

compUpdate

Recovering damages:

When a third party is the cause of injuries,
Fund often uses 'TPL' and 'subrogation'

Jane Doe is on her way to the bank to make a deposit for her employer. Another driver runs a red light and crashes into Jane's car. She suffers broken ribs and a back injury.

John Doe is sitting in his new chair at work. When he pushes back on the chair to stand up, the chair leg breaks and he falls, hitting his head and shoulder on the wall behind him. He suffers neck and shoulder injuries.



Both incidents above resulted in work-related injuries, and the injured employees received workers compensation benefits from their employers' insurance companies. In both cases, neither the employers nor the workers were responsible for the accident. Instead, a "third party" was the cause. The other driver and the chair manufacturer were responsible because of negligence and product liability.

According to Idaho Code 72-223 (1) a "third party" is "some person other than the employer" who has "a legal liability to pay damages" for a worker's injury. The third party can be sued for damages. Because the insurance

companies in the two above incidents paid substantial benefits, the companies decided to use "subrogation" to recover funds from the other driver and the chair manufacturer.

Third party litigation, TPL, and subrogation. To most employers, those terms are just insurance jargon or mumbo-jumbo, and can seem complicated and confusing to any employer with a subrogated claim. To help untangle "subrogation," we will try in this issue of *compUpdate* to answer some of the questions we get from our policyholders.

Q. What is subrogation?

A. Subrogation is an interest or right of an insurance company in another's legal right to collect a debt or damages. Let's say a worker is injured in an accident involving a third party. The insurance company is required by law to provide benefits to the injured worker, regardless of who is at fault. The injured worker can seek damages directly from the third party, and the insurance company has a subrogated right to be reimbursed for benefits it has paid, from damages awarded to the injured worker. But suppose the injured worker doesn't sue the third party for damages. Then

the insurance company also has the subrogated right to sue the third party itself to recover money it has paid on a claim. In effect, the insurance company is allowed to "step into the shoes" of the injured worker.

Q. Why do I need to file a workers compensation claim if the accident was not my employee's fault?

A. It's the law. An employer is required to file a Notice of Injury and Claim for Benefits even though another party or faulty equipment might be responsible. The law also requires the workers compensation carrier to pay

any benefits due regardless of fault. Idaho Code 72-223 (1) states: "The right to compensation under this law shall not be affected by the fact that the injury, occupational disease or death is caused under circumstances creating in some person other than the employer a legal liability to pay damages therefore, such person so liable being referred to as the third party ..."

Q. How will subrogation affect my premium?

A. Damages received from third parties reduce the actual losses credited

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against an employer, so it is easy to see in dollars and cents just how important subrogation can be for an employer. Subrogation can help reduce an employer's experience modification, or "e-mod." "E-mod" is a method of modifying an employer's premium based on the past experience of that employer and is calculated by the rating organization for Idaho, the National Council on Compensation Insurance (NCCI).

An employer's premium is increased or decreased based on the company's loss record. The premium is multiplied by the e-mod. For example, if the standard premium is \$10,000, a .90 e-mod would reduce a company's premium to \$9,000. A 1.10 e-mod would increase the premium to \$11,000 for the same coverage.

When a claim is ready for closure and money has been recovered on a subrogation claim, a Correction (C) Report is filed with NCCI, if the amount previously reported on that claim is more than the final net payout. NCCI will recalculate the policyholder's e-mod and send the insurer the corrected e-mod. The new e-mod will be applied to the latest policy period. Depending on the circumstances, it may be applied to a previous period. The bottom line is that recovered funds could lower the employer's insurance costs.

Q. Why don't you pursue every claim involving a third party?

A. Pursuing small or certain other claims may actually increase the cost. The State Insurance Fund reports all claims to NCCI. Benefits are reported in three categories:

- **Medical** – payments made to medical vendors and claimant travel reimbursements.
- **Compensation** – time loss, permanent partial impairment, permanent partial disability, and lump sum settlements.
- **Claim expenses** – investigations, surveillance, legal costs and fees,

and medical records on noncompensable cases.

If a case does not involve a third party, only medical and compensation benefits are reported. On subrogation claims, medical, compensation and claim expenses incurred in the recovery of the amount spent are reported. Keep in mind that claim expenses include legal expenses, which include attorney's fees and litigation costs. In most cases, legal expenses cannot be recovered, so a claim could end up costing more than before recovery. So, it may not make fiscal sense to pursue some claims.

