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A. **Conflicts of law:**
   Maximizing your recovery when handling Workers' Compensation claims involving multiple jurisdictions

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Emerging Issues

Conflicts of law:

Maximizing your recovery when handling Workers' Compensation claims involving multiple jurisdictions

by Andrew J. Reinhardt

Most workers' compensation attorneys who represent injured employees encounter, to a greater or lesser degree, cases having multistate implications, and therefore presenting conflict-of-law questions. Endless factual complications can be present. Consider, for example, a case where an employee is a resident of state A, was hired in state B, by a company having its principal place of business in state C, and is injured while working in state D.

It is important to be familiar the with typical requirements for any state to exercise jurisdiction over a claim. It should also be apparent that there are a number of cases that could be filed in one of several states or it could be that certain portions of a claim might be pursued in one state while another portion of the claim is pursued in another state. States may have different rules in regards to allowing such multiple filings depending upon whether there has been a binding election or acceptance of benefits from another state. It may also be important whether successive filings are for different benefits or periods of benefits. Generally, while double recoveries are not favored, on some occasions greater total recoveries may be obtained for an injured worker who pursues multiple state filings. Also, regardless of whether a workers' compensation claim can or should be pursued in more than one state, familiarity with the types of recoveries that can be obtained from one state versus another would be important to advise an injured worker as to what jurisdiction he should choose to pursue his case.

Q-1: What are the typical requirements for any state's workers' compensation tribunal to assert jurisdiction over a particular claim?

a. States will typically not subordinate their law to another state in regards to taking jurisdiction over a claim

It is initially noted that the U.S. Supreme Court, in *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965), held that the Full Faith and Credit Clause of the federal Constitution does not require that a state subordinate its workers' compensation policies to those of another state. *Crider* is frequently cited, and has been followed in such cases as *Robert M. Neff, Inc. v. Workmens Compensation Appeal Board (Burr)*, 155 Pa. Commw. 44, 624 A.2d 727 (1993). In *Neff*, it was held that a Pennsylvania employee injured in the state while working for an Ohio employer, was entitled to all Pennsylvania compensation and medical benefits to which he would otherwise be entitled, regardless of the fact that he had contractually agreed to be covered by the Ohio workers' compensation law, even if Ohio law authorized such an agreement. 624 A.2d at 732-33.

Some states do, however, as a matter of state law, decline to hear compensation cases where doing so would require enforcement of the compensation law of a state which (as do the majority of states) has an administrative (rather than judicial) enforcement scheme. For example, in *Jerry v. Young's Well Service*, 375 So. 2d 186 (La. Ct. App. 1979), it was held first that Louisiana courts had no jurisdiction to apply Louisiana compensation where the employment contract was entered into, and the accident occurred, outside the state, and then held that a Louisiana court was without jurisdiction to enforce the Arkansas compensation act, which was enforced by an administrative commission, and under which "any remedy [is] . . . inextricably bound to the administrative procedures of that commission." *Id.* at 188.

Similarly, in *Ray v. Aetna Casualty & Surety Co.*, 517 S.W.2d 194 (Tenn. 1974), it was held that, regardless of a lack of constitutional limitation on such power:

> The general rule is that courts of one state will not enforce the workmen's compensation laws of another jurisdiction, where the other state has provided

> a special tribunal to administer claims thereunder. *Id*. at 197.

The *Ray* Court quoted the approval of that principle in the leading academic authority on workers' compensation, which presently appears at 9 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 140.02(3), at 140-6, -7 (2000). Some jurisdictions, however, reject that principle. See, as illustrative, the Arizona statute providing:

> B. If a workman who has been hired without this state is injured while engaged in his employer's business, and is entitled to compensation for the injury under the law of the state where he was hired, he may enforce against his employer his rights in this state if they are such that they can reasonably be determined and dealt with by the commission and the courts in this state. Ariz. Rev. Stat. § 23-904(B).

b. Most states will take jurisdiction over claims for accidents in their state

It appears that, at present, most states will take jurisdiction of compensation claims for injury resulting from in-state accidents. Larson suggests "place of injury" as a basis for residual jurisdiction, thereby avoiding the danger of coverage by no state, explaining:

> The view that, whatever other arrangements it may make about applicability, each state should unreservedly take responsibility for injuries within its borders rests not on any survival of delictual conflicts rules but simply on statutory construction, on the unavoidable interest of the state in an injury that may affect its own citizens more than those of any other state, and on the desirability of providing a backstop liability to which claimants can turn when they find themselves on the wrong side of all other extraterritoriality rules. 9 Larson & Larson, *supra*, §143.03(1), at 143-16.

Attention is called to *Rutledge v. Al G. Kelly & Miller Bros. Circus*, 18 N.Y.2d 464, 223 N.E.2d 334 (1966), where the New York Court of Appeals rejected a rule previously applied in that state which denied compensation coverage of in-state injuries in some circumstances, and held:

> New York has a primary public interest in industrial accidents happening here and it may take jurisdiction when an industrial accident occurs here *even though control of the work, payment of wages, and employment of the claimant all may have their roots elsewhere*. 223 N.E.2d at 338 (emphasis added).

The *Rutledge* Court applied that rule so as to hold that the New York Board had jurisdiction over a compensation claim by an Arkansas resident employed by an Oklahoma-based traveling circus, who was injured in New York.

c. Some states, including Virginia, require other contacts with the state besides simply an in-state accident or in-state residence

The following Connecticut provision is illustrative of statutory provisions excluding some nonresident employees injured in in-state accidents from compensation coverage:

> (B) "Employee" shall not be construed to include:
>
> . . . .
>
> (vi) Any person who is not a resident of this state but is injured in this state during the course of his employment, unless such person (I) works for an employer who has a place of employment or a business facility located in this state at which such person spends at least fifty per cent of his employment time, or (II) works for an employer pursuant to an employment contract to be performed primarily in this state. Conn. Gen. Stat. Ann. § 31-275(9)(B)(vi).

In *Kluttz v. Howard*, 228 Conn. 401, 636 A.2d 816 (1994), the court took notice of this definition while holding that a nonresident employee injured in Connecticut prior to its effective date was eligible for Connecticut compensation benefits.

Assumption of jurisdiction over out-of-state accidents is a question subject to inconsistent statutory and case law. One approach is that taken in Virginia where it is provided by statute:

> A. When an accident happens while the employee is employed elsewhere than in this Commonwealth which would entitle him or his dependents to compensation if it had happened in this Commonwealth, the employee or his dependents shall be entitled to compensation, if:
>
> 1. The contract of employment was made in this Commonwealth; and
> 2. The employer's place of business is in this Commonwealth;
>
> provided the contract of employment was not expressly for service exclusively outside of the Commonwealth. Va. Code Ann. §65.2-508A.

In *Worsham v. Transpersonnel, Inc.*, 15 Va. App. 681, 426 S.E.2d 497 (1993), it was held that the statutory requirement that the employer's place of business must be in the Commonwealth is not satisfied by its merely conducting business in the state, and that the WCC had no jurisdiction where the employer was incorporated and maintained its principal place of business elsewhere and the claimant was not required to live in the state. 426 S.E.2d at 499; *see CLC Construction, Inc. v. Lopez*, 20 Va. App. 258, 456 S.E.2d 155 (1995), as an example of cases where, in contrast to *Worsham*, the place of business in the Commonwealth requirement was met. 456 S.E.2d at 158.

