

## **Employer's Subrogation Upheld Despite Contract Recovery Argument**

*Clyde Kennedy v. WCAB (Henry Modell & Co., Inc.),  
No. 1649 C.D. 2012 (Opinion filed 8/01/13)*

Despite strenuous efforts by the Claimant to defeat a compensation lien; the Commonwealth Court upheld the employer's subrogation entitlement.

The Claimant, Clyde Kennedy, was injured in 1989. He was working by a conveyor belt, the operation of which caused a severe injury to his right hand. The injury was accepted as compensable, and Claimant was paid wage loss and medical benefits.

Claimant sued the manufacturer of the conveyor belt, an entity called Keystone Spray Equipment, Inc. Claimant's counsel informed the employer of the pendency of this action, and agreed to protect employer's subrogation in the event of a recovery.

The civil action was filed in Philadelphia Common Pleas Court, under theories of negligence, breach of warranties and strict tort liability. Keystone was insured by Regis Insurance Company, but the carrier refused to defend, claiming a "products hazard" exclusion in the policy. This was a problem for the plaintiff, because the manufacturer was insolvent and could not independently pay any judgment or settlement, and evidently lacked the means even to maintain an action against its insurer.

Undeterred, however, Claimant's counsel obtained a stipulated "consent judgment" against the manufacturer for over \$426,000.00. The manufacturer stipulated, among other things, to negligence in the manufacture and installation of the conveyor belt. In lieu of trying to execute against the insolvent manufacturer, Claimant took an assignment of any rights the manufacturer had to seek indemnification from the carrier, Regis.

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Claimant then filed suit against Regis under a breach of contract and bad faith theories, and obtained a judgment equal to the previously stipulated \$426,000.00.

At that point, the Employer advised claimant's attorney that its lien was slightly in excess of \$81,000.00. Receiving no response, Employer filed a (workers' compensation) petition for Review. Claimant defended under the theory that Employer had no subrogation rights because fund recovered did not arise from the negligence of any third party that caused the original work injury. Rather, the actual cash recovery obtained was under a breach of contract theory.

The WC Judge and the Appeal Board did not buy this argument, so Claimant went to the Commonwealth Court.

In affirming, the Commonwealth essentially found that, while the ultimate recovery was indeed premised on a theory of the liability insurer's breach of its contractual obligation to the original defendant manufacturer; the genesis of this recovery was, in fact, the (stipulated) negligence of the manufacturer, which was the direct cause of Claimant's original work injury.

Claimant's analogies to the limitations on employer subrogation in medical malpractice and uninsured motorist recoveries were dismissed as inapposite.

The Claimant himself had no independent rights against Regis stemming from its refusal to defend and indemnify Keystone. He merely stepped into the shoes of Keystone as an assignee to pursue indemnification because Keystone could not. His recovery was based on the original tort claim against Keystone.

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