Q. When do attorneys get involved in subrogation? Does my injured employee

Recovered damages	1998	1999
Motor vehicle accidents	\$685,937.58	\$760,378.23
Product liability	52,523.07	7,896.49
General liability	35,928.60	404,653.50
Slip & fall	17,888.94	23,022.04
Dog bite	8,783.88	8,417.03
Chemical exposure	3,370.60	400.75
Fraud reimbursement	4,731.79	2,114.53
Assault	12,614.38	6,306.73
TOTAL	\$821,778.84	\$1,213,189.30

need an attorney?

A. An injured worker always has the right to hire an attorney. On small cases where the injured worker has not missed any time from work, or certain other cases, an attorney may not be involved. A Fund subrogation examiner generally works directly with the third party carrier to recover the money paid to medical providers. Once it is determined that the claimant is no longer seeking treatment, a letter is sent to the third party carrier requesting reimbursement. If the insurance carrier has agreed to reimburse the Fund, a check will be issued directly to the Fund for the amount paid.

On cases involving time loss, the third party carrier will generally require a settlement that includes the injured worker and the Fund. These cases can be more difficult to resolve and one of the Fund's in-house attorneys may be brought into the case. In some cases, the Fund may work with the injured

worker's attorney to seek recovery. If the employee hires an attorney, the recovery of the entire amount paid on the claim may not occur. This could be due to provisions of a settlement or because the injured worker's attorney, according to Idaho Code, has a right to deduct a portion of the amount recovered on behalf of the Fund for attorney's fees and costs.

On large cases where a third party carrier, or other third party, is disputing all or a portion of the claim, a third party lawsuit may have to be filed in district court. The workers compensation law gives the employee the right to file a third party action. If the Fund has paid benefits to the employee, the suit can be filed jointly by the employee and the Fund. If the employee refuses to participate, the Fund can then file suit in the employee's name.

On large cases, or cases where a third party action must be filed, the Fund will retain an attorney experienced in third party litigation. If the Fund's retained attorney takes an equal or leading role in the case, an agreement can be made with the injured worker's attorney to reduce the Fund's obligation to pay a portion of the worker's attorney's fees.

Q. How are recovered amounts applied to a claim?

A. If no attorney is involved in the third party claim, all money that is recovered is applied proportionately back to the amounts paid for medical and time loss benefits. For example, assume the Fund paid \$2,000 in medical benefits and \$1,000 in compensation benefits, and recovered \$3,000. \$2,000 would be applied to the medical account and \$1,000 to the compensation account.

If the Fund recovered only \$2,000 (67 percent of the total amount paid), \$1,340 would be applied to the medical account (67 percent of \$2,000) and \$660 to the compensation account (67 percent of \$1,000).

If the injured worker's attorney represents the Fund on a third party claim, he or she will deduct attorney's fees from the subrogation recovery and send the balance to the Fund. For example,

assume the employee's attorney recovered \$3,000 in the above example. He or she would take approximately a third of that amount (\$1,000) for attorney's fees and send the Fund the balance of \$2,000. The Fund then would apply the \$2,000 proportionately back to the medical and compensation accounts as shown above.

If one of the Fund's retained attorneys represents the Fund in a subrogation claim, attorney's fees are paid on an hourly basis under a claim expense. Therefore, all money recovered is applied back to the medical and compensation accounts with the attorney's fees categorized as a claim expense. For example, assume the Fund's attorney recovered \$3,000 in the above example. \$2,000 would be applied to the medical account and \$1,000 would be applied to the compensation account. The attorney's fees (assume \$1,000) would be applied to the claim expense account.

Q. How long does the subrogation process take?

A. On small cases involving no time loss, the subrogation recovery usually is obtained relatively quickly. Cases involving time loss may take longer, but generally can be resolved within two years.

If the injuries are severe, or the case is disputed, recovery could take an extended length of time. The statute of limitations for filing a third party suit is generally two years. This means a lawsuit must be filed in district court within two years from the date of the injury if the case has not been resolved. Generally, such lawsuits may not be filed until close to the expiration of the two-year statute of limitations.

Q. What might prevent or limit recovery of funds?

A. Employer or injured worker at fault: If the third party can show that the actions or non-actions of the employer or injured worker were all or part of the cause of the accident and injury, any recovery may be reduced or not allowed, depending on the degree of fault. For example, an employer removes a guard from a saw and a worker cuts his hand on the saw. The guard might have prevented the accident and the employer could be determined to be "at fault." Similarly, it might be determined

Determining subrogation possibilities

When the State Insurance Fund receives a third party claim, it is forwarded to the Claims Department's Subrogation Unit. Compensability of the claim is determined before any further steps are taken. Once compensability is established, benefits are started and the Fund's subrogation efforts begin.

