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MINNESOTA WORKERS' COMPENSATION SUBROGATION

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MINNESOTA WORKERS' COMPENSATION SUBROGATION

WHAT IS A WORKERS' COMPENSATION SUBROGATION CLAIM?

Subrogation is defined in Black's Law Dictionary, Revised 4th Edition as:

> A legal fiction through which a person who, not as a volunteer or in his own right, and in absence of outstanding and superior equities, pays the debt of another, is substituted to all rights and remedies of the earlier, and the debt is treated in equity as still enough to include every instance in which one party pays the debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by such other.

The right to recover workers' compensation subrogation in Minnesota is governed by Minnesota Statute § 176.061 (Appendix A). Minn. Stat. § 176.061 is a relatively confusing statute. Not surprisingly, it has recently been the subject of a significant amount of litigation. There are a number of issues governed by the statute we believe will be the subject of litigation in the future.

The major thrust of Minn. Stat. § 176.061 is to provide a mechanism for reimbursement of workers' compensation benefits where someone other than the employer or employee is at fault for the employee's injuries. If a recovery is large enough and the workers' compensation benefits paid are fully reimbursed (under the statutory formula), the statute also provides a mechanism by which the employer/insurer may obtain a credit against future workers' compensation benefits payable.

HOW DO YOU RECOGNIZE A GOOD SUBROGATION CASE?

There is no easy answer to this question and certainly no comprehensive one. Finding an answer is complicated by the fact that many workers' compensation specialists do not have extensive experience evaluating liability claims. A subrogation case is a liability action and needs to be evaluated from a fault perspective. In order to recognize a good subrogation case, you will need to 1) investigate, and 2) evaluate.

INVESTIGATION: First, you must investigate. We invite your attention to the Investigation Checklist found at Appendix E. By no means exhaustive, it should be helpful to you in developing a checklist tailored to your individual situations. Your investigator should obtain more information than provided on the First Report of Injury Form, although that may be a good place to start. You should talk with the employee, all witnesses, the employer and anyone else having knowledge of how the injury occurred.

Your investigation should include a preliminary assessment of: 1) the amount of workers' compensation benefits paid and future exposure; 2) the cost of the investigation; 3) the potential cost of the litigation; and 4) the likelihood of prevailing at trial. It makes no sense to spend $500 to investigate the possibility of recovering $250. In many cases, interviewing the employee may be sufficient. In other cases it may be necessary and cost effective to have a qualified expert visit the accident scene and evaluate the instrumentalities involved.

An investigation by an adjuster should be cost effective and will usually provide sufficient information for evaluation purposes. Remember to wear your liability hat while performing this task. Fault is an important aspect of every subrogation case. In Minnesota, if the employee is 51 percent at fault for his injury, there will be no subrogation recovery to the employer regardless of how much money is paid. Finally, we suggest cooperation with an employee's attorney if the attorney will share investigation results with you. However, be very cautious about allowing the employee's attorney access to co-employees.

** Because written or recorded statements will eventually be discovered by all parties, do not take or allow unfavorable statements to be taken by anyone. **

EVALUATION: After the preliminary investigation, the second step in assessing a subrogation claim is evaluation. This evaluation should be made as soon as you have completed the investigation.

In evaluating a claim, the evaluator must recognize the following:

a) As a general rule, the more parties involved, the more protracted and expensive the litigation will be.

b) Product liability cases tend to be relatively more expensive than simple negligence cases.

c) Slip and fall cases are not all poor liability cases and should be evaluated on their individual merits.

d) Fault for injuries occurring on construction projects frequently rests with the general contractor who is responsible for the safety of all persons on the job site.

e) The mere fact that a Lambertson claim may be asserted should not deter you from commencing a subrogation action. The Lambertson claim should be evaluated in terms of its merits and the cost to defend the claim. The employer's liability may be small and/or the defense relatively inexpensive. Furthermore, you may have a duty to commence an action

even where a valid and expensive Lambertson claim may be asserted. This could occur when the Workers' Compensation Reinsurance Association (WCRA) requires you seek a recovery.

f) Results in a civil lawsuit are often highly influenced by the personalities of the parties and the witnesses. Because of its derivative nature, the most important personality in the employer's subrogation claim is the employee.

g) When evaluating a claim you must determine the best and worst case scenario.

