

# Strategic Partnering With the Employer in a Work Injury Case

O'MEARA LEER  WAGNER KOHL  
Relationships • Reliability • Results

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# Introduction

## Today's Presenter



**SHAMUS P. O'MEARA, MANAGING SHAREHOLDER  
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Shamus O'Meara is the Managing Shareholder with the Minneapolis law firm of O'Meara, Leer, Wagner & Kohl where he has represented clients in employer liability matters for over 25 years. He handles investigations and forensic examinations, evidence preservation, third party claim coordination and litigation involving work injuries. He has been recognized as a Minnesota Attorney of the Year and Minnesota Super Lawyer, and serves as an expert witness and consult on safety and emergency management topics.



# Strategic Reasons to Partner With the Employer

- We are your client's Employer. Our interests are aligned
- We have many records and access to information
- We probably conducted an initial investigation
- There is often a long employment history. Your client's friends are here
- There is a parallel WC claim
- Opportunity to coordinate to resolve everything
- We gave Notice and have a third party dialog
- You can save \$:
  - Experts.
  - Research.
  - Discovery (documents, common deponents)
- Partnering facilitates objective dialog and risk evaluation
- Educate/Inform about client perspectives, legal issues, etc.



# Workers' Compensation Subrogation – It's Not a Lien

- Most Effective Method to Recover \$
- Powerful Claim -- It's Not a Lien. Tremendous Value as an Independent Tool
- Separate, Independent Right Authorized by Statute and Case law
- Used to Maximize Recovery and Minimize Exposure:
  - Liability Resolution.
  - Mediation Position.
  - WC Claim Resolution – Global Settlement
- Evaluate from Third Party Fault Perspective
  - Employee vs. Third Party.
  - Employer's Fault not Aggregated
- Intervention Rights
- Separate Lawsuit



## Statutory Formula - Minn. Stat. § 176.061, subd. 6

- Recovery Rights Against Third Party that Caused Work Injury
- Applies if Employee and Employer's Claims Settled or Tried Together
  - No-Naig/No Reverse-Naig/No Henning Agreement
- Workers' Compensation Benefits "Paid and Payable"
- Employer's Separate Claim for Increased Premiums
- Subrogation Claim Exists:
  - Moment Employee Elects Workers' Compensation Benefits
- Requires Joint Approval to Settle under formula



# Employer Liability (*Lambertson*) Claims

- Third Party's Right of Contribution Against Employer
  - Employer's % Fault not to Exceed Total Benefits "Paid and Payable"
- Claim is Fault-Based, Not Fear-Based. Third-Party vs. Employer
- Typical Claims:
  - Negligent Training/Supervision;
  - Unsafe Workplace; OSHA Violations;
  - Product Modifications/Misuse (Industrial Injury)
- Evaluation Employer Conduct and Policies
- What Else is Out There?
  - Construction Contracts;
  - Maintenance Agreements;
  - Indemnification Arrangements"
- "Waive and Walk" Minn. Stat. § 176.061, Subd. 11
- Employer Waives Recovery for WC benefits "Paid and Payable" to Avoid *Lambertson* claim by Third Party
- Coordinated between Employer and WC Carrier



# Employer Liability and MN Comparative Fault Act

- No Employer Liability Claim when Third Party Fault is 50% or Less.
- Third Party Pays Only its fair share.
- Minn. Stat 604.02, Subd. 1
  - “When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award: (1) a person whose fault is greater than 50 percent . . .”).
- *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012) (Staab I); *Gaudreault v. Elite Line Services, LLC*, 22 F.Supp. 933 (D. Minn. May 21, 2014).
- Waive and Walk Includes Indemnification Exposure
  - *Breckner v. Weis Builders, Inc.*, WL 2587425 (2009)