- A third party liability (TPL) case is established and a TPL number assigned. The Fund will identify any insurance coverage for the third party. If insurance coverage is identified a letter is sent to the insurance carrier notifying them of the Fund's subrogation rights.
- An investigation is conducted to determine the viability of the subrogation case. If needed, an investigator will be sent to the site of the accident. If faulty equipment is involved, it will be catalogued and stored. Any reports, such as police reports, OSHA reports, chemical data sheets, etc., will be obtained.
- Once the Fund has gathered all of the information available, a decision will be made on whether there is a viable third party case. If there appears to be a viable third party case, notice will be sent to the claimant, policyholder and all other parties that the Fund intends to pursue its subrogation rights.
- The Fund will periodically send the third party carrier an update of benefits that have been paid. Once all benefits have been paid, a demand letter will be sent to the carrier requesting reimbursement of the amount expended by the Fund.

How you can assist in recovering damages

- If you believe there is any possibility that an accident involved a third party, immediately contact the claims examiner who is handling the claim.
- Preserve evidence. If you suspect an accident occurred because of faulty equipment, secure the equipment immediately and contact the claims examiner.
- In the event of a slip and fall injury that you suspect a third party is responsible, take photos of the scene as soon as possible.
- If the injuries are the result of an assault, submit the notice of injury as soon as possible and provide the city or county where charges were filed. If available, submit copies of the police report with the notice.
- If you know an injured worker is pursuing a third party claim, contact the claims examiner immediately.
- If you learn an injured worker has recovered money for an injury caused by a third party, contact the claims examiner immediately.
- Always contact the claims examiner before providing any statements or information to the third party or his or her representatives.

that the injured worker's negligence caused all or part of the accident and injury. The employer's or worker's fault could reduce or extinguish any rights of the employer/surety to recover its costs from the third party.

Indemnification agreements: If an employer has entered into an indemnification agreement, more commonly known as a Waiver of Subrogation, with the third party, the Fund would not pursue a third party case because it would, in effect, be suing its policyholder.

Uninsured motorist coverage: If an injured worker files a claim against his

or her uninsured or underinsured motorist coverage, some courts have held that a workers compensation surety cannot assert a subrogation interest against that coverage. The apparent reasoning has been that the surety should not be allowed to reap the benefits of a contract that the worker entered into independent of his employment. Additionally, most uninsured motorist policies exclude coverage for damages that would be covered by workers compensation.

Other factors: In some cases, the insurer may compromise its subrogation

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www2.state.id.us/isif/

ANTI-FRAUD HOTLINE 1-800-448-ISIF (4743)

Work near powerlines needs notification

Employers should be aware that a change in the law requires them to notify a power utility in writing before sending out employees to work near high-voltage lines.

HB 586 amended Idaho Code Sections 55-2401 through 2405 to broaden the indemnity provisions and expand the definition of the parties subject to the law. The law now provides that an employer or contractor has a duty to notify a power utility *in writing* before working near power lines.

If failure to notify the power utility results in physical or electrical contact with a high-voltage overhead line, then the employer or contractor shall be liable to the public utility owning or operating the overhead line for all damages to the facilities and all costs and expenses, including damages to third persons incurred by the public utility as a result of the contact.

Recovering damages

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lien simply because of the practicality of the litigation process. For example, in many cases, the third party's liability may not be entirely clear, and it may be debatable whether the third party was actually at fault. Were such cases to proceed to trial, both the injured worker and the insurer take the risk that a jury will find the third party is not liable and, thus, award no damages. In order to avoid this, the worker and the insurer may agree to accept a settlement from the third party for less than the total damages sustained as a result of the injury.

Similarly, in some cases, even when liability is clear, the third party may have limited assets or limited insurance coverage. In such cases, the third party's insurance company may offer "policy limits" to settle the claim. However, the policy limits may not be enough to pay the subrogation lien, as well as any uncovered damages the worker may have suffered. In such cases, the worker and his employer's insurer may agree to compromise their respective claims to ensure prompt resolution of the matter.



New district office phone numbers:

Twin Falls: 736-3064

Pocatello: 236-6412