After the investigation and evaluation of the liability issues, coupled with your determination of the value of the workers' compensation claim, you must make a decision -- Do I want to act, or react? We believe there is usually a better return on proactive, aggressive pursuit of subrogation claims, rather than a reactive or passive approach.

Not every case is suitable for subrogation. A common sense approach when evaluating liability is necessary. The potential for a recovery must be balanced with the costs incurred in obtaining the recovery and the uncertainties of the jury system.

AGAINST WHOM MAY AN ACTION BE BROUGHT?

Generally an action may be brought against anyone from whom an employee could recover under a tort theory or under certain contractual theories. If the employee has a purely contractual right to recover benefits, the employer is not subrogated to that right. For example, if an employee has a right against an insurance carrier in the form of no-fault benefits, uninsured motorist coverage, or underinsured motorist coverage, there is no subrogation right.

MUST THE EMPLOYEE BE FULLY REIMBURSED FIRST?

Minn. Stat. § 176.061 provides a statutory right to recover even though the employee is not fully reimbursed for his damages. In other subrogation litigations, an injured person must be fully reimbursed before there is any right of subrogation.

WHEN MUST A WORKERS' COMPENSATION SUBROGATION ACTION BE FILED?

The statute of limitations applicable to an action by an employer to recover workers' compensation benefits is the same as applicable to the employee. One can imagine situations where this general rule would lead to absurd results. A situation could arise where no workers' compensation benefits are paid until two years after the date of the accident. If the applicable statute of limitations is two years, the time for commencing an action would have expired. To deny the employer a right to recover in such a situation would probably be unconstitutional. The Court has not dealt with this

specific issue and, in most cases of common law negligence, it will not arise because a six-year statute of limitations is applicable. Nonetheless, there are several types of actions where two-year statutes of limitations are applicable. These include medical malpractice actions; actions involving injuries arising out of improvements to real property; and intentional torts. Shorter time periods may be applicable in other cases, including claims against a municipality and Dram Shop claims. Dram Shop claims and municipal actions require a party to give notice to the prospective defendant within certain short time periods (as little as 120 days after the occurrence). When in doubt, it is important for the claim person to get legal advice. Notice requirements should be determined and complied with in all potential subrogation cases, regardless of when the action itself must be filed.

In situations where an employee commences a cause of action and the employer does not intervene or commence its own action until after the statute of limitations expires, Courts have held the statute of limitations does not run during the period of the pendency of the employee's action. It is wise to commence one's action within the statutory period to insure there are no problems and avoid the issue even being raised. Furthermore, new claims should be aggressively pursued in order to maximize recovery.

WHAT IS INVOLVED IN A SUBROGATION ACTION?

A subrogation action typically involves the initiation (or threat) of a lawsuit. There are many situations where you will want to take an aggressive approach on the subrogation claim in order to fully protect your interests. This can be done either by intervening in the employee's suit or by commencing a separate lawsuit in the name of the employee or employer. The employer will then be a party to the action and have a right to recover damages before a jury. In certain specialized situations, moreover, you may want to "associate" with the employee's counsel for discovery and/or trial purposes through a Notice of Association. A recent appellate decision holds that a Notice of Association does not confer party status on the employer.

While the employer's subrogation interest is similar to the employee's, it is not identical. The employer will be interested in proving the past medical and past wage loss damage items while the employee, having already recovered these past items from the employer in the form of compensation benefits, will be more interested in establishing an entitlement to future medical and wage loss expenses. The employee will also have an interest in proving past and future damages for pain and suffering which the employer cannot recover. Because of the divergence in interests between the employer and employee, separate counsel is usually required to represent the subrogation claim to ensure the subrogation interests are being fully protected.

If you have properly investigated the file, located the at-fault parties, and contacted their insurers with a calculation of damages paid -- then it is possible to resolve a case without legal assistance.

