

# The Odd Couple: How WC Claims Affect PI Cases

By Matt C. Fendon

# Roadmap

- WC 101
- TORTS VERSUS THE EMPLOYER
- THIRD PARTY LITIGATION
  - REASSIGNMENTS
  - LIENS

# WC IS THE SOLE REMEDY!!!

- A state governed no fault system where an employee who sustains a personal injury or occupational disease arising out of and in the course of employment by an employer subject to the act is entitled to certain benefits provided by the act unless the employer has some delineated defense and this is the employee's exclusive remedy against the employer.



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## 2 Main Types of Benefits

- Medical Benefits



- Compensation



# Medical Benefits

- Active Medical Care
  - Bi-weekly to monthly office visits
  - Physical therapy
  - Imaging studies
    - CT Scans
    - MRIs
    - Bone Scans
  - Injections
  - Surgery



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# Medical Benefits

- Active Medical Care (cont'd)
  - Lasts until the patient reaches his/her maximum medical improvement
  - Can be deemed stationary by treating physician or Independent Medical Examination
  - Once active care ends, supportive care goes into effect as long as it's recommended



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# Medical Benefits

- Supportive Care
  - Basically, what the closing physician recommends for long-term care
  - Usually involves
    - 2-4 office visits, annually
    - Medications
    - Possibly PT
    - Possibly injections
    - X-rays



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# Medical Benefits

- Supportive care (cont'd)
  - Usually given for a time period (e.g., 2 years)
  - Or sometimes reviewable on an annual basis
  - “Use it or lose it!”
    - Insurance companies will terminate supportive care if the claimant is not using it.
  - What if I need more active care?
    - File a Petition to Reopen



# Temporary Compensation

- 2 types of temporary compensation
  - Temporary total disability
    - Applicable when claimant is on “no work” status per treating physician
    - Dependent’s benefits are payable
  - Temporary partial disability
    - Applicable when claimant is on “light duty” status
      - Requires submission of monthly status reports to get paid
      - Claimant is paid the difference between the claimant’s average monthly wage and earnings

# Permanent Compensation

- Scheduled Permanent Disability



- Unscheduled Permanent Disability





# Permanent Compensation

- Scheduled permanent disability - YOU MEAN MY BODY PARTS/HEALTH AREN'T PRICELESS?
  - Hands
  - Legs
  - Feet
  - Eye
  - Hearing
  - And more



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# Permanent Compensation

- **Unscheduled permanent disability**
  - Shoulders, backs, head, etc. (A.R.S. 23-1044(C))
  - Scheduled coupled with a previous scheduled injury
    - Could be an arm injury with permanent impairment, and the claimant has a subsequent leg injury with impairment (*Ronquillo v ICA*)
    - Or per *Rodgers v ICA*, two scheduled disabilities to the same extremity = unscheduled

# Death Benefits

- ARS 23-1046 (see statute)
  - Burial Expenses
  - Surviving Spouse
  - Surviving Children
  - Surviving Parents
  - Surviving Siblings



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# TORTS VERSUS THE EMPLOYER

- 3 Arizona circumstances where the choice of WC v Tort exists
  - Non posting of notices
  - Uninsured employers
  - Willful misconduct by employer
- Other states have other exceptions to exclusive remedy





# Pre Injury Rejection

- Requirements for rejection
  - Done in writing
  - Typically at hire
  - Before injury



# Non Posting - a post injury argument

- Employers must post right to reject the WC Act in obvious and visible places
- Employers must keep blank rejection sheets available at place of hire
- Employees injured during the time notice was not posted OR forms not available may choose between WC or tort
  - See ARS 23-1022(A); ARS 23-906(D); ARS 23-907





# Non Posting

- Acceptance of WC despite non posting waives right to sue (and vice versa)
  - ARS 23-1024(A) & (B)
- Issues with acceptance/non posting?
  - Most WC claims are now filed by physicians, so this eliminates any chance at tort
  - Often difficult to prove that notice was not posted save for by witness testimony which works in one case (*Circle K Corp*, 118 Ariz 63) and not another (*Juene v Del E Webb*, 76 Ariz 418)
  - Right to the notice is personal to the employee so no wrongful death (*Johnson v Kerr-McGee Oil Industries*, 129 Ariz 393)



# Uninsured Employers

- Easiest of the 3
- General tort elements must be met
- Employer still has limited common law defenses
  - assumption of risk and contributory negligence N/A (ARS 23-907(A))



