

[J-179-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BRUBACHER EXCAVATING, INC.,	: No. 24 MAP 2002
	:
Appellant	: Appeal from the order and opinion of the
	: Commonwealth Court dated May 7, 2001
	: at No. 900 C.D. 1999, affirming the order
v.	: of the Workers' Compensation Appeal
	: Board dated March 5, 1999 at No. A96-
	: 3132.
WORKERS' COMPENSATION APPEAL	:
BOARD (BRIDGES),	: 774 A.2d 1274 (Pa. Commw. Ct. 2001)
	:
Appellee	: ARGUED: December 3, 2002
	:
	:
	:
	:

OPINION

MR. CHIEF JUSTICE CAPPY

Decided: November 20, 2003

In this appeal, we consider the boundaries of the statutory provision of the Workers' Compensation Act that grants an employer the right of subrogation when a third party is found to have caused an employee's compensable injury, 77 P.S. §671 ("Section 319"). Specifically at issue is whether Section 319 permits subrogation when an injured employee who is receiving workers' compensation benefits returns to work for a third-party employer after partial recovery from a compensable injury, the third-party employer wrongfully terminates the employee, and thereafter, the employee obtains a recovery for his termination pursuant to the Americans with Disabilities Act. While we reaffirm the significance and the strength of the statutory doctrine of subrogation in our workers'

compensation system, based upon the plain language of Section 319 - which only allows subrogation where the third party *causes* the employee's compensable injury - we hold that in the context of a wrongful termination of an employee by a third-party employer, subrogation is not available. Thus, we affirm the order of the Commonwealth Court.

The facts underlying this appeal are not in dispute. Appellee James Bridges worked as a Master Mechanic for Appellant Brubacher Excavating, Inc. In September 1992, Bridges injured his back while lifting a cylinder head from an engine, and as a result began receiving total disability benefits in the amount of \$455.00 per week. In July 1993, Bridges was released by his physician to return to light-duty work. Acting on Brubacher's referral, Bridges sought and obtained a position with Diesel Services, Inc., as a Service Writer/Service Advisor. Bridges began working for Diesel Services in November 1993, earning approximately \$400.00 per week and receiving partial disability benefits of \$245.26 per week for his back injury.

Later that month, however, Bridges was terminated from his employment because Diesel Services' workers' compensation insurance carrier refused to extend coverage to Bridges. Upon his termination, Brubacher resumed receiving total disability benefits from Brubacher. Later, in February 1995, Bridges filed suit against Diesel Services in the United States District Court for the Eastern District of Pennsylvania, claiming that Diesel Services had violated the Americans with Disabilities Act, 42 U.S.C. §12101, when it terminated him.

When Brubacher learned that Bridges had brought a civil action against Diesel Services, it sought subrogation against any recovery obtained by Bridges pursuant to Section 319 of the Workers' Compensation Act. The Americans with Disabilities Act litigation was settled in September 1996 for an undisclosed amount.

The Workers' Compensation Judge determined that Brubacher was not entitled to subrogation because the two injuries, Bridges' back injury and the unlawful termination, were different in both type and causation. The Workers' Compensation Appeal Board

affirmed on the same basis. The Commonwealth Court, sitting *en banc*, similarly concluded that Diesel Services' discriminatory termination of Bridges was "totally unrelated" to Bridges' back injury, and therefore affirmed the decision of the lower administrative tribunals. Brubacher Excavating v. WCAB (Bridges), 774 A.2d at 1279.

We granted Brubacher's petition for allowance of appeal to review the limits of the right to subrogation under Section 319 of the Workers' Compensation Act. For the reasons stated below, we affirm the decision of the Commonwealth Court.¹

Subrogation in our workers' compensation system is a significant and firmly established right. Specifically, while subrogation is an important equitable concept that applies whenever a debt or obligation is paid by one party though another is primarily liable, Smith v. Yellow Cab Co., 135 A. 858, 860 (Pa. 1927), in the realm of workers' compensation, it has assumed even greater stature. Our Court has stated that the statutory right to subrogation is "absolute and can be abrogated only by choice." Winfree v. Philadelphia Elec. Co., 554 A.2d 485, 487 (Pa. 1989). This is so because the statute granting subrogation "clearly and unambiguously" provides that the employer "shall be subrogated" to the employee's right of recovery. Id.; see also Thompson v. Workers' Comp. Appeal Bd. (USF&G Co.), 781 A.2d 1146, 1151, 1153 (Pa. 2001) (Section 319 subrogation is automatic; *ad hoc* equitable exceptions do not apply to Section 319). Thus, the importance and strength of subrogation in our system of workers' compensation cannot be understated.

Yet, whether an employer is entitled to subrogation in any given case remains dependant upon the statutory provision that creates this right. Thus, we turn to the issue of

¹ Whether subrogation is available with respect to monies recovered due to the settlement of a civil rights action is a question of law. Thus, our standard of review is *de novo*. Our scope of review, to the extent necessary to resolve the legal question before us, is plenary. Buffalo Township v. Jones, 813 A.2d 659, 664 n.4 (Pa. 2002).

whether the statutory provision granting subrogation, Section 319, affords Brubacher a right to subrogation over monies recovered by Bridges pursuant to the settlement of the Americans with Disabilities action against Diesel Service. As with all cases of statutory construction, we begin with the words of the statute. Kmonk-Sullivan v. State Farm Mutual Auto. Ins. Co., 788 A.2d 955, 959 (Pa. 2001).

