

1961

Subrogation in the Missouri Workmen's Compensation Act-- Section 287.150

Seldon E. Brown

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Seldon E. Brown, *Subrogation in the Missouri Workmen's Compensation Act--Section 287.150*, 26 Mo. L. REV. (1961)

Available at: <https://scholarship.law.missouri.edu/mlr/vol26/iss3/7>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

SUBROGATION IN THE MISSOURI WORKMEN'S COMPENSATION ACT—SECTION 287.150

SELDON E. BROWN*

INTRODUCTION

An employee is killed or injured and he or his dependents receive benefits under the Workmen's Compensation Act.¹ An action arises against a negligent third party for the injury or death. Questions arise as to who may bring an action against the negligent party, and what rights in the recovery have the employee or his dependents, the employer, the insurer of the employer, or the second injury fund.

I. THE ORIGINAL PROVISION

Section 287.150 of the Missouri statutes is designed to answer these questions. Prior to 1955 that section contained only what is now subsection one. Before examining the other subsections of the provision and in order to understand the shortcomings which those other subsections were designed to remedy, a brief survey of subsection one is warranted. That subsection provides:

Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer, after deducting the expenses of making such recovery shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation.

An understanding of the operation of this provision can best be ob-

*Attorney, St. Louis, Mo.; LL.B., University of Louisville, 1929; Director of Insurance and Workmen's Compensation for Associated Industries of Missouri, St. Louis, Mo.

1. C. 287, RSMo 1959.

tained by an examination of some of the appellate court rulings which have construed it.

In *McKenzie v. Missouri Stables, Inc.*² the injured compensated employee brought action against the negligent third party and was awarded a substantial judgment over defendant's objection that the employer should bring the action and not the compensated employee. On appeal the decision was affirmed, the court holding that under the statute either the employee, the employer, or both, may be proper parties plaintiff and that action by one is conclusive on the other. The court went beyond the actual statutory provision in holding further that if the employer recovers he is the trustee for the employee for the surplus and that if the employee recovers, he is the trustee for the employer for the amount the employer paid him.³ As noted, the principle of trusteeship is not mentioned in the statutory provision; however, it would be difficult to find fault with this construction as it is likely the best solution that could be found to an otherwise difficult and technical procedural problem.

In another case brought under the statute, this one by the employer and the employee's widow, *Anzer v. Humes-Deal Co.*,⁴ the court pointed out that the employer's being subrogated as provided in the statute does not strengthen the injured employee's case against the third party. Thus, if the injured employee was contributorily negligent, no recovery could be obtained. *Pappas Pie & Baking Co. v. Stroh Bros. Delivery Co.*,⁵ dealt with a somewhat similar problem in holding that where the employer brought suit to recover for the employee and also for damage to the employer's truck, the employer must prove that the third party was negligent.

The Missouri courts also held in a series of cases under the statute that the payment of compensation by the employer is not a condition precedent to his right of subrogation;⁶ and that in a death case where the wrongful death statute⁷ names certain persons who may bring the action, an employer subrogated to the rights of those parties may bring the suit in his own name.⁸ Where this is done the action must be brought within the

2. 34 S.W.2d 136 (St. L. Ct. App. 1931).

3. *Id.* at 139.

4. 332 Mo. 432, 59 S.W.2d 962 (1933).

5. 67 S.W.2d 793 (St. L. Ct. App. 1934).

6. *Markley v. Kansas City So. Ry.*, 338 Mo. 436, 90 S.W.2d 409 (1936).

7. See § 537.080, RSMo 1959.

8. *Superior Mineral Co. v. Missouri Pac. R.R.*, 45 S.W.2d 912 (St. L. Ct. App. 1932).

time allotted under the wrongful death statute, and if the persons who under the death statute may bring the action are barred, so is the employer.⁹

Protection for the employer was found in *Everard v. Women's Home Companion Reading Club*,¹⁰ where it was held that where either the employer or employee handles the claim against the third party, the wrongdoing third party must take notice of the rights of all, and cannot, by a settlement with the injured party, increase the burden of the innocent employer.