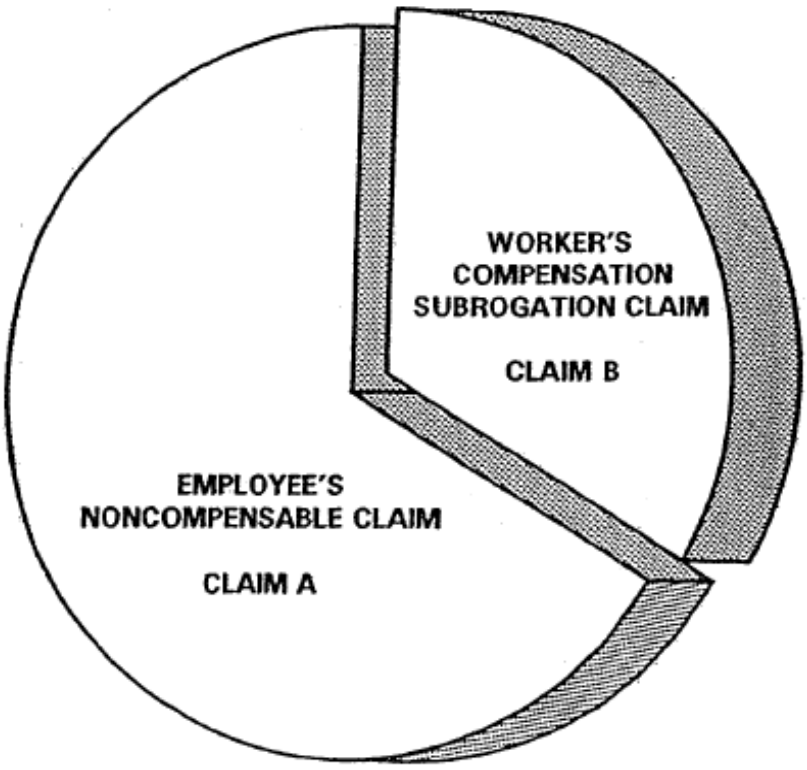
Settlement is handled much the same way you get contribution from another employer or insurer for a previous injury, or a Gillette-type injury. See Appendix F for a proposed settlement letter.

IF I INTERVENE, MUST I AGREE TO THE SETTLEMENT?

The easy answer is "no". You don't have to agree to a third-party settlement based on an employee's determination of how proceeds are to be allocated. You cannot, however, unreasonably interfere in an employee's settlement. The employee must provide notice of settlement negotiations and afford the employer an opportunity to protect its interest.

WHAT IS A "NAIG" SETTLEMENT?

A "Naig" settlement is simply one wherein the employee settles the non-compensable portion of the claim. The workers' compensation subrogation claim is left intact. This settlement is one which recognizes that the employee's claim consists of two parts, the non-compensable claim and the workers' compensation subrogation interest. A "Naig" settlement is a settlement approved by the Minnesota Supreme Court. The name comes from the case of Naig v. Bloomington Sanitation, 258 N.W.2d 891, (Minn. 1977). Schematically, this type of settlement may be demonstrated as follows:



A "Naig" settlement is merely the settlement of Claim A, leaving Claim B intact.

HOW ARE THE PROCEEDS SPLIT IN THE ABSENCE OF A NAIG SETTLEMENT?

In the absence of a "Naig" settlement, there are two methods for splitting an award between the employee (Claim A) and the employer (Claim B). One method is the statutory formula found in Minn. Stat. § 176.061. See the Statutory Formula Application Example found at Appendix D. This is the most frequently utilized method.

The second method involves the District Court making the apportionment between Claim A and Claim B based upon the facts as to which portion of the total award represents a recovery of compensation payments and which portion represents reimbursement of pain and suffering, loss of consortium, etc. This latter method is generally referred to as a "Henning allocation," after the case of Henning v. Wineman, 306 N.W.2d 550, (Minn. 1981), wherein the Supreme Court approved this method.

HOW IS THE SUBROGATION INTEREST MEASURED AFTER A NAIG SETTLEMENT?

In Tyroll v. Private Label Chemicals, Inc., 505 N.W.2d 54 (Minn. 1993), our Supreme Court sought to resolve the issue of the appropriate measure of damages to be applied in calculating Claim B after there has been a "Naig" settlement. The court held that after a "Naig" settlement, the employer must still prove the nature and extent of the employee's personal injury damages at trial. Thereafter, the employer is entitled to collect the present value of all workers' compensation payments, past and future, as long as this present value does not exceed the employee's damages as awarded by the jury. Thus, the Supreme Court has provided a mechanism whereby in many instances, the employer is better off to allow the employee to reach a Naig settlement because this will allow the employer to make a complete recovery and eliminate the potential for paying a share of the recovery to the employee and the employee's attorney. Unfortunately, there are a couple of instances in Tyroll where the wording is sufficiently vague that the decision may be subject to future attack. Certainly, this will be likely when the court sees how its decision has allowed additional recovery and how it deters complete settlement.