# Uninsured Employers

- Injured workers can also file worker's report of injury with the Industrial Commission and be covered by the Special Fund
- The Fund would then subrogate against the employer
- If the injured worker files with the ICA, this waives the right to tort lawsuit





# Willful Misconduct by Employers

- Strictly interpreted
- only single case where standard met in AZ
- AZ appellate courts have rejected most attempts to use this
- Defined as: “An act done knowingly and purposely with the direct object of injuring another.” 23-1022(A)

# Willful Misconduct by Employers

- Agents versus Owners
  - If tortfeasor is foreman, supervisor/manager, most jurisdictions will not allow common-law suit versus the employer
  - Unless the employer commanded or expressly authorized the assault



# Willful Misconduct by Employers



- *Ford v. Revlon*, 153 Ariz. 38
  - Action brought against manager for assault and battery and IIED
  - Action brought against Revlon for IIED
  - They pointed to a 1923 case - *Twohy Bros Co*, 293 F 566 (9<sup>th</sup> Circuit)

# Willful Misconduct by Employers

- *Irwin Investors, Inc*, 166 Ariz. 113
  - Young female fast food worker molested by older male co-employee
  - Suit dismissed because the employer has no prior notice of the male employee's intentions
  - The P attempted to argue *Ford v Revlon*



# Wilful Misconduct by Employer

- *Lowery v. Universal Match Corp*, 6 Ariz. App. 98
  - Court bounced this case where employee alleged wilful misconduct for employer failing to provide safety devices to protect employees from gasses and chemicals
- *Bonner v. Minico, Inc.*, 159 Ariz. 246
  - Supremes upheld wrongful death action versus employer when company president shot and killed an employee even though he was under psychotic delusion

# THIRD PARTY LITIGATION

- Possible Defendants
  - Physicians
    - Even MDs employed by self insured employers are fair game
  - GCs
    - Duty to provide reasonably safe site
    - Employees of Subs are invitees so higher duty owed
  - Landowners
  - Joe Blow
  - Co-Employees
    - See Willful Misconduct above
    - Lent Employee Doctrine
  - Insurance carriers - can sue WC carrier for acting in bad faith by withholding approval of settlement between employee and third party



# Reassignments

- Must file in Year 1 against third party tortfeasor unless...
  - Reassignment!!
- 23-1023(B) automatically assigns right to WC insurance carrier come Year 2
- Key words: “may be reassigned” to employee
  - WC carrier has no obligation to reassign
  - *State v Superior Court of State In and for Maricopa County*, 155 Ariz. 166
  - Horror story time

# Reassignments

- Best reassignments
  - Express, written from the WC carrier (form)
- Courts have found reassignments in:
  - Other documents
  - Conversations via WC carriers and claimants and their attorneys
    - Oral reassignment does not violate the statute of frauds because suit against third party is not brought on reassignment but via negligence *Easter v Percy*, 157 Ariz. 253 (App. 1988)



# Reassignments

- Tidbits -
  - No reassignment needed if formal WC claim never filed
  - Even if the plaintiff's third party case is dismissed, insurance carrier can still bring a claim in Year 2
  - Reassignments are not retroactive (“assignee stands in no better position than assignor”)
  - MORETTO V SAMARITAN HEALTH, 198 ARIZ 192

# Liens

- 23-1023 (C) WC lien attaches to “total recovery less the reasonable expenses, including attorney fees, extended in securing the recovery.”
  - “Shall” provide written notice to WC carrier of intent to sue and
    - “timely and periodic notice” of all pleadings/rulings
- Settling the PI case for less than the WC lien “shall be made” only with the WC carrier signing off
  - Denied WC claims (P has BOP to show he/she settled for reasonable amount)
- Also, must notify the ICA of any settlement or judgement and basis of proceeds



# Liens

- Future credits
  - Contract - can make deals on future credits (good luck though : )
    - Can technically get the carrier to waive the future credit altogether
  - Structured settlements future credit = PV of gross settlement
- Tidbits -
  - Watch for the carrier trying to include costs of procuring medical records, IMEs, investigations, etc. If not defined as “medical benefits” under ARS 23-1062(A), scrutinize and move to exclude.

# Q&A

- Who is Matt Fendon?
  - Managing Member/Founder of MFLG
  - Board Certified by AZ State Bar in Worker's Comp
  - Practice in areas of
    - Worker's comp



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