In *General Electric v. DeCubas*, 504 So. 2d 1276 (Fla. Dist. Ct. App. 1986), it was held that under a statute providing for payment of compensation for out-of-state injuries and deaths if, *inter alia*, "the employment was principally localized in this state," even if the contract of employment was made elsewhere, *Id*. at 1277, an employee working about 73 percent of his time in Florida qualified, rejecting the argument that the question to be determined was where the *employer* was principally localized. In *Johnson v. United Airlines*, 550 So. 2d 134 (Fla. Dist. Ct. App. 1989), it was held that an airline flight attendant's employment was "principally localized" in Florida, where she was based, although the majority of her flight time was spent outside of Florida airspace. In *Ewing v. George A. Hormel & Co*., 428 N.W.2d 674 (Iowa Ct. App. 1988), it was held that the Iowa Commission had no jurisdiction over a claim by an employee who, although an Iowa resident, had his employment "localized" in Nebraska and was injured in that state. *Id*. at 675.

The applicable Alabama statute provides that an employee or his dependants, if otherwise entitled to compensation had the injury or death resulted from an in-state accident, are entitled to compensation for an out-of-state accidental injury, provided:

(1) His employment was principally localized in this state;
(2) He was working under a contract of hire made in this state in employment not principally localized in any state;
(3) He was working under a contract of hire made in this state in employment principally localized in another state whose workmen's compensation law was not applicable to his employer; or
(4) He was working under a contract of hire made in this state for employment outside the United States. Ala. Code §25-5-35(d)(1)-(4).

In *Ex parte Flint Construction Co*., 775 So. 2d 805 (Ala. 2000), it was held the trial court (in a state utilizing the judicial rather than administrative method of enforcing its compensation act), had jurisdiction of a claim for out-of-state injuries, when his employment was not localized in any particular state, but his employment was pursuant to a contract for hire entered into in Alabama. *Id*. at 808.

Murray v. Ahlstrom Industrial Holdings, Inc., 131 N.C. App. 294, 506 S.E.2d 724 (1998), is illustrative of cases turning on whether the contract of employment was made in the forum state. There, the employee was injured in Mississippi after having been telephoned at his North Carolina home by his former, out-of-state employer and offered a job in Mississippi. The *Murray* court held that, under the rule that "for a contract to be made in North Carolina, the final act necessary to make it a binding contract must be done here," 506 S.E.2d at 726, the offer, and following telephone negotiation, acceptance by the claimant in North Carolina, was such final act, empowering the Commission to assume jurisdiction. In *D.L. People's Group, Inc. v. Hawley*, 804 So. 2d 561 (Fla. 1st Dist. Ct. App. 2002), it was held that Florida had jurisdiction over a claim for an employee's death in Missouri, where such employee signed the employment contract in Missouri and sent it to the employer's president, who signed and executed it in Florida. *Id*. at 563.

Ray should be noted as illustrating the point that if other requisite factors are not present, the mere fact that the employee is a resident of the forum state will not be sufficient to permit assumption of jurisdiction over his compensation claim. There, the Tennessee Supreme Court held that when the employee, a Tennessee resident, was injured in Missouri, and the contract of employment was entered into in that state, contacts with Tennessee were insufficient to justify application of Tennessee law. 517 S.W.2d at 197.

An interesting variation is presented by *Wartman v. Anchor Freight Co*., 75 Ohio App. 3d 177, 598 N.E.2d 1297 (1991). The *Wartman* Court applied a section of the Ohio act providing:

> If an employee is a resident of a state other than this state and is insured under the workers' compensation law or similar laws of a state other than this state, the employee and his dependents are not entitled to receive compensation or benefits under this chapter, on account of injury, disease, or death arising out of or in the course of employment while temporarily within this state and the rights of the employee and his dependents under the laws of the other state shall be the exclusive remedy against the employer on account of the injury, disease, or death.
>
> 598 N.E.2d at 1300 (quoting Ohio Rev. Code Ann. § 4123.54(G) (which remains in effect)) to the case of a Kentucky resident employed by a Michigan corporation who was injured while driving a truck through Ohio.

The court held that the employee was not insured under the workers' compensation law of another state, because he was not covered under Michigan law (as a nonresident of Michigan injured outside Michigan), and was also not covered under Kentucky law, regardless of his residency of that state. Therefore, he was not precluded from entitlement to Ohio compensation benefits. *Id*. at 1301-02.

Q-2: Where more than one state may assert jurisdiction over a claim because the employer's place of business is in one state and the accident occurred in another, what limitations might be placed on the employee's ability to choose the jurisdiction in which to file?

a. An injured worker will often have a choice of multiple jurisdictions in which to file claims

In general, it can be stated that, absent a specific statutory provision, there is no obstacle to prevent a compensation claimant from filing his claim in any state having jurisdiction. This point was recognized by the U.S. Supreme Court in *Thomas v. Washington Gas Light Co*., 448 U.S. 261 (1960), which (while primarily dealing with another issue, as discussed herein under Q-3, *infra*), held that it was "perfectly clear" that the employee there:

> could have sought a compensation award in the first instance either in Virginia, the State in which the injury occurred, *Carroll v. Lanza*, *supra*; *Pacific Employers*, *supra*, or in the District of Columbia, where petitioner resided, his employer was principally located, and the employment relation was formed. *Id*. at 279 (citations omitted).

The *Thomas* Court further stated, *citing, e.g*., *Cardillo v. Liberty Mutual Ins. Co*., 330 U.S. 469 (1947), and *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532 (1935):

> [A]s those cases underscore, *compensation could have been sought under either compensation scheme* even if one statute or the other purported to confer an exclusive remedy on petitioner. Thus, for all practical purposes, respondent and its insurer would have had to measure their potential liability exposure by the more generous of the two workmen's compensation schemes in any event. 448 U.S. at 279-80 (emphasis added).[1]

In *Argonaut Ins. Co. v. Vanatta*, 539 S.W.2d 35 (Tenn. 1976), the deceased employee was a Tennessee resident, whose contract of employment was made in Alabama and who was employed there, and who died in a Tennessee accident. The court held that the claim was properly instituted in Tennessee:

> even though upon these facts the family of the deceased might also have had a claim under the Alabama statute, had they seen fit to pursue the matter in that state. *Id*. at 37.

In *Rutledge*, the New York Court of Appeals held that "[w]e ought not apply a rule of mutually exclusive jurisdiction . . . and deny jurisdiction here because under the same facts jurisdiction would be taken elsewhere." 223 N.E.2d at 338. In *Neff*, it was held that although the employee had a contractual right to claim benefits in Ohio, he had a right under Pennsylvania law to file for benefits there, and "requiring [him] to first submit claims to the Ohio Bureau constitutes an unreasonable burden." 624 A.2d at 733. In *Johnson*, it was held by the Florida First District Court of Appeal that the pendency of the employee's claim in Illinois did not affect her entitlement to Florida compensation benefits. 550 So. 2d at 135.

Q-3: What will be the impact on an employee's ability to pursue a workers' compensation claim in one state of his having filed for and/or been awarded compensation benefits in another state?

a. States may disallow successive recoveries for the same injury depending upon the state's approach to their having been both a filing and election in a prior state

The question of successive workers' compensation awards in different states has generated conflicting opinions, and cannot be regarded as completely settled. Consideration of the question should begin with three U.S. Supreme Court opinions. In *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1944), it was basically held that a final compensation award is entitled to the same full faith and credit as a court judgment, and that an employee therefore could not claim compensation in a second jurisdiction after claiming and recovering compensation in a first jurisdiction. In *Industrial Commission v. McCartin*, 330 U.S. 622 (1947), *Magnolia* was modified so as to permit an employee to file a compensation claim in a second state in the absence of "some unmistakable language by a state legislature or judiciary," *Id*. at 627, of the first state "cut[ting] off an employee's right to sue under other legislation passed for his benefit" in the first state. *Id*. at 628. In *Thomas*, the Court (in a plurality opinion) overruled *Magnolia*. *Id*. at 285. A majority of the *Thomas* Court held that the employee there had a right to file for an additional award in the District of Columbia after obtaining an award in Virginia, because the Virginia statute alleged to bar successive D.C. claim "lack[ed] the 'unmistakable language' which *McCartin* requires." *Id*. at 289-90 (concurring opinion).