The downside of this particular decision is that it requires the employer to meet the burden of proof on the employee's damage case. This will require the cooperation of the employee and will entail additional expense, particularly for medical experts. Even for wrongful death cases, proof will be more difficult as it may be necessary in a particular case to subpoena the heirs and next of kin to testify when they are reluctant to be involved.

As we indicated, the post-"Naig" subrogation interest (Claim B) includes the present value of all workers' compensation payments, past and future. This differs from the pre-"Naig" measure of damages in that the pre-"Naig" award will include a future credit. After a "Naig," there is no future credit. Instead, the present value of the future payments are collected now rather than waiting for the compensation payments to come due. Interestingly, this will require the trial court to make a determination of the amount of the future compensation payments reasonably likely to occur.

WHAT ARE THE BENEFITS OF A "NAIG" SETTLEMENT?

One way you may benefit from a "Naig" settlement is by avoiding the employee's attorneys fees. The statutory formula in Minn. Stat. § 176.061 provides that the "costs of collection" are to be deducted before the formula is applied. Obviously, the major "costs of collection" are attorneys fees. Employees' attorneys often take the position they are entitled to a contingent fee out of both the employee's claim (Claim A) and the subrogation claim (Claim B). Accordingly, they attempt to settle the entire claim collecting fees on both portions. It is important to note that when there is a "Naig" settlement, the employee's attorney is owed nothing from the workers' compensation subrogation recovery (Claim B). Recent cases make clear that the employee's attorney is not entitled to a fee on your recovery if you settle your claim separately before trial. Thus, one important method of maximizing your recovery, where you do not need the plaintiff's attorney, is to do whatever you can to force a "Naig" settlement. By doing so, you have the opportunity of obtaining a recovery by using your own attorney at a lower rate. Furthermore, once there has been a "Naig" settlement, there is no Lambertson-type contribution liability, any such claim becomes merely an offset that cannot exceed your recovery.

"Naig" settlements have historically elicited a certain fear in claims handlers. However, proper investigation and development of a file will leave you in generally as good a position, whether or not the employee has entered into a "Naig" settlement. In fact, as we have indicated, you may be better off after a "Naig". Nonetheless, you must be in a position to actively pursue subrogation. Do not wait for an employee's attorney to do it for you.

Occasionally, a "Naig" settlement is not a desired result. In some cases the employee and/or his attorney may be of such value that you do not want them out of the suit. For example, there are cases of marginal liability where the employee's personality is important to a favorable liability finding; or liability cases where you are not sufficiently interested in advancing the litigation expenses to pursue your claim alone and plaintiff's attorney is willing to advance the costs. This is most likely to occur when expensive experts are required to prove the liability claim. In such cases there are strategies which may be employed to deter a "Naig" settlement.

WHAT IS A REVERSE "NAIG"?

Quite simply, it is the opposite of a "Naig" settlement. In a "Naig" settlement, the employee settles his claim with the defendant tortfeasor. In a reverse "Naig" settlement, the employer settles its separate cause of action (Claim B) with the defendant tortfeasor. In many instances this type of settlement is the most effective means the employer has to recover workers' compensation benefits it has paid or will be required to pay to the employee.

A reverse "Naig" settlement most often includes an assignment of the subrogation claim to allow a defendant tortfeasor the opportunity to claim workers' compensation payments as an offset to any amount it is found liable for at the trial of the employee's claim. However, recent case law holds this offset is available only where the reverse "Naig" settlement is accomplished prior to trial. In addition, while a reverse "Naig" probably extinguishes any potential Lambertson claims the defendant tortfeasor may have against the employer, you should always include specific language in any reverse "Naig" release which expressly releases the employer from any existing or potential Lambertson claims. An example of a Reverse "Naig" Release is attached as Appendix B.

WHEN IS A REVERSE "NAIG" APPROPRIATE?