In summary, the decisions under subsection one hold that the employer and insurer are subrogated to the rights of the injured employee and dependents as against the negligent third party; that the cause of action is the same and is not strengthened nor weakened by reason of the subrogation; that the employer and employee are trustees for the other and each must account to the other for any recovery from the third party; and that the third party must take notice of all rights in the claim and may settle the claim at his peril.

Although these principles are apparently simple, experience has shown that the employer, insurer, and the injured employee must work together if each is to be properly protected in the matter of recovery from the third party. If the employer or insurer permits the injured employee to proceed against the third party, it is necessary to keep informed with respect to the proceedings. Failure to do so may result in finding the claim settled, the employee's attorney paid and the employee, not being aware of his duties as trustee, having dissipated the trust. If the employee has little money or property, as is often the case, the problem of "getting blood out of a turnip" arises and it is just not done.

On the other hand if the employer or his insurer is handling the third party claim, it must be kept in mind that *negligence* on the part of the third party must be proved before there may be recovery, and damages to the injured employee must also be shown. It is the employee's damages that are to be recovered.¹¹ In proving the negligence of the third party and damages to the employee the injured employee is likely to be one of the best witnesses. But often the employer or insurer in handling the claim proceed as though the injured employee did not exist, and there is no

9. *Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982, 111 S.W.2d 1 (1937).

10. 122 S.W.2d 51 (St. L. Ct. App. 1938).

11. *Sommers v. Hartford Acc. & Indem. Co.*, 277 S.W.2d 645 (K.C. Ct. App. 1955).

agreement as to how the recovery will be shared. The employee is told nothing, but expected to appear at the trial of the case and be an interested and enthusiastic witness or party.

If recovery is awarded in the third party claim, the employer or insurer pays from the recovery the expenses, attorneys' fees, etc., and reimburses himself for compensation and medical expenses paid the employee from the recovery and there is often nothing left for the employee or his widow. Notice that although subsection one permits the employer, when he makes the recovery, to pay attorneys' fees and expenses first, then reimburse himself, nothing is said about the disposition of the remainder when the employee makes the recovery. In these cases the employer or insurer has often insisted on the right of full payment out of the recovery first, or they would agree that the employee's attorney be paid his fee first and then the employer or insurer be paid in full, leaving to the injured employee what was left.

II. THE 1955 AMENDMENT

This is the problem that was presented to the 68th General Assembly of Missouri, in 1955, by Representative Eugene Walsh of St. Louis, Missouri. Representative Walsh introduced into the House, H.B. 335, which would have amended section 287.150 by adding a new provision to be known as subsection two, as follows:

Where an employee or his dependents proceed against the third person, to recover damages for injury or death for which the employer is liable under this law, the employer may acquire a lien on the cause of action of the employee or his dependents to the extent of his right of subrogation except that in any such case all expenses incurred in making recovery against the third person shall be apportioned between the employer and employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered. The employer's lien under this section shall be perfected and enforced in the same manner as is provided for liens of attorneys under sections 484.130 and 484.140.

This would provide a statutory disposition of the recovery in those cases where the employee or his dependents received compensation from the third party. However, objection was made to the proposal, because it departed from the principle of subrogation. It provided for the employer "a lien on the cause of action of the employee or his dependents to the extent of his right of subrogation." It further provided that this lien "shall be perfected and enforced in the same manner as is provided for liens of

attorneys under sections 484.130 and 484.140.¹² The objectors believed that the attempt to combine the principle of subrogation as it had been used under subsection one, above quoted, with the idea of a lien to "be perfected and enforced" as "liens of attorneys" would be confusing and unnecessary.

The main goal Representative Walsh was seeking to attain was that of having the employer or insurer pay a proportionate share of the expense and the attorney's fee incurred by the employee or his dependents in obtaining recovery from the third party.

After consideration by the House Committee on Workmen's Compensation, H.B. 335 was amended and passed in the language presently found in subsection three of section 287.150. When passed, the provision was referred to as subsection two, but became subsection three when section 287.150 was amended again in 1957. Subsection three in section 287.150 reads:

Whenever recovery against the third person is effected by the employee or his dependents, the employer shall pay from his share of the recovery a proportionate share of the expenses of the recovery, including a reasonable attorney fee. After the expenses and attorney fee has been paid the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered, or the balance of the recovery may be divided between the employer and the employee or his dependents as they may agree. Any part of the recovery found to be due to the employer, the employee or his dependents shall be paid forthwith and any part of the recovery paid to the employee or his dependents under this section shall be treated by them as an advance payment by the employer on account of any future installments of compensation.