In setting forth an employer's right to subrogation, the General Assembly made the key to subrogation the claimant's *injury*. Specifically, Section 319 of the Act permits subrogation only when a third party causes "*the compensable injury*":

Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, ... against such third party to the extent of the compensation payable under this article by the employer;

77 P.S. §671.

Thus, only when a third party brings about the compensable injury will an employer's right to subrogation arise. "Compensable injury" is not defined in the Act. However, "injury" is defined, and clearly denotes a physical or mental injury:

The terms "injury" and "personal injury" as used in this act shall be construed to mean an injury to an employee, regardless of his previous physical condition, arising in the course of his employment and related thereto, and such disease or infection as naturally results from the injury or is aggravated, reactivated or accelerated by the injury;

77 P.S. §411(1).

Furthermore, our case law has consistently interpreted the term "compensable injury" to have two components. The two components are (1) a work-related physical or mental injury suffered by a claimant and (2) some disability, i.e., a loss of earning power. See, e.g., Metropolitan Edison Co. v. WCAB (Werner), 718 A.2d 759, 764 (Pa. 1998) (a compensable injury under the Act requires proof of, *inter alia*, violence to the physical

structure of the body or disease or infection, injuries sustained due to exposure to hazardous or toxic conditions of the workplace, or psychic injury); Richards v. Unemp. Comp. Bd. of Rev., 768 A.2d 852, 856-57 n.9 (Pa. 2001) (compensable injury requires both injury and loss of earning power). Thus, pursuant to the plain terms of Section 319, an employer is entitled to subrogation when the third party causes a claimant's work-related physical or mental injury and that injury results in a loss of earning power. Dale Mfg. Co. v. WCAB (Bressi), 421 A.2d 653, 654-55 (Pa. 1980).

Applying this statutorily-based standard to the facts of the case, the third party employer Diesel Services did not "cause" claimant Bridges' compensable injury, i.e., cause *both* his physical injury and the resulting loss of earning power. While Diesel Services' actions may have resulted in a loss of earning power, it is not disputed that Diesel Services did not in whole or in part cause Bridges' physical injury. Thus, one of the necessary elements is missing, and subrogation is not available in this case.

In challenging this conclusion, Brubacher relies heavily on the policies underlying the right to subrogation in claiming a right to the settlement monies. Our Court has identified three underlying purposes for the Section 319 right to subrogation: (1) to prevent the employee from receiving a "double recovery" for the same injury; (2) to ensure that the employer is not compelled to pay compensation due to the wrongful act of a third party; and (3) to prevent a third party from escaping liability for its wrongful conduct. Dale Mfg. Co., 421 A.2d at 654. Yet, Brubacher's argument regarding policy cannot trump or avoid the plain words of the statute which require causation of a compensable injury. "[W]hen the words of a statute are clear, the letter is not to be disregarded under the pretext of pursuing

its spirit.” 1 Pa.C.S. §1921(b). Thus, Brubacher’s policy arguments, in light of the plain words of the statute, must fail.²

In sum, the plain language of Section 319 requires an employer to establish that a third party caused the “*compensable injury*” before subrogation is permitted. A compensable injury is both a physical or mental injury and a loss in earning power. Here, Brubacher could not prove that Diesel Services caused Bridges’ compensable injury because Diesel Services’ act of wrongfully terminating Bridges did not cause in whole or in part Bridges’ physical injury. Thus, Section 319’s statutory requirement of causation of a

² Furthermore, while rendered after the briefs were filed by the parties in this matter, our recent decision in Pooler v. WCAB (Warehouse Club, Inc.), 810 A.2d 1182 (Pa. 2002), which speaks to subrogation under the Workers’ Compensation Act, does not compel a different result. In Pooler, an employee was injured in a slip and fall accident in the course of his employment. For this work-related injury he began to receive workers’ compensation benefits. The employee’s attorney brought a third party action on behalf of the employee, but brought the suit against the wrong party. The action was dismissed and by that point in time, the action could not be re-filed against the correct parties; the applicable statute of limitations had expired. The employee filed a legal malpractice action against the attorney alleging that the attorney had negligently failed to file the action against the correct parties. The legal malpractice action was settled, and the employer sought subrogation against the settlement monies. Our Court held that the proceeds of the legal malpractice were subject to subrogation. Id. at 1184-85. This was in spite of the employee’s assertion that subrogation was inappropriate because it was neither a compensable injury nor causally related to a work injury.

Underlying our upholding of subrogation in the context of a legal malpractice action in Pooler was the critical requirement that to establish legal malpractice, one must also establish the underlying cause of a compensable injury. As stated by our Court in Pooler, “[i]t is this elemental requirement of proving the case within the case that makes a legal malpractice action unique.” Pooler, 810 A.2d at 1184. Thus, in Pooler, the malpractice claim was deemed to be, in essence, a conduit for the underlying tort claim, which necessarily encompassed proof of the underlying physical injury and its cause. “[T]he employee must demonstrate not merely an injury as a result of the malfeasance of his previous counsel, but also the malfeasance of the original tortfeasor which resulted in the underlying injury.” Id. (emphasis supplied). Thus, subrogation in the context of a legal malpractice action satisfied the statutory requirement of establishing that the third party caused the compensable injury. The statutory requirements are simply not satisfied in this case where the third party did not cause the compensable injury.

compensable injury has not been met and Brubacher is not entitled to subrogation. 77 P.S. §671.

The order of the Commonwealth Court is affirmed.

Former Chief Justice Zappala did not participate in the decision of this case.

Mr. Justice Nigro files a dissenting opinion in which Madame Justice Newman joins.