouse's case. The Court of Appeals has approved a wrongful death settlement in which only \$2,000 was assigned to the wrongful death count and \$166, 000 for the pre-death consortium claim to the widow of a claimant. See *Bridges v Van Enterprises*.

3. A subrogation interest is not a lien. In any Missouri workers compensation case, get the claimant's attorney to agree in writing to protect your subrogation interest pursuant to Ruediger, which is codified in Section 287.150. For accidents after 8-28-05 involving the death of the employee, the recovery in any third-party case is subject to an actual subrogation lien of the Employer/ Insurer.

4. Depending on the total benefits paid on a case, try to compromise the settlement of the comp. case with a waiver of your subrogation.

5. Remember that upon the settlement or trial of the third-party case, any future obligations under the workers' compensation case, including the value of future medical, are subject to an offset or credit to the gross amount the claimant settled or was awarded in the third party case. (If no comparative fault is assessed, it is a dollar for dollar credit.)

6. Be explicit if you are concluding a comp case by stipulation whether or to what extent you are waiving your subrogation interest.

7. Special rules apply when an insurer becomes insolvent and MIGA provides coverage. See *Tillman v Cam*, 20 S.W.3d 579 (Mo.App. S.D. 2000)

8. If defense counsel is retained to protect your subrogation interest, a determination or stipulation is required as to which party effected the settlement or recovery against the third party which may modify the "net third party" figure. *Parker v Laclede Gas*, 770 S.W.2d 461 (Mo.

App. E.D. 1989) See also *Bi-State Development Agency v Raymond Gurley*, ED 81442 (Mo. App. 4/2003)

9. A post-trial settlement of a third-party case in which comparative fault was found by the “trier of fact” will not negate or supercede the finding of comparative fault and its impact on the calculation of the Employer’s subrogation interest under 287.150.3.

10. The two-year remarriage dowry of 287.240 (above) is not subject to the credit provision of future installments and can be ordered to be paid even if the remarriage occurs during the credit period. *Ikerman v Koch* 580 SW3d 273 (Mo Banc 1979)

11. In a case decided in October of 2006, the Western District court of appeals held that an Employer and Workers’ Compensation Carrier does not have the right to intervene in a third-party suit to protect their subrogation interest in a third-party recovery pursuant to section 287.150 RsMo. *Michael Kinney v Schneider National Carriers Inc. et al.* WD 66261

The Court found that Schneider failed in their burden to establish a right to intervene under Rule 52.12(a)(1) as an unconditional right or under Rule 52.12 (a)(2) as a right based upon an argument that the Employer did not have the ability outside of intervention to protect their subrogation interest.

13. Based upon the application of *Ruediger*, codified in section 287.150, an Employer can be entitled to all of the third-party proceeds to which the claimant would be entitled after attorney fees and costs. *Missouri Highway and Transportation Commission v David Merritt* ED 87198 (Mo App Oct 2006) The Court refused to follow the calculation and formula provided for in *Barker v H and J Transporters, Inc.* 837 S.W.2d 537 (Mo. App. 1992).

Subrogation Examples

1 Total benefits paid (Work Comp Paid): 10,000

Third Party Recovery by settlement: 30,000

Assume 1/3 atty’s fee in third party case and no expenses

$$\begin{array}{r} \text{Subrogation Interest} = 10,000 \quad (30,000 - 10,000) = 6,667 \\ \text{-----} \times \\ 30,000 \end{array}$$

Total Comp liability for case: **3,333**

2 Value of TTD and Medical paid in Comp- 10,000 (PPD anticipated \$8,000)

Third Party Recovery by settlement prior to comp case settlement or hearing: 50,000

Assume 1/3 atty's fee in third party case and no expenses

Employer takes a "holiday" or dollar for dollar credit on PPD (8,000), balance owed to employer:

$$\text{Subrogation Interest} = 10,000 \times \frac{(50,000-16,666)}{50,000} = \mathbf{6,700}$$

Employer gets 6,700. Employee's recovery (50,000-16,500-6,700) = 26,800 is treated as an advance of any future benefits (8,000 PPD) and so no PPD will be owed or paid.