Neff is illustrative of cases following *Thomas*. 624 A.2d at 732-33. However, *Gray v. Holloway Construction Co*., 834 S.W.2d 277 (Tenn. 1992), should be noted as illustrating the continuing, albeit minority, viability of *Magnolia*. In *Gray*, the court held that, under Tennessee law:

> an employee injured on the job in another state, who files a workers' compensation claim in that jurisdiction and obtains either an award . . . or a court-approved settlement of the claim . . . or who actively pursues a claim in a venue that has jurisdiction, is barred from filing a subsequent claim in Tennessee. *Id*. at 279 (citations omitted).

The court further stated:

> Although the basis for this rule is frequently expressed in the Tennessee cases in terms of an "election of remedies" on the part of the plaintiff-employee, it is also evident that an out-of-state judgment would be entitled to full faith and credit

> in the courts of Tennessee, and that a further recovery for the same injury under the Tennessee workers' compensation statute would be barred by the federal constitution. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149 (1943). *Id.*

b. A binding election might occur with acceptance of benefits from one state

In *Perkins v. Beak, Inc.*, 802 S.W.2d 215 (Tenn. 1991), a case cited in *Gray*, it was held that the employee's execution of an agreement for compensation providing that "benefits would continue until terminated in accordance with the workmen's compensation law of Virginia," *Id.* at 216, constituted a binding election precluding him from obtaining Tennessee compensation benefits. The *Perkins* court held that:

> [t]he circumstances of each case must be considered in determining *whether the employee has made a binding election*. The mere acceptance of benefits from another state does not constitute an election, but affirmative action to obtain or knowing and voluntary acceptance of benefits from another state will be sufficient to establish a binding election. *Id.* at 217.

The *Gray* Court approved *Perkins* and held that the employee in its case did not make a binding election to receive Texas compensation benefits by, inter alia, accepting Texas temporary disability benefits paid voluntarily by an insurer. The *Gray* Court concluded:

> The palpable if unspoken principle underlying our decision in *Perkins* was a perceived need to guard against unfair manipulation of the Tennessee legal system and a possible double recovery by an injured worker who has already secured an adequate compensation award in another jurisdiction. That concern remains a valid one. Nevertheless, to invoke the rule applied in *Perkins* to Walter Gray's case would produce just the opposite result—instead of a double recovery, there would be no recovery at all. Clearly, that result would constitute a perversion of the otherwise sound policy developed in the line of cases culminating in *Perkins*. 834 S.W.2d at 282.

c. The limitation caused by a binding election may depend upon a proper benefit comparison between states

The approach taken by Florida on the successive award issue can be contracted with the above-discussed Tennessee approach. It is provided in the Florida act:

> (d)If an accident happens while the employee is employed elsewhere than in this state, which would entitle the employee or his or her dependents to compensation if it had happened in this state, the employee or his or her dependents are entitled to compensation if the contract of employment was made in this state, or the employment was principally localized in this state. However, if an employee receives compensation or damages under the laws of any other state, the total compensation for the injury may not be greater than is provided in this chapter. Fla. Stat. Ann. §440.09(1)(d).

In *de Cancino v. Eastern Air Lines*, 239 So. 2d 15 (Fla. 1970), *appeal after remand*, 283 So. 2d 97 (Fla. 1973), where the employee filed a compensation claim in Florida while her claim in New York was pending, the court held:

> The only pertinence which compensation proceedings in another state may have is concerned with offsetting the amount of benefits received so that total benefits do **not** exceed what might have been awarded in a Florida forum. So long as this limitation on recovery is observed, it is of no importance what the stage of proceedings may be in another state. 239 So. 2d at 15.

In *Lee v. District of Columbia Department of Employment Services*, 509 A.2d 100 (D.C. 1986), it was held that under a section then providing that "[n]o employee shall receive compensation under this chapter and at the same time receive compensation under the workers' compensation law of any other state for the same injury or death," *Id.* at 103,[2] precluded the employee's receipt of D.C. compensation benefits for the period for which he had already received Maryland benefits. The *Lee* court held that the administrative rejection of proposed construction of the language as barring only complete double recovery was reasonable. *Id.* at 104-05.

It is worth noting that *Larson* takes a position upholding the public policy desirability of successive awards, arguing:

> On the policy question whether the availability of the supplementary-award procedure is a desirable thing there is some difference of opinion. Against it is the argument that it may subject the employer and carrier to repeated claims in different jurisdictions, protracting litigation and making it impossible for the employer and carrier to know with assurance when a claim has been fully satisfied. On the other side it is urged that employees typically are at a disadvantage in learning of their potential rights under various statutes of other states, especially since complex conflict-of-laws issues may sometimes be

> involved; hence they may quite forgivably make an unfortunate choice at the time of filing the first claim.
> . . . .
> In any case, the worst that can happen to the defendants, apart from the inconvenience mentioned above, *is that they will have to pay no more than the highest compensation allowed by any single state having an applicable statute—which is the same amount that would always be payable if the claimant made the best-informed choice the first time*.
> 9 Larson & Larson, *supra*, §141.06, at 141-10, -11 (2003) (emphasis added).

Q-4: How can an injured worker maximize benefits when more than one state is available as a choice for filing a workers' compensation claim?

a. Double recoveries are not favored but greater total recoveries may be appropriate

As stated by Larson, "a complete double recovery under the acts of two states" is an "impossible" result "except in a few rare fact combinations." *Id.* § 141.07 at 141-11 (2003). See, for example, as cases applying the general rule, *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608, 610 (1961); *Johnson*, 550 So. 2d at 135; and *Brooks v. Eastern Airlines, Inc*., 634 So. 2d 809 (Fla. Dist. Ct. App. 1994). It was held in *Brooks* that the Florida statutory preclusion of award of total compensation benefits in two or more states greater than provided by Florida law applied not only to payments made in multiple states for coinciding periods of disability, but also to payments made "during an altogether separate interval of disability." 634 So. 2d at 811.

Focus, therefore, should be on the cases involving the "rare" exceptions to the general rule precluding double recovery. One such case is *Uninsured Employer's Fund v. Wilson*, 46 Va. App. 500, 619 S.E.2d 476 (2005). There, the employee was a Michigan resident, hired by his Michigan-based employer for a job in Virginia. He filed a claim with the Virginia WCC, which awarded the requested benefits. He also entered into a settlement with the employer in Michigan for payment of the Virginia award, plus $75,000 and payment of all outstanding medical benefits, which settlement was approved in Michigan. The UEF (standing in the shoes of the employer) argued, *inter alia*, that it was entitled to a $75,000 credit against the employee's medical claims, claiming that the employee would otherwise be getting a "double recovery." 619 S.E.2d at 479. The court rejected that argument, holding that under the applicable statute settlement payments not approved by the Virginia WCC could only "be deducted from the amount to be paid as *compensation*" to the employee under Virginia law, *Id.* at 478 (court's emphasis), and that the Michigan settlement payments did not qualify. The court concluded:

> Voluntary payments made to a claimant pursuant to an unapproved out-of-state settlement may not be credited under Code §65.2-520 against an employer's liability to provide medical benefits. *Id.* at 480.