The amendment provided that where the employee or his dependents effect the recovery against the third party, the employer "shall pay from his share of the recovery, a proportionate share of the expenses of the recovery, including a reasonable attorney fee." After this has been done, "the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered." It was believed that this provision would effectively require the employer and insurer to contribute

12 §§ 484.130, .140, RSMo 1959.

from their share of the recovery a fair portion of the expense of the recovery including the attorney's fee. No longer could the employer and insurer sit back and accept the fruits of the employee's and dependent's efforts and contribute nothing as had been done in the past.¹³ Not only did the amendment provide how the recovery was to be divided and expenses and attorney's fee handled, it went further and permitted the employer, the employee and his dependents to divide the balance of the recovery as they may agree. This agreement could be made at any time, before or after the recovery was effected. It simply provides that if the employer and employee or his dependents agree to share "the balance of the recovery" that agreement may be carried out. If there is no agreement in this regard it is to "be apportioned between the employer and employee or his dependents in the ratio that the amount due the employer bears to the total amount recovered."

The latter part of the amendment, "any part of the recovery paid to the employee or his dependents under this section shall be treated by them as an advance payment by the employer on account of any installments of compensation," merely carries through the provision of subsection one of 287.150, where the employer and his attorney effect the recovery.

While this all seems simple and easy enough, questions have arisen. Probably the key question is: what constitutes the employer's "share of the recovery?" Assume that the employee has been awarded compensation by the referee or the Commission of \$2500 in weekly benefits plus medical and hospital benefits of \$1000, and that the medical and hospital benefits have been paid by the employer and insurer but that only \$1200 of the weekly benefits have become due and have been paid. At this point the employee and his attorney effect a third party settlement in the amount of \$10,000. What is the recovery as to the employer and insurer? It is certainly the \$1000 medical and hospital expense, but is it the award of \$2500 or is it the \$1200 that has actually been paid on the award? Although as will be seen later, a recent case holds otherwise,¹⁴ it would appear that the employer and insurer cannot recover (be reimbursed, or be paid) amounts that they have not paid out. "The recovery" to the employer and insurer at this point should be the \$2200 actually paid. The \$2200 figure and the \$10,000 figure would be the factors used in determining the employer's contribution to the expense of the recovery, including rea-

13. See *Zasslous v. Service Blue Print Co.*, 288 S.W.2d 377 (St. L. Ct. App. 1956).

14. *Knox v. Land Constr. Co.*, 345 S.W.2d 244 (K.C. Ct. App. 1961).

sonable attorneys' fees. If the amount of the award, \$2500 plus the \$1000 figure, is the factor to be used, it would seem that the employer is being taken advantage of. He should not be required to contribute more to the expense of recovery than what he has actually paid out as of the time of the recovery, particularly in view of the statutory requirement "any part of the recovery found to be due to the employer, the employee or his dependents shall be paid forthwith."

In the illustration above, it is apparent that the recovery is sufficient to cover all expenses, attorneys' fees, and the subrogation interests of the employer. The more difficult problems arise when the recovery is small in comparison to the compensation benefits paid out. This problem was recognized by the legislature when it provided "or the balance of the recovery may be divided between the employer and the employee or his dependents as they may agree."

The big problem involved in these claims is that generally the recovery is insufficient to allow the employer and employee to do all that they might want done. The employer and insurer desire to recover all of their losses and come out whole, which is usually expecting too much, and the employee or his dependents naturally expect to receive something at the conclusion of the third party case. At the same time the third party will, of course, do all that he can to hold down his loss, and indeed he should not be required to pay more than will fairly and reasonably compensate for the damages that he has caused.

At the same time there is the dilemma of balancing or harmonizing recoveries from two distinct types of claims or cases—the common law case, resting upon negligence in which damages, general and special, are recoverable and the workmen's compensation case in which negligence is not in issue and damages, as such, are unknown, the employee being entitled to medical care and a portion of his lost wages under the name of weekly benefits. Substantial amounts of money may become due in either case, but not necessarily at the same time, nor from the same incident. An accident may occur for which the third party is not liable, but the employer may suffer loss because the injuries are great. Again, the legal liability of the third party may be weak, but he may still be willing to make some payment—buy his peace, so to speak.