Total Comp liability for case: **3,300**

NOTE: If Attorney for the Claimant had obtained the 8,000 first, before settling third party case:

$$\text{Subrogation Interest} = 18,000 \times \frac{(50,000-16,666)}{50,000} = 11,999.88$$

Total comp liability would have been: (18,000-11,999.88) = **6,000**

3 Total Work Comp Paid- 20,000

Total damages found by judge or jury in third party case: 60,000

Comparative fault of claimant set at 40% by jury or judge ("trier of fact")

Assume 1/3 Attorney's fee in third party case and no expenses

$$\text{Subrogation Interest} = 20,000 \times \frac{(36,000 - 12,000)}{60,000} = 8,000$$

Total Comp liability for case: **12,000**

4 Total Work Comp Paid- 45,000: Open medical awarded for hip replacement

Total damages found by judge or jury in third party case: 500,000

Comparative fault of claimant set at 40% by jury or judge (“trier of fact”)

Assume 1/3 Attorney’s fee in third party case and no expenses

$$\text{Subrogation Interest} = \frac{45,000}{500,000} \times (300,000 - 100,000) = \underline{\underline{18,000}}$$

Amount of holiday on future benefits owed (value of medical for hip replacement):

$$\text{Holiday Amount} = (300,000 - 100,000 - 18,000) \times 60\% = \underline{\underline{\$109,200}}$$

Many times a claimant’s attorney receives a settlement offer in a third party case that takes into account the comparative fault of the claimant. Unlike division of proceeds in a consortium claim that can be done by stipulation, the assignment of comparative fault under the subrogation statute must be assessed by the “trier of fact”. My favorite response when an attorney asks me to reduce my subrogation interest based upon comparative fault: “ We think you are a great attorney and can do better than that at trial as it would relate to the comparative fault determination.” Can he/she argue with your logic?

You must make an accurate prediction of the likely comparative fault yourself when negotiating a possible reduction of your interest, but the Employer and Insurer is certainly in a superior negotiating position.

5 Total Work Comp Paid- 20,000

Third party recovery by settlement: Consortium claim of spouse: 30,000
Personal injury of claimant: 40,000

Underinsured Motorist claim: 25,000

Assume 1/3 atty’s fee in third party case and no expenses

$$\text{Subrogation Interest} = \frac{20,000}{70,000^*} \times (40,000 - 15,000) = 7,142.86$$

* (45,000 plus 25,000 uninsured) In *Barker v H & J Transporters*, the Western District in 1992 allowed the amount recovered in underinsurance (total of policies in the name of the claimant and his employer) to be included in the amount of the "total recovery" although those same proceeds are not included in the "third party recovery". Barker was distinguished as noted above.

Total Comp liability for case: **12,857.14**

6 Total Work Comp Paid- 20,000

Third party recovery by settlement: 10,000

Assume 1/3 atty's fee in third party case and no expenses

$$\text{Subrogation Interest} = 20,000 \times \frac{(10,000 - 3,333)}{10,000} = 6,666 \text{ (all that the Clmt gets)}$$

Total Comp liability for case: **13,333**

These are the type of case where the attorney for the claimant has a tough sale to his client and often asks the Employer/ Insurer to waive or reduce the amount they will accept in satisfaction of their subrogation interest. Ie "Let's split it into thirds." Forgotten by the claimant is the 20,000 in benefits already received and the attorney's fee already paid to the claimant's attorney from the workers' compensation case.

Based upon the application of *Ruediger*, codified in section 287.150, an Employer would be entitled to all of the third-party proceeds to which the claimant would be entitled after attorney fees and costs. *Missouri Highway and Transportation Commission v David Merritt* ED 87198 (Mo App Oct 2006)

The Court refused to follow the calculation and formula provided for in *Barker v H and J Transporters, Inc.* 837 S.W.2d 537 (Mo. App. 1992).