With respect to the "double recovery" argument, the *Wilson* Court held that:

> [w]hen a correct reading of the workers' compensation statute nonetheless results in the potential for "undeserved benefits," the decision to rebalance the ledger lies solely "within the province of the legislature, not the judiciary." *Id.* at 479 (quoting *Newport News Shipbuilding & Dry Dock Co. v. Holmes*, 37 Va. App. 188, 555 S.E.2d 419, 422 (2001)).

Ryder Truck Lines, Inc. v. Kennedy, 296 Md. 528, 463 A.2d 850 (1983), is an additional case where statutory language, there ambiguous statutory language, was construed as requiring that there be what might be regarded as a "double recovery." There, the employee, a truck driver, was a resident of Maryland, where, although married to a woman (Domenica) who lived in Florida with their minor child, he lived with his girlfriend (Donna), their minor child, and a minor child from the girlfriend's former marriage. The employee's fatal accident occurred in Virginia. Donna filed compensation claims in Maryland. Domenica filed claims in Virginia and was awarded survivors benefits there for herself and her child. Domenica then filed a total dependency claim in Maryland, and the employer, inter alia, sought credit for the Virginia award. The *Ryder* Court, following discussion of the relevant statutes in both states, held that the Maryland statutory language:

> [i]f an employee or the dependents of an employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this article[,] 463 A.2d at 855,

was

> ambiguous because it does not clearly indicate whether the dependent receiving an award in a foreign state must be the same dependent in this State or may be a different and unrelated dependent before the operation of the statute is triggered. *Id.* at 855-56.

The court held that the employer could not receive credit in Maryland for the Virginia award to Domenica against the Maryland benefits due Donna and her children:

> To hold that Domenica and Teresa Grass'

> receipt of compensation under the laws of Virginia could bar Donna and her children from recovering in Maryland would in effect make the laws of Virginia supreme and binding in this State. They are not the same dependents and § 21(c)(4) does not apply. *Id.* at 857.

The court held, however, that the Commission properly denied a partial dependency award in Maryland to Dominica and her daughter "when they had received an award of total compensation in Virginia." *Id.*

b. Associations with out of state counsel may facilitate better representation of injured workers

Obviously, claimant's counsel are not always able to handle the multiple state filing by themselves. Counsel may need to consider referring their clients to attorneys in other states when available benefits are potentially greater with such referrals.

Similarly, consideration may need to be given to co-representation of a client and coordinated filings for different benefits and/or for successive periods of benefits that do not exceed allowable amounts in other states.[3] It is also maybe advisable to conduct a benefits and/or procedural comparison between states that considers, among other things, applicable statues of limitations, maximum and minimum average weekly wages, the maximum number of weeks for which temporary total or temporary partial benefits are allowed, the body parts for which permanent partial benefits may be payable, the types of work related injuries or illnesses that are compensable, the laws affecting vocation rehabilitation, the length of times or type of medical benefits that may be awarded, the extent to which bad faith can be claimed against employers or workers compensation insurance companies, the interplay between the workers compensation claim and any third party claims as well as the total maximum value of a claim or settlement that might be possible.[4]

Conclusion

There are general rules of thumb discussed above as to when a state's workers' compensation tribunal may exercise jurisdiction over a workers' compensation claim. The question of whether different or multiple filings may be made must also be considered. Multiple filings in different jurisdictions may result in a greater total recovery if the filings in each state are for different benefits or for different periods of time and the total benefits do not exceed that allowed by the workers compensation laws of the state in question. Failure to consider all of these issues may result in less than a total recovery for injured workers.

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Endnotes

1. While citation is to the plurality opinion in *Thomas*, the concurring and dissenting opinions did not indicate disagreement with that opinion on the point for which it is here cited.
2. The present equivalent section provides:
   > (a-1) No employee shall receive compensation under this chapter and *at any time* receive compensation under the workers' compensation law of any other state for the same injury or death. D.C. Code Ann. § 32-1503(d)(2)(a-1) (emphasis added).
3. Among the sources of capable attorneys who handle workers compensation claims around the country is the website of the Workers Injury Lawyers Advocacy Group, a national organization of attorneys representing injured workers. See www.wilg.org.
4. A benefits comparison is also available from a website sponsored by the United States Department of Labor. See www.dol.gov/esa/regs/statutes/owcp/stwclaw/stwclaw.htm.

MICHIGAN LAW ON MULTI-STATE WORKERS' COMPENSATION ISSUES

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In a previous article, we discussed how various states address the pertinent issues that arise when a workers' compensation claim involved more than one jurisdiction.[1] The purpose of this article is to address how the state of Michigan statutes and cases have addressed those issues. This may be of some assistance to attorneys practicing in the state of Michigan or attorneys from other states when their clients' claims might potentially also be filed in this state. That is the purpose of this discussion below.

I. What Are the Requirements For Michigan To Assert Jurisdiction Over A Workers' Compensation Claim?

The Michigan General Statutes address when the Michigan's Workers' Compensation Agency ("WCA") can obtain jurisdiction over employee injuries that occur outside the state. Pursuant to M.C.L.A. § 418.845:

> The worker's compensation agency shall have jurisdiction over all controversies arising out of injuries suffered outside this state if the injured employee is employed by an employer subject to this act and if either the employee is a resident of this state at the time of injury or the contract of hire was made in this state. The employee or his or her dependents shall be entitled to the compensation and other benefits provided by this act.

The current status of the law referenced above reflects recent changes made by the state legislature in 2009. Previously, § 418.845 required the employee to be *both* a

[1] Andrew Reinhardt, Conflicts of Law: Maximizing your recovery when handling Workers' Compensation claims involving multiple jurisdictions, VTLA Journal, Summer 2006.

resident of Michigan at the time of injury *and* be employed under a contract of hire made in the State for the Workers' Compensation Agency ("WCA") to assert jurisdiction. [2] Prior to January 13, 2009, §418.845 provided:

> The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of this state at the time of injury and the contract of hire was made in this state. Such employee or his dependents shall be entitled to the compensation and other benefits provided by this act.

The landmark case *Karaczewski* v *Farbman Stein & Company*, 478 Mich 28; 732 NW2d 56 (2007) upheld this two-part requirement in 2007. In this case an employee, a Florida resident who sustained an injury in Florida, attempted to rely solely upon an employment contract having been entered into in Michigan to establish that the Bureau had jurisdiction. The Supreme Court held that M.C.L.A. § 418.845 required the employee to be *both* a resident of the State and an employee's contract of hire in the State, for the Bureau to assert jurisdiction over an out-of-state injury. The Court also decided that its' holding would apply retroactively to any pending cases, regardless of whether the dates of injury preceded the Court's ruling.

However in *Brewer v. A.D. Transport Express, Inc., No. 139068*, rel'd (5/10/10) the Court recognized the 2009 legislative amendments to M.C.L.A. § 418.845. The Court noted the "potentially enlarged existing rights for Michigan residents injured in

[2] Amended by P.A.2008, No. 499. Imd. Eff. Jan. 13, 2009.

other states under contracts of hire not made in Michigan." By expanding the Workers' Compensation Agency's jurisdiction "to include out-of-state injuries suffered by Michigan employees whose contracts of hire were not made in Michigan, the amendment imposed a new legal burden on out-of-state employers not previously subject to the Agency's jurisdiction."