A reverse "Naig" is appropriate whenever you can make a sufficient recovery and/or avoid liability of a dangerous Lambertson claim. Such a settlement ensures you do not have to expend any more money to obtain your recovery and eliminates the uncertainty of recovery. Individual cases where this settlement device might be particularly appropriate include situations where there is weak liability; where the Lambertson exposure is high; and, where the money offered is fair and reasonable.

Reverse "Naigs" are particularly useful when there are limited liability limits. If a recovery can be made without litigation or early in the litigation, it is usually a good move from the employer's standpoint.

WHEN IS A REVERSE "NAIG" NOT APPROPRIATE?

When the future workers' compensation payments will be large and the defendant is financially responsible, a reverse "Naig" settlement is usually not appropriate, particularly where liability is favorable. This is because a reverse "Naig" settlement eliminates the employer's future credit for future workers' compensation benefits payable to or on behalf of the employee.

You may still be able to use a reverse "Naig" in combination with a close out of the employee's future workers' compensation claim. We have found that plaintiffs' attorneys are often interested in a small close out of their client's future compensation in return for more money on the liability case because of

the higher fee generated by such a result. To accomplish this settlement, the defendant must be willing to settle the employee's liability claim (Claim A) and you must be willing to compromise the employer's subrogation claim (Claim B). You will then be in a position to settle with the defendant on a reverse "Naig" basis while the employee settles on a "Naig" basis. The settlement documents should reflect the simultaneous close out of the employee's future compensation. A separate stipulation specifically concerning the close out must also be submitted to the Workers' Compensation Division for an Award on Stipulation. This stipulation should include a recital of the separate consideration for the close out of the employee's future interest (e.g., the employer compromised its subrogation claim in a certain amount in exchange for the stipulation).
The simultaneous settlement of the subrogation and Lambertson claims along with the settlement of the employee's workers' compensation claim (excluding medical) is usually referred to as a "global" settlement.

CAN THE EMPLOYEE SETTLE THE CASE WITHOUT YOUR PERMISSION?

Minnesota Courts have consistently held, as long as the defendant or his insurance carrier is on notice of your subrogation interest, the defendant and the employee cannot settle the third-party case in such a manner as to extinguish your subrogation rights. Thus, no matter what they agree to between themselves, your rights are not extinguished. However, if they attempt to do so, you should get legal counsel immediately.

For example, if a defendant enters into a settlement with the plaintiff for $50,000 without notice to you and you have put the defendant on notice of your subrogation interest, you may be entitled to obtain a share of the $50,000. You may also go after the defendant (and his carrier) for the rest of the interest not satisfied out of the $50,000. Despite the limits of $50,000, you may still be able to collect because the defendant's insurer has failed to properly protect its insured in settling for the $50,000 limit. In such circumstances, the defendant's carrier could be held liable in bad faith for failure to obtain a settlement of all the claims within its policy limits.

This does not mean you may unreasonably withhold consent to a reasonable settlement. Case law has never dealt with the issue of whether you can withhold this consent merely as a lever to force a greater share of the proceeds to be paid to you. Nonetheless, there is some leeway. There generally will be some question as to the reasonable value of most claims. The reasonableness of your position in a given instance must be resolved on a case-by-case basis.

WILL OUR RECOVERY BE REDUCED BY FEES PAID TO THE EMPLOYEE'S ATTORNEY?

This must be determined on a case-by-case basis. The statute provides that the "costs of collection" are to be deducted prior to dividing the proceeds between the employer and employee. This may be a

very important portion of the statute in a given case.

The statute provides that the "costs of collection" are deducted prior to dividing the proceeds between the employer and the employee. Employees' attorneys generally seek to have the court equate "costs of collection" with their own fees and expenses thus obtaining a fee for the collection of the employee's share of the recovery. However, there is authority in Minnesota, dating back to the early 1970's for the proposition that where the employer obtains its own attorney, it need not pay fees to the employee's attorney. Recent court decisions have held that if the employer settles his separate claim (Reverse Naig) before the start of trial, the employee's attorney is not entitled to a fee on the employer's share of the recovery.