III. THE 1959 AMENDMENTS

In the 1959 session of the legislature, section 287.150 was further enlarged by addition of what are now subsections two and four. Subsection two reads:

When a third person is liable for the death of an employee and compensation is paid or payable under this chapter, and recovery is had either by judgment or settlement for the wrongful death of the employee, subject to subsection 3, the employer shall receive or have credit for all sums paid or payable under this chapter to any one or all of the dependents of the deceased employee to the extent of the settlement or recovery for the wrongful death, whether or not one or all of the dependents are entitled to share in the proceeds of the settlement or recovery and whether or not one or all of the dependents could have maintained the action or claim for wrongful death.

This amendment was to correct the situation created by *Masters v. Southwestern Greyhound Lines*¹⁵ and *Daniels v. Kroeger*.¹⁶ In each, compensation was awarded in specific amounts. In the *Daniels* case the widow was awarded \$6000 and the children \$6000. The widow then recovered \$12,400 from the third party. The court held that \$6000 was all that the employer was entitled to receive by way of subrogation, because the third party action belonged to the widow and not the children. Since \$6000 was all that the widow received in compensation, that was all he could recover from her by his right of subrogation. Thus employers were apparently faced with a situation in which the Commission might award all the compensation to the children, the widow would bring the third party case and receive a substantial recovery, and the employer would be unable to effect his right of subrogation.

This problem arises as a result of the Missouri Wrongful Death Statute which gives the widow having the statutory cause of action only six months in which to sue, and failing so to do it passes to the children.¹⁷ In many jurisdictions the right of action for death passes to the decedent's administrator. When subsection two was presented to the legislature it was suggested that the Missouri death statute should be changed to provide that the right to sue for death should pass to the administrator rather than the widow and children. However, there was no bill pending in the 1959 session of the legislature in this regard. Apparently, there has been no appellate court case dealing with subsection two up to the present time.

Subsection four of section 287.150, also added during the 1959 legislature, provides:

15. 205 S.W.2d 882 (Spr. Ct. App. 1947).
16. 294 S.W.2d 562 (St. L. Ct. App. 1956).
17. § 537.080(2), RSMo 1959.

In any case in which an injured employee has been paid benefits from the second injury fund as provided in paragraph 3 of section 287.141, and recovery is had against the third party liable to the employee for the injury, the second injury fund shall be subrogated to the rights of the employee against said third party to the extent of the payments made to him from said fund, subject to provisions of sub-section three.

This provision was requested by the administrators of the second injury fund, in order to afford the fund the same protection as the employer in third party cases, represented by the *Masters* and *Daniels* cases.

IV. KNOX V. LAND CONSTRUCTION COMPANY¹⁸

It often happens when one attempts to speculate on the state of the law in a particular area—what it is or what it might be—an opinion is rendered contrary to what has been written. Such is the *Knox* case decided by the Kansas City Court of Appeals, in the April session, pertaining to distribution of a recovery from a third party under subsection three. In the *Knox* case an employee was killed in an automobile accident in Kansas. His widow received an award of \$12,797.85 for herself and minor children as compensation benefits in Missouri. Through her own lawyer she brought suit in Kansas and recovered \$22,500 from the third party. With interest, the judgment amounted to \$23,896.88 when paid. The Commission in Missouri approved an attorney's fee of 50 per cent of the judgment, and held that the \$12,797.85 compensation award was the appropriate figure to use in determining the share of the employer in the third party recovery.

It appears that as of the time of the recovery, the employer had paid the burial benefit of \$400, as well as 108.57 weeks in weekly death benefits, totalling \$3800, and \$397.85 in medical aid, or a total of \$4597.85. After paying an item of \$626.81 for trial and traveling expenses in connection with the Kansas suit, the attorneys' fees were allowed at \$11,635 and the widow was allowed \$11,635.07.