The Court went on to hold "A claimant injured outside of Michigan need only show *either* that he was a Michigan resident at the time of his injury or that his contract of hire was made in this State" to give the WCA jurisdiction. Importantly, it also ruled that the amended language of M.C.L.A. §418.845 did not apply retroactively, i.e.: before the effective date of the legislative amendment, to cases in which the claimant was injured before the amendment's effective date. The amendment did not contain any language manifesting a legislative intent to apply the standard retroactively. Instead, the legislature provided a specific and future effective date and the amendment did not fall within an exception for remedial or procedural amendments that could apply retroactively.

That same year Supreme Court overruled the retroactive part of its' previous decision in *Karaczewski* in *Bezeau v. Palace Sports & Entertainment,* Inc., 487 Mich 455 (2010) (SC Docket No. 137500, rel'd July 31, 2010). Mr. Bezeau, a professional hockey player for the Detroit Vipers, had a contract of hire made in Michigan. He was injured, however, while he was on loan playing for the Providence Bruins of Rhode Island. While he was no longer a Michigan resident, he filed his workers' compensation claim in Michigan. The Court noted that *Karaczewski's* retroactive effect "was inconsistent with how the statute had been previously applied, and retroactivity disrupted the

administration of justice." In ruling for the plaintiff, Mr. Bezeau, the Court overruled the retroactive part of *Karaczewski* and noted that injuries occurring before *Karaczewski* are not subject to the two-part requirement.

In summary, the *Brewer* Court made it clear that the amendments to M.C.L.A. § 418.845 are not retroactive and only apply to injuries occurring on or after its effective date. Therefore, only on January 13, 2009 and afterwards can the Workers' Compensation Agency ("WCA") assert jurisdiction by meeting only one of the two requirements. Prior to actions occurring before January 13, 2009, both requirements must be met as stipulated in the holding in *Karaczewski.*

II. Will Michigan Allow Simultaneous Or Successive Recoveries For The Same Accident And Injury In Multiple States?

Yes. There is no statutory prohibition against filing a claim in more than one jurisdiction, and the United States Supreme Court recognized in *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 279 (1980), that absent such a statute, there is no obstacle to prevent a compensation claimant from filing a claim in any state having jurisdiction.

Furthermore, an employee who receives benefits for injuries in one state is not barred from receiving compensation in Michigan. In *Cline v. Byrne Doors Inc.*, 37 N.W.2d 630, 324 Mich. 540 (1949), the Michigan Supreme Court held that "an order by the Florida industrial commission directing an insurance carrier to furnish medical care under the Florida compensation act to a Michigan resident employee injured in Florida

did not prevent the granting of compensation to employee in Michigan because of the full faith and credit clause of the federal constitution."

However, M.C.L.A. §418.846 does provide a limit to the amount that a claimant may recover for a single injury under two or more separate jurisdictions. M.C.L.A. § 418.846 provides:

> If an employee or the employee's dependents receive worker's compensation benefits from an employer, a carrier, a principal, or a subcontractor under the law of another state for the same personal injury for which benefits are payable under this act, the amount recovered under the law of the other state, whether paid or to be paid in future installments, shall be credited against the benefits payable under this act.

In *Shaw v. Grunwell & Cashero of Milwaukee*. 327 N.W.2d 349; 119 Mich.App. 758 (1982), the claimant was working for a Michigan company when he became disabled after aggravation of a preexisting back injury he sustained while working for a Wisconsin company. The Court held that the workers' compensation award against a Michigan company to claimant had to be reduced by the amount he had received from his Wisconsin employer, which had voluntarily paid benefits and medical expenses according to benefit schedule provided by Wisconsin workers' compensation laws.

III. What Is The Impact In Michigan Of An Acceptance Of Benefits Or Election In Another State?

No case law could be found discussing whether the election of remedies under another state's worker's compensation law bars a claimant from receiving benefits in Michigan. Thus, the impact of acceptance of benefits in another state seems to be, as set forth in answer to Question 2, to reduce the amount of the Michigan compensation award by the amount of compensation benefits awarded in the other jurisdiction.

Law and precedent have established that a claimant can file for compensation in any state. However, compensation limits have been established under M.C.L.A. 418.846 to ensure that there is not a double recovery for employees receiving benefits from more than one state. While the fundamental principle underlying workers' compensation is full compensation for injuries sustained workers' compensation law does not favor double recovery. See: *Stanley v. Hinchliffe & Kenner*, 395 Mich. 645, 657-659, 238 N.W.2d 13 (1976); See also Cline v. Byrne Doors, Inc. (1949) 37 N.W.2d 630, 324 Mich. 540.

IV. How Will Michigan Do A Benefit Comparison To Allow A Maximizing Of Recovery Between States?

There is no case discussing how Michigan conducts a benefits comparison in order to maximize recovery between states. As set forth in the answers to Questions II, pursuant to M.C.L.A. §418.846, a Michigan compensation award may be set off by the amount of the award in another jurisdiction, and the total compensation cannot exceed that which is permitted by Michigan law. Accordingly, if Michigan benefits are more generous than those in another jurisdiction, then a claimant should consider filing in Michigan first. On the other hand, there may be circumstances where filing first in

another state, or simultaneously could also be considered. See sample order for use in your multi-state cases at Exhibit I hereto.

MULTISTATE WORKERS' COMPENSATION CLAIMS: HOW TO MAXIMIZE YOUR RECOVERY WITH CONSIDERATION OF SUBROGATION LAWS WHEN THERE IS ALSO A THIRD-PARTY CASE ARISING OUT OF THE WORK ACCIDENT

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Each state has its own workers' compensation laws. Most attorneys representing injured workers only handle claims within their home state. As a result, it is generally the practice for workers' compensation attorneys to think primarily of pursuing claims on behalf of claimants within their home state. However, there may be circumstances under which other states should also be considered for filing claims on behalf of injured workers.

It is very possible that a workers' compensation claimant actually has the option of filing claims for one accident in multiple states. This topic was discussed at length in the author's previous article. The premise of that article was very simply that injured workers' total recovery can be maximized by consideration of filing claims in more than one state.[1] That article involved only consideration of workers' compensation benefits, how they vary from state to state, and how under some circumstances one state's workers' compensation laws might be preferable to another.

The purpose of this paper is to discuss why we should consider other jurisdictions for filing workers' compensation claims when an accident gives rise to both a workers' compensation and a personal injury third-party claim because of the potential impact of workers' compensation subrogation laws on the total recovery between the two cases. As will be discussed below, the amount of money that may have to be paid back to the workers' compensation carrier out of a third-party recovery might vary from state to state. The election of the state for pursuing the workers' compensation claim might impact the procedure for or the amount of reimbursement. It might determine whether the reimbursement to the workers' compensation insurance carrier can be adjusted due to employer fault or other special circumstances, whether the carrier's lien is reduced for attorney's fees and expenses, or whether the carrier is entitled to reimbursement for a

[1] Andrew Reinhardt, *Conflicts of Law: Maximizing Your Recovery When Handling Workers' Compensation Cases Involving Multiple Jurisdictions*, WORKERS FIRST WATCH (Fall 2007).

third-party recovery that includes pain and suffering, consortium, or punitive damages. The choice of forum for filing might decide whether the carrier would be entitled to the proceeds of a collateral third-party claim, like a medical malpractice or a wrongful death claim. It will certainly decide the statutes of limitation or procedural rules that limit the workers' compensation carrier's right of subrogation and the types of defenses that can be raised to third-party claims under the statutory employer doctrines or laws of exclusivity. The underlying premise of all these questions being asked prior to choosing a particular state is that these questions will be resolved by the law of the state where the workers' compensation claim is filed and benefits are awarded. As will be discussed herein, these questions are a matter of state workers' compensation law and not personal injury law. With that in mind, let us discuss each of these questions with a few case examples.