This recent decision occurred in the context of an intervention. The court has still not decided whether the employee's attorney would be entitled to fees on the employer's share where the employee has commenced a separate action. The question then arises as to whether or not the costs and fees of the employer may also be included in the "costs of collection" where the employer has a separate action. The court left open the possibility that in the appropriate case where the employer's attorney is sufficiently involved and does pay costs to advance the case, the court may determine that the employer's fees and costs are to be included in the "costs of collection". However, in most cases, once trial starts, the employee's attorney will be awarded fees on the employer's recovery. It is important to note that the employer has absolutely no duty to advance any of the fees and costs in furthering the employee's third-party action. Nonetheless, in some cases it will be to the employer's benefit to work out a cost sharing arrangement with the employee.

We think it is often important for the employer to make a formal appearance very early in the litigation. The employer has the option of intervening in the existing action or commencing a separate action, either before or after the employee commences his action.

Recent decisions of the appellate courts make it clear that the employer may settle its case separately any time before trial commences without paying any fees to the employee's attorney. Such a settlement would be a "reverse Naig" settlement. In an appropriate case, efforts should be made to incorporate such a settlement with a "Naig settlement" of the employee's claim, thereby reducing the portion of limited defense funds that end up in the employee's attorney's hands.

RED FLAG CASES:

1. All automobile accidents.

2. Product liability cases involving machinery and chemicals.

3. Slip and fall cases off the employer's premises.

4. Third-party actions brought by the employee.

5. Cases where medical and indemnity benefits are unusually high.

6. Injuries to employees of subcontractors on construction projects.

EXAMPLE OF STATUTORY FORMULA APPLICATION

Minn. Stat. § 176.061 (Subd. 6)

Consider the following:

1. Total settlement or verdict equals $75,000.
2. Workers' compensation benefits paid to date equal $30,000.
3. Employee's fault - 20%.
4. Defendant's fault - 60%.
5. Employer's fault - 20%.

APPLICATION

Step 1

Verdict	$75,000.00
Less employee's 20% comparative fault	-15,000.00
Recovery after deducting comparative fault	60,000.00
Less one-third attorney's fees & costs (cost of collection)	20,000.00
Net award	$40,000.00

Step 2

Less statutory one-third to employee	-13,333.33
Balance remaining for subrogation	26,666.67

Step 3

Employer's Subrogation Recovery arrived at pursuant to M.S. § 176.061(6)c	-20,000.00
Work Comp paid - [(cost of collection divided by recovery) x Work Comp benefits paid]	
$30,000 - [$20,000 divided by $60,000) x $30,000 =	$20,000.00
Remainder, if any, is paid to the employee but constituted a Future Credit. Arrived at by deducting the subrogation recovery (h) from balance remaining for subrogation (g) $26,666.67 - $20,000 =	$ 6,666.67

*NOTE: The future credit will be reduced by the percentage of the cost of collection (d); leaving in this case a net value of $4,444.40.

LAMBERTSON CONTRIBUTION

Employer's liability (20% of $75,000.00) (assume employer is fully insured for Part One and Part Two with the same insurer)	$15,000.00

NET CASH ANALYSIS

Cash to Employer	$20,000.00
Lambertson's liability	(-) 15,000.00
Net cash to Employer	5,000.00
Total value of subrogation recovery = Net cash ($5,000.00 = future credit $4,440.00)	$ 9,440.00

From the foregoing, you can see that if the employer's liability is high, there is a possibility of paying more than is recovered in the subrogation action.

MINNESOTA STATUTE 176.061. -- THIRD-PARTY LIABILITY

Subd. 1. Election of Remedies. If an injury or death for which benefits are payable occurs under circumstances which create a legal liability for damages on the part of a party other than the employer and at the time of the injury or death that party was insured or self-insured in accordance with this chapter, the employee, in case of injury, or the employee's dependents, in case of death, may proceed either at law against that party to recover damages or against the employer for benefits, but not against both.

Subd. 2. Action for recovery of damages. If the employee, in case of injury, or the employee's dependents, in case of death, brings an action for the recovery of damages, the amount of the damages, the manner in which they are paid, and the persons to whom they are payable, are as provided in this chapter. In no case shall the party be liable to any person other than the employee or the employee's dependents for any damages resulting from the injury or death.

Subd. 3. Election to receive benefits from employer; subrogation. If the employee or the employee's dependents elect to receive benefits from the employer, or the special compensation fund, the employer or the special compensation fund has a right of indemnity or is subrogated to the right of the employee or the employee's dependents to recover damages against the other party. The employer, or the attorney general on behalf of the special compensation fund, may bring legal proceedings against the party and recover the aggregate amount of benefits payable to or on behalf of the employee or the employee's dependents, together with costs, disbursements, and reasonable attorneys' fees of the action.