By using the total amount of the compensation award (\$12,797.85) as the share of the employer at the time of the recovery, the Commission determined the employer's proportionate share of the total recovery (\$23,896.88) and the net recovery after the payment of expenses (\$11,635.07) to be 53.56 per cent. The court then determined that the net recovery after the payment of expenses (\$11,635.07) should be apportioned

18. *Supra* note 14.

as follows: 46.44 per cent thereof (\$5403.36) to the widow as her share to be paid forthwith, the balance (\$6231.74) to be credited to the employer. Because the employer and his insurer did not ask for a division of the recovery until almost two years after payment of the judgment the court concluded that they had acquiesced in the payment of their share to the widow and were entitled to credit for this payment in the following manner:

\$4597.85	representing burial, medical and	108-4/7th weeks' compensation already paid
\$6231.74	representing the employer's share in the award	or 178 weeks' compensation, credit for future payments
<hr/>		
\$10,829.59	total credits	286-4/7th weeks' compensation
\$1968.26	still due on award	or 56 weeks' compensation.

There are several comments to be made pertaining to the decision.

1. The lawyers of Missouri may be surprised to learn that the Commission can approve attorneys' fees in common law cases where subrogation is involved. The court said: "Appellant's first point has to do with the reasonableness of the 50 per cent attorney fee allowance. The Commission has authority to pass on this matter."¹⁹

In the opinion of the writer, the only attorney fee the Commission had authority to pass on was that part of the fee that this statute required the employer to pay. The balance of the fee was a matter of contract between the attorneys and the widow.²⁰

2. Had the Commission used the figure \$4597.85, which was the amount of money the employer had paid out at the time of the recovery, and was the only amount the employer was entitled to recover, the result would have been different. There would have been a balance of \$9396.48 due the widow, which the statute says "shall be paid forthwith" to the widow. This amount would have been credited, of course, against future compensation payments.

3. The Commission seems to have overlooked entirely the command of the statute that "any part of the recovery found to be due to the employer, the employee and the dependents shall be paid forthwith." Instead

19. *Id.* at 248.

20. *Id.* at 247.

of ordering a distribution, the court set up credits, and in this respect erred, in the opinion of the author.

4. By using the \$12,797.85 award figure to determine the employer's interest in the third party judgment at the time of recovery, the employer in effect pays a greater part of the costs and attorney's fee than should be required of him.

5. The Commission and the court err when in their approach to the problem they permit their minds to be oriented by Larson's *Workmen's Compensation Law*, reporting upon the law of New York and Massachusetts.²¹ The law of those states is entirely different from what the Missouri statute on attorneys' fees in subrogation cases requires.

The Knox opinion is a good illustration of what results when the Commission of the court fail to follow the statute. "The amount due the employer" in this case was the amount he had paid out under this award as of the time of the recovery from the third party. That amount was the employer's share of the recovery at the time the recovery was made. That amount, less a "proportinate share of the expense of the recovery, including a reasonable attorney's fee," should have been paid forthwith to the employer. The balance of the recovery belonged to the widow and should have been paid forthwith to her.

The unpaid balance of the compensation award should be credited with "any part of the recovery found to be due to the . . . dependents." In this case there would have been no balance due on the compensation award had the statute been followed.

It is true that the amount due the employer will change from day to day as he pays the benefits and as they become due to the employee or his dependents. In this respect every case will present economic problems that are different from every other case. That is why the statute permits the recovery to "be divided between the employer and the employee or his dependents as they may agree."

The fact that the widow in this case would have paid the larger part of the attorney's fee is not important. She had agreed to pay 50 per cent of the recovery to her lawyer for a fee. All of this recovery from the third party belonged to the widow except the amount due the employer at the time of the recovery. She is not hurt by keeping her agreement to pay her attorney's fee. But the employer is hurt by this arbitrary formula used by the Commission to divide this recovery.

21. *Ibid.*

In the *Knox* case there is no reason why the employer in the final analysis should have been out any money, except a proportionate share of the expenses including a reasonable attorney's fee from his share of the recovery. This because there was sufficient recovery to take care of all the claims. Suppose at the time of the recovery from the third party the employer had paid out all of the compensation award. In such a case the employer would have to pay more of the attorney's fee, but he also would have recovered more.

If the opinion in the *Knox* case is what section 287.150, subsection three means in subrogation as it is applied to workmen's compensation cases, then it would appear that the employer will have to take over and manage the third party action with his own counsel, or have his own counsel participate in said action for his own protection.