I. Do Some States Have More Favorable Reimbursement Formulas Than Others?

Yes. For instance, in Arkansas, when an employee commences an action against a third party, any amount recovered from the third party is to be applied first to the reasonable costs of collection. "Then, in every case, one-third (1/3) of the remainder shall belong to the injured employee or his or her dependents, as the case may be."[2] The remainder, "or so much as is necessary to discharge the actual amount of the liability of the employer and the carrier" is applied next, and "any excess shall belong to the injured employee or his or her dependents."[3] "In no event shall the compensation beneficiary be entitled to less than one-third of the amount recovered from the third party, after deducting the reasonable cost of collection."[4]

Likewise, in Wisconsin, after deducting the reasonable cost of collection,

> [O]ne-third of the remainder shall in any event be paid to the injured employee or the employee's personal representative or other person entitled to bring action. Out of the balance remaining, the employer, insurance carrier, or, if applicable, uninsured employers fund shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under this chapter, except that it shall not be reimbursed for any payments made or to be made under Wis. Stat. Ann. §§ 102.18(1)(bp), 102.22, 102.35(3), 102.57, or 102.60. Any balance

[2]ARK CODE ANN. § 11-9-410(B) (2009).

[3]ARK CODE ANN. § 11-9-410(C), (D) (2009).

[4]ARK CODE ANN. § 11-9-410(B) (2009).

> remaining shall be paid to the employee or the employee's personal representative or other person entitled to bring action.[5]

In Texas, the "net amount" recovered by a worker in an action against a third party is to be used to reimburse the carrier, and any amount recovered that exceeds the amount of reimbursement is to be treated as an advance against future benefits, including medical benefits, to which the claimant is entitled.[6] The compensation carrier gets the first money a worker receives from a third-party tortfeasor.[7]

Also, in Montana, if the injured worker institutes the third-party action, he or she is entitled to at least one-third of the recovery and the employer is entitled to recover its workers' compensation liability. Thereafter, the injured worker is entitled to the excess.[8] However, if the employer institutes the action, the injured worker is only entitled to the excess recovery beyond the employer's subrogation lien.[9]

In North Dakota, the employer is entitled to recover up to the amount of its workers' compensation liability. However, the employer is entitled to no more than 50 percent of the total third-party recovery.[10]

II. Do Some States Adjust Reimbursement Based on Fault?

Yes. For instance, in Utah, the employer is to be reimbursed for its workers' compensation liability out of a third-party recovery after the deduction of litigation costs.[11] The lien may be

[5]WIS. STAT. ANN. § 102.29 (2009); Nelson v. Rothering, 174 Wis. 2d 296, 306, 496 N.W.2d 87, 92 (Wis. 1993) (application of the reimbursement statute "does not require a determination of the equities involved but rather a mathematical application of the legislative formula for apportioning the settlement proceeds."); Threshermens Mut. Ins. Co. v. Page, 217 Wis. 2d 451, 461, 577 N.W.2d 335, 339 (Wis. 1998) ("[T]he statutory formula ensures that the employee receives at least one-third of any third-party proceeds after costs of collection" and that "the compensation insurer be reimbursed as fully as possible from the remainder of the sum collected, with any balance going to the employee.").

[6]TEX. LAB. CODE ANN. § 417.002 (a) and (b) (Vernon 2009).

[7]Tex. Mut. Ins. Co. v. Ledbetter, 251 S.W.3d 31, 35 (Tex. 2008).

[8]MONT. CODE ANN. § 39-71-414(2)(d) (2009).

[9]MONT. CODE ANN. § 39-71-414(2)(d)(3) (2009). Note that § 39-71-416 of the Montana Code provides that the employer may reduce workers' compensation benefits by 30 percent in the event of a third-party recovery.

[10]N.D. CENT. CODE § 65-01-09 (2009).

[11]UTAH CODE ANN. § 34A-2-106(5) (West 2009).

reduced proportionately if the courts determine that the employer's fault constitutes more than 40 percent of the total fault.[12] Any excess is paid to the injured worker and the employer takes an offset for any future workers' compensation liability it may incur.[13]

In Delaware, in the case of *Delaware v. Foley*,[14] the court found that the amount due to the employer under the subrogation statute should be reduced by 50 percent because of the jury's finding of the worker's comparative negligence in the worker's cause of action against a third party. The court reasoned that if the employer had pursued the litigation, it would have been permitted to recover only half of the worker's damages because the employer could have only collected any amount which the employee would have been entitled to recover in an action in tort. Permitting the employer to recover the full lien, when the worker's own award was substantially reduced, would have been inequitable and contrary to Delaware law.[15]

In *South Central Arkansas Electric Cooperative. v. Buck*,[16] an injured employee was struck by a car while attempting to remove a tree that had fallen across electrical lines. He received workers' compensation benefits and then brought an action against the driver of the car. The employee was found to be 40 percent negligent in the third-party action. The court held that the employee had not been made whole, as the jury awarded the employee $80,000, but he actually received a judgment of $48,000, from which $21,973.22 was deducted for court costs and attorney's fees. Accordingly, there was no lien in favor of the employer.

III. Do Some States Totally Prevent Reimbursement in Special Circumstances?

Yes. In *CGU Insurance Co. v. Sabel Industries, Inc*.,[17] the court held that the employer was required to show that the employee was fully and completely compensated before it was entitled to recover on a subrogation lien. The court also held that under Georgia's statute, the employer was not entitled to recover for benefits not yet paid.

[12]UTAH CODE ANN. § 34A-2-106 (2009).

[13]UTAH CODE ANN. § 34A-2-106(5)(c) (2009).

[14]No. 07C0889, 2007 WL 4577626 (Del. Super. Ct. 2007).

[15]*Id*. at *1-2.

[16]117 S.W.3d 591, 354 Ark. 11 (Ark. 2003).

[17]564 S.E.2d 836, 838, 255 Ga. App. 236, 239 (Ga. Ct. App. 2002)

In *Brunet v. Liberty Mutual Insurance Group*,[18] the Vermont Supreme Court held that a workers' compensation insurer was entitled to "first dollar" reimbursement from any recovery that an employee received from a third party, regardless of whether the recovery represented economic or noneconomic damages. Later, however, Vermont's legislature amended its reimbursement statute[19] to prevent reimbursement, except to prevent double recovery, which reduces the benefits of a plan privately purchased by the injured employee, including uninsured motorists' coverage. Interpreting the amendment to § 624 (e), the Vermont Supreme Court held in *Travelers Insurance Co. v. Henry*,[20] that when an injured employee recovers under any first-party insurance policy, the court must apportion the award between economic and noneconomic damages to determine the existence of a potential "double recovery." The court reasoned that "[w]orkers' compensation benefits reflect . . . economic losses[,] . . . includ[ing] . . . lost wages, diminished earning capacity, medical expenses, vocational rehabilitative services, and in the case of the employee's death, burial and funeral expenses, and wage replacement paid to a surviving spouse, dependent children, or other dependents,"[21] and if the employee recovers such damages and has already been compensated for those losses by the insurer, the insurer is entitled to reimbursement to prevent a double recovery. On the other hand, compensation for pain and suffering and other related nonmonetary injuries are noneconomic damages, and the insurer is not entitled to reimbursement from this portion of the employee's award.[22]

IV. Do States Vary on Whether or How the Employer Must Share in the Attorney's Fees and Expenses Incurred in Obtaining the Third-Party Recovery?