If an action as provided in this chapter is prosecuted by the employee, the employer, or the attorney general on behalf of the special compensation fund, against the third person, and results in judgment against the third person, or settlement by the third person, the employer has no liability to reimburse or hold the third person harmless on the judgment or settlement in absence of a written agreement to do so executed prior to the injury.

Subd. 4. Application of subdivisions 1, 2, and 3. The provisions of subdivisions 1, 2, and 3 apply only if the employer liable for benefits and the other party legally liable for damages are insured or self-insured and engaged, in the due course of business in, (a) furtherance of a common enterprise, or (b) in the accomplishment of the same or related purposes in operations on the premises where the injury was received at the time of the injury.

Subd. 5. Cumulative remedies. If an injury or death for which benefits are payable is caused under circumstances which create a legal liability for damages on the part of a party other than the employer, that party being then insured or self-insured in accordance with this chapter, and the provisions of subdivisions 1, 2, 3, and 4 do not apply, or the party other than the employer is not then insured or self-insured as provided by this chapter, legal proceedings may be taken by the employee or the employee's dependents in accordance with clause (a), or by his employer, or by the attorney general. on behalf of the Special Compensation Fund, in accordance with clause (b), against the other party to recover damages, notwithstanding the payment of benefits by the employer or the Special Compensation Fund or their liability to pay benefits.

(a) If an action against the other party is brought by the insured employee or the employee's dependents and a judgment is obtained and paid or settlement is made with the other party, the employer or the Special Compensation Fund may deduct from the benefits payable the amount actually received by the employee or dependents or paid on their behalf in accordance with subdivision 6. If the action is not diligently prosecuted or if the court deems it advisable in order to protect the interests of the employer or the Special Compensation Fund, upon application the court may grant the employer or the Special Compensation Fund the right to intervene in the action for the prosecution of the action. If the injured employee or the employee's dependents or any party on their behalf receives benefits from the employer or the Special Compensation Fund or institutes proceedings to recover benefits or accepts from the employer or the Special Compensation Fund any payment on account of the benefits, the employer or the Special Compensation Fund is subrogated to the rights of the employee or the employee's dependents or has a right of indemnity against a third party. The employer or the attorney general on behalf of the

Special Compensation Fund may maintain a separate action or continue an action already instituted. This action may be maintained in the name of the employee or the names of the employee's dependents, or in the name of the employer, or in the name of the attorney general on behalf of the Special Compensation Fund, against the other party for the recovery of damages. If the action is not diligently prosecuted by the employer or the attorney general on behalf of the Special Compensation Fund, or if the court deems it advisable in order to protect the interest of the employee, the court, upon application, may grant to the employee or the employee's dependents the right to intervene in the action for the prosecution of the action. The proceeds of the action or settlement of the action shall be paid in accordance with subdivision 6.

(b) If an employer, being then insured, sustains damages due to a change in workers' compensation insurance premiums, whether by a failure to achieve a decrease or by a retroactive or prospective increase, as a result of the injury or death of an employee which was caused under circumstances which created a legal liability for damages on the part of a party other than the employer, the employer, notwithstanding other remedies provided,

may maintain an action against the other party for recovery of the premiums. This cause of action may be brought either by joining in an action described in clause (a) or by a separate action. Damages recovered under this clause are for the benefit of the employer and the provisions of subdivision 6 are not applicable to the damages.

(c) The third party is not liable to any person other than the employee or the employee's dependents, or the employer, or the Special Compensation Fund, for any damages resulting from the injury or death.

A co-employee working for the same employer is not liable for a personal injury incurred by another employee unless the injury resulted from the gross negligence of the co-employee or was intentionally inflicted by the co-employee.

Subd. 6. Costs, attorney fees, expenses. The proceeds of all actions for damages or of a settlement of an action under this section, except for damages received under subdivision 5, clause (b) received by the injured employee or the employee's dependents or by the employer or the Special Compensation Fund, as provided by subdivision 5, shall be divided as follows:

(a) After deducting the reasonable cost of collection, including but not limited to attorney's fees and burial expense in excess of the statutory liability, then

(b) One-third of the remainder shall in any event be paid to the injured employee or the employee's dependents, without being subject to any right of subrogation.