Yes. In Alabama, where the employer is required to pay part of the employee's attorney's fee in a third-party action, the employer's intervention in the employee's third-party action does not relieve it from the obligation of paying a portion of the employee's attorney's fees.[23]

In Tennessee, an attorney representing an injured worker who recovers from a third party is entitled to a first lien for the fees against the recovery. If the employer engaged an attorney to represent the employer in effecting the recovery against the third party, the court is required to

[18]682 A.2d 487, 488, 165 Vt. 315, 317 (Vt. 1996)

[19]VT. STAT. ANN. tit. 21 § 624(e) (2009).

[20]178 Vt. 287, 882 A.2d 1133 (Vt. 2005).

[21]*Id*. at 298-99, 882 A.2d at 1142.

[22]*See* Progressive Cas. Ins. Co. v. Estate of Keenan, 2007 VT 86, ¶ 6, 182 Vt. 298, 937 A.2d 630 (Vt. 2007) (UIM award was required to be allocated between economic and noneconomic damages in accordance with *Henry*).

[23]Ayers v. Duo-Fast Corp., 779 So. 2d 210 (Ala. 2000).

apportion the reasonable fee between the attorney for the worker and the attorney for the employer, in "proportion to the services rendered."[24]

In Georgia, the court in *Commercial Union Ins. Co. v. Scott*,[25] held that a workers' compensation carrier was not required to share in the worker's attorney's fee, as the attorney's motive for suing the tortfeasor was to obtain an adequate recovery for his own client and, thereby, an attorney's fee for himself, rather than to obtain reimbursement for the insurer.[26] Since *Scott* and *Johnson* were decided, the Georgia legislature enacted Section 34-9-11.1(d) of the Official Code of Georgia Annotated, which states that the attorney representing an injured employee is entitled to a reasonable fee for services from the recovery from a third person, provided that where the employer or insurer has engaged another attorney to represent it in effecting a recovery against a third party, the court shall, upon application, apportion a reasonable attorney's fee between the attorney for the injured person and the attorney for the employer or insurer.[27]

V. Do States Vary on How the Third-Party Recovery Affects Future Workers' Compensation Benefits?

Yes. In Alabama, any recovery obtained by a carrier or employer on a subrogated third-party claim in excess of the compensation paid to the injured worker after the subtraction of attorney's fees is held in trust for the benefit of the injured worker.[28] In Idaho, the employer receives reimbursement of the amount it already paid on workers' compensation benefits and an offset against future liability. Any excess realized as a result of a third-party action beyond what the employer already paid in compensation is paid to the injured worker.[29] In Louisiana, the injured worker is entitled to any amount recovered from a third party over the amount of compensation previously collected, and the employer receives a credit for any future compensation for which it

[24]TENN. CODE. ANN. § 50-6-112(b); Hickman v. Cont'l Baking Co., 143 S.W.3d 72, 79 (Tenn. 2004) (where the employer chooses not to participate in the prosecution of the suit against the third party, the employee's attorney's fee is charged against the entire recovery and the employer incurs a pro-rate reduction of its subrogation claim).

[25]116 Ga. App. 633, 635-36, 158 S.E.2d 295, 297 (Ga. Ct. App. 1967).

[26]*See* Johnson v. Lee, 460 F.2d 1053, 1055 (5th Cir. 1972) ("As indicated by Commercial Union Ins. Co. v. Scott, the compensation benefit payor is not required to bear any pro rata share of attorneys fees except to the extent that the amount recovered is insufficient to satisfy both liens in full.") (citations omitted).

[27]GA. CODE ANN. § 34-9-11.1(d) (2009).

[28]ALA. CODE § 25-5-11(d) (2009).

[29]IDAHO CODE ANN. § 72-223(5) (2009).

may become liable.[30] Employers in Massachusetts, Missouri, and Nebraska are also entitled to a credit or offset against future workers' compensation liability by statute.[31] In Virginia, future workers' compensation benefits are payable at the same ratio that the third-party attorneys fees and expenses bear to the third-party recovery.[32]

VI. Do States Vary on What Items are Reimbursable?

1. Pain and Suffering

Yes. In *Southern Quarries & Contracting Co. v. Hensley*,[33] the employee argued that a portion of the judgment against the third party was attributable to pain and suffering and that the employer was not entitled to a credit for that amount since pain and suffering is not compensable under the workers' compensation statute. The court disagreed on the basis that the jury's verdict made no specific allocation for pain and suffering.

In *Tobin v. Department of Labor & Industries*,[34] the court held that the Department of Labor and Industries was not entitled to reimbursement with respect to the claimant's third-party recovery for pain and suffering because the department did not pay the claimant for pain and suffering.

In *Gapusan v. Jay,*[35] the plaintiffs and the employer settled the third-party case for the tortfeasor's liability insurance policy limits. The employees argued that they were entitled to an apportionment of funds that compensated them for pain and suffering. The court held that under California law, the employer's right of reimbursement takes first and full priority after the payment of expenses and fees.

> The unavailability of apportionment when a case proceeds to judgment further shows the Legislature did not intend to dilute an employer's right of reimbursement through the application of common law equity principles. A judgment,

[30]LA. REV. STAT. ANN. § 23:1103A1 (2009).

[31]MASS. GEN. LAWS ANN. ch. 152, § 15 (West 2009); MO. ANN. STAT. § 287.150 (West 2009); NEB. REV. STAT. ANN. § 48-118 (2009).

[32]VA. CODE ANN. § 65.2-313 (2009).

[33]313 Ky. 640, 644, 232 S.W.2d 999, 1001-02 (Ky. Ct. App. 1950).

[34]145 Wash. App. 607, 613, 187 P.3d 780, 782 (Wash. Ct. App. 2008).

[35]66 Cal. App. 4th 734, 741, 78 Cal. Rptr. 2d 250, 255 (Cal. Ct. App. 1998).

> just as a settlement, may be insufficient to reimburse the employer and compensate the employee for pain and suffering or other damages not fully covered by workers' compensation. Yet, after the payment of attorney fees and other costs, the employer is entitled to reimbursement from the entire amount of the judgment.[36]

"A non-negligent employer is not reimbursed solely from economic damages; rather, the 'reimbursement payment is deducted from the entire judgment.'"[37]

2. Consortium

In *Correll v. E.I. DuPont de Nemours & Co*.,[38] the court held that the employer was not entitled to a setoff against the benefits paid pursuant to workers' compensation for the loss-of-consortium damages recovered by the employee's widow against third parties. Likewise, in *Glenn v. Johnson*,[39] the court held that the amount recovered by a wife for loss of consortium in a wrongful death action is for her exclusive benefit and is not subject to the workers' compensation lien of the decedent's employer.[40]

Courts in Arizona and Wisconsin have held otherwise. The court in *Martinez v. Industrial Commission of Arizona*,[41] held that "the carrier's lien for compensation payments made extends to the entire third-party recovery received by the worker and his dependents, including proceeds attributable to a spouse's loss of consortium claim.''[42] Also, in *Brewer v. Auto-Owners Insurance Co.,*[43] the court held that it was improper to deduct the full value of a widow-plaintiff's loss of consortium claim before allocation of the remainder of the damages received.

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[36]*Id*. at 741 n.5, 78 Cal. Rptr. 2d at 255 n.5.

[37]*Id*. (citing Scalice v. Performance Cleaning Sys., 50 Cal. App. 4th 221, 237, 57 Cal. Rptr. 2d 711 (Cal. Ct. App. 1996)).

[38]207 S.W.3d 751 (Tenn. 2006).

[39]198 Ill. 2d 575, 764 N.E.2d 47 (Ill. 2002).

[40]*Id*. at 583, 764 N.E.2d at 52 (citing Page v. Hibbard, 119 Ill. 2d 41, 47-48, 518 N.E.2d 69 (Ill. 1987)).

[41]168 Ariz. 307, 812 P.2d 1125 (Az. Ct. App. 1991).

[42]*Id.* at 307-08, 812 P.2d at 1125-26.

[43]142 Wis. 2d 864, 418 N.W.2d 841 (Wis. Ct. App. 1987).

3. Punitive Damages

In Mississippi, punitive damages may be reached by the employer's subrogation action, according to the court in *Mississippi Power Co. v. Jones*.[44] By statute, the employer was entitled to recovery out of the "net proceeds" of the tort actions. The court stated that punitive damages were included in the "net proceeds" which were subject to subrogation.

In Illinois, however, where the plaintiff in *McDaniel v. Hoge*,[45] sued individually for injuries under the Public Utilities Act, including punitive damages, the Court observed that the injures were not employment-related and not incurred by an employee, and were therefore not subject to a workers' compensation lien.

VII. Do States Vary on the Issue of Rights of Subrogation Against the Proceeds of an Underinsured or Uninsured Motorist Policy?

Yes. In *Travelers Insurance Co. v. Joseph*,[46] the court held that the employer was entitled to reimbursement out of the uninsured or underinsured benefits payable to an employee where the UM/UIM benefits were provided by the employer, but not where the benefits sought were pursuant to the employee's UM/UIM policy.[47] Also, Alabama does not allow employers a right of subrogation against the proceeds of an uninsured or underinsured motorist policy.[48] In Virginia, a workers' compensation carrier's lien only extends to the proceeds of an uninsured or underinsured policy when the policy in question was purchased "by and at the expense of the employer."[49]

On the other hand, in New Jersey, "any proceeds, whether recovered from the direct third-person tortfeasor or from a functionally equivalent source, uninsured motorist insurance proceeds or legal malpractice proceeds are subject to [workers' compensation] liens . . . . Recoveries that are

[44]369 So. 2d 1381 (Miss. 1979).

[45]120 Ill. App. 3d 913, 916, 458 N.E.2d 1063, 1065 (Ill. App. Ct. 1983).

[46]656 So. 2d 1000 (La. 1995).

[47]*See* Travelers Ins. Co. v. Liberty Mut. Ins. Co., 164 Vt. 368, 670 A.2d 827 (Vt. 1995); Martinez v. Lovette, 121 N.C. App. 712, 468 S.E.2d 251 (N.C. Ct. App. 1996) (subrogation improper from employee's UM benefits).

[48]River Gas Corp. v. Sutton, 701 So. 2d 35 (Ala. Civ. App. 1997).

[49]VA. CODE ANN. § 65.2-309.1 (2004).

not directly from the tortfeasor are subject to a lien even when the employee is not fully compensated." [50]

VIII. Do States Vary on the Right of Subrogation from the Proceeds of a Collateral Third-Party Claim, Like a Medical Malpractice Claim or a Wrongful Death Claim?

Yes. In Minnesota, the court in *Illg v. Forum Insurance Co.*,[51] held that an insurer that had made a special fund payment was not entitled to reimbursement from the proceeds of a wrongful death settlement entered into between the deceased employee's heirs and the negligent third party's liability insurer. The court reasoned that the special fund payment was not compensation within the meaning of the statute giving the insurer indemnity rights for compensation paid to an employee injured as a result of a third-party's negligence.

In Florida, the proceeds of a medical malpractice claim which arose after the industrial accident were subject to the employer's workers' compensation lien in *Liberty Mutual Insurance Co. v. Chambers*.[52] The court held that nothing in the state statute regulating collateral sources of benefits in malpractice litigation prohibited the employer from asserting the lien.

IX. Do State Laws Vary on the Statutes of Limitations for Filing a Subrogation Claim or the Procedural Rules and Hurdles for Protecting the Carrier's Right of Subrogation?

Yes. In Maryland, an employer, which is subrogated to an injured employee's cause of action by virtue of having paid workers' compensation to the employee, has no greater rights than its subrogor and is bound by the same statute of limitations which governs the employee's action.[53] Likewise, in Texas, an employer's subrogation action against a third party responsible for the injury or death of an employee is subject to the same statute of limitations that would have been applicable if the action were brought by the employee.[54]

[50]Frazier v. N.J. Mfrs. Ins. Co., 142 N.J. 590, 605, 667 A.2d 670, 678 (N.J. 1995).

[51]435 N.W.2d 803 (Minn. 1989).

[52]526 So. 2d 66, 67 (Fla. 1988).

[53]Anne Arundel County v. McCormick, 323 Md. 688, 693, 594 A.2d 1138, 1141 (Md. 1991).

[54]Guillot v. Hix, 838 S.W.2d 230 (Tex. 1992).

Notably, the Supreme Court of Illinois, in *Wilson-Raymond Constructors Co. v. Industrial Commission,*[55] held that the time within which an employer was required to file a third-party action for reimbursement was measured from the date the employer's right to reimbursement arose, and not from the date of the underlying injury.

In Alabama, a workers' compensation insurer's cause of action against the third-party tortfeasor accrues at the expiration of the applicable statute of limitations (one year for personal injuries). If the injured employee does not sue within the time required by statute, the employer has six additional months within which to bring the action against the tortfeasor.[56]

X. Do State Laws Vary on Defenses to Third-Party Claims Such As Under the "Exclusive Remedy" or "Statutory Employer" Doctrines?

Yes. In Kentucky, if a claim is made for the payment of workers' compensation or any other benefit provided by the workers' compensation law, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons.[57]

In Montana, an employee suffering an injury arising out of and in the course of employment while working for an uninsured employer may pursue all remedies concurrently, including a claim for benefits from the uninsured employers' fund, a damage or independent action or any other civil remedy provided by law.[58]

Neither New Jersey nor Wisconsin recognize the statutory employer doctrine. Section 34:15-3 of the New Jersey Statutes Annotated provides as follows:

> If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract, written or verbal, with a subcontractor to do all or any part of such work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injury caused to an employee of such contractor or subcontractor by any defect in the condition of the ways, works, machinery or plant if the defect arose or had not been discovered and

[55]79 Ill. 2d 45, 402 N.E.2d 584 (Ill. 1980).

[56]Liberty Mut. Ins. Co. v. Lockwood Greene Eng'rs, Inc., 273 Ala. 403, 140 So. 2d 821 (Ala. 1962).

[57]KY. REV. STAT. ANN. § 342.610 (West 2009).

[58]MONT. CODE ANN. § 39-71-508 (2009).

> remedied through the negligence of the employer or some one intrusted by him with the duty of seeing that they were in proper condition.[59]

Section 102.07(8m) of the Wisconsin Statutes provides that "[a]n employer who is subject to this chapter is not an employer of another employer for whom the first employer performs work or service in the course of the other employer's trade, business, profession or occupation."[60]

XI. Conclusion

As you can see from the above discussion, there are quite a number of issues that may need to be considered before filing or receiving workers' compensation benefits in a particular state when there is a third-party case arising out of the work accident. Each of these issues could have a significant impact on the total recovery received by an injured worker from the personal injury and workers' compensation cases combined. In appropriate cases, research should be done on these issues. Counsel for an injured worker or personal injury claimant should also have ready access to a directory of lawyers around the country who have expertise in the laws of all the various states to assist in making these decisions.[61]

[59]N.J. STAT. ANN. § 34:15-3 (West 2009).

[60]WIS. STAT. § 102.07(8m) (2009).

[61]Workers' Injury Law & Advocacy Group, a national organization of attorneys representing injured workers, is one source for capable workers' compensation attorneys around the country. *See* the Workers' Injury Law & Advocacy Group (WILG) Web site, http://www.wilg.org./