(c) Out of the balance remaining, the employer or the Special Compensation Fund shall be reimbursed in an amount equal to all benefits paid under this chapter to or on behalf of the employee or the employee's dependents by the employer or Special Compensation Fund, less the product of the costs deducted under clause (a) divided by the total proceeds received by the employee or his dependents from the other party multiplied by all benefits paid by the employer or the Special Compensation Fund to the employee or the employee's dependents.

(d) Any balance remaining shall be paid to the employee or the employee's dependents, and shall be a credit to the employer or the Special Compensation Fund for any benefits which the employer or the Special Compensation Fund is obligated to pay, but has not paid, and for any benefits that the employer or the Special Compensation Fund is obligated to make in the future.

There shall be no reimbursement or credit to the employer or the Special Compensation Fund for interest or penalties.

Subd. 7. Medical treatment. The liability of an employer or the Special Compensation Fund for medical treatment or payment of any other compensation under this chapter is not affected by the fact that the employee was injured through the fault or negligence of a third party, against whom the employee may have a cause of action which may be sued under this chapter, but the employer, or the attorney general on behalf of the Special Compensation Fund, has a separate additional cause of action against the third party to recover any amounts paid for medical treatment or for other compensation payable under this section resulting from the negligence of the third party. This separate cause of action of the employer or the attorney general on behalf of the Special Compensation Fund may be asserted in a separate action brought by the employer or the attorney general on behalf of the Special Compensation Fund against the third party, or in the action commenced by the employee or the employer or the attorney general on behalf of the Special Compensation Fund under this chapter, but in the latter case the cause of action shall be separately stated, the amount awarded in the action shall be separately set out in the verdict, and the amount recovered by suit or otherwise as reimbursement for medical expenses or other compensation shall be for the benefit of the employer or the Special Compensation Fund to the extent that the employer or the Special Compensation Fund has paid or will be required to pay compensation or pay for medical treatment of the injured employee and does not affect the amount of periodic compensation to be paid.

Subd. 8a. Notice to employer. In every case arising under subdivision 5, a settlement between the third party and the employee is not valid unless prior notice of the intention to settle is given to the employer within a reasonable time. If the employer or insurer pays compensation to the employee under the provisions of this chapter and becomes subrogated to the right of the employee or the employee's dependents or has a right of indemnity, any settlement between the employee or the employee's dependents and the third party is void as against the employer's right of subrogation or indemnity. When an action at law is instituted by an employee or the employee's dependents against a third party for recovery of damages, a copy of the complaint and notice of trial or note of issue in the action shall be served on the employer or insurer. Any judgment rendered in the action is subject to a lien of the employer for the amount to which it is entitled to be subrogated or indemnified under the provisions of subdivision 5.

Subd. 9. Service of notice on attorney general. In every case in which the state is liable to pay compensation or is subrogated to the rights of the employee or the employee's dependents or has a right of indemnity, all notices required to be given the state shall be served on the attorney general and the commissioner.

Subd. 10. Indemnity. Notwithstanding the provisions of chapter 65B or any other law to the contrary, an employer has a right of indemnity for any compensation paid or payable pursuant to this chapter, including temporary total compensation, temporary partial compensation, permanent partial disability, economic recovery compensation, impairment

compensation, medical compensation, rehabilitation, death, and permanent total compensation.

Subd. 11. Right of contribution.

To the extent the employer has fault, separate from the fault of the injured employee to whom workers' compensation benefits are payable, any nonemployer third party who is liable has a right of contribution against the employer in an amount proportional to the employer's percentage of fault but not to exceed the net amount the employer recovered pursuant to subdivision 6, paragraphs (c) and (d). The employer may avoid contribution exposure by affirmatively waiving, before selection of the jury, the right to recover workers' compensation benefits paid and payable, thus removing compensation benefits from the damages payable by any third party.

Procedurally, if the employer waives or settles the right to recover workers' compensation benefits paid and payable, the employee or the employee's dependents have the option to present all common law or wrongful death damages whether they are recoverable under the Workers' Compensation Act or not.

Following the verdict, the trial court will deduct any awarded damages that are duplicative of workers' compensation benefits paid or payable.