

OHIO WORKERS' COMPENSATION SUBROGATION STATUTE UNCONSTITUTIONAL

On May 26, 2004, the Ohio Supreme Court in *Modzelewski v. Yellow Freight System, Inc.* held the 1993 version of the Ohio Workers' Compensation subrogation statute unconstitutional. The Supreme Court in *Holeton v. Crouse Cartage Co.* ruled that the 1995 version of the Workers' Compensation subrogation statute was unconstitutional on equal protection grounds because it only applied to judgments and not settlements. The statute allowed the plaintiff who took a case to judgment to designate the judgment as compensation for items not covered by Workers' Compensation, such as pain and suffering, to avoid subrogation.

The 1993 version of the statute mandated subrogation from damage awards obtained through lawsuits. There was no like provision for subrogation for third-party damages recovered without filing a lawsuit. The Court held that there was no rational basis for distinguishing between settlements after filing a lawsuit and settlements before filing a lawsuit. In other words, an employee should not be penalized for settling a claim against a third-party tortfeasor before suit is filed.

This decision will only have temporary effect in cases where the plaintiff is injured within the scope and course of his employment. A new Workers' Compensation statute became effective April 9, 2003. For causes of action arising after that date, there is automatic subrogation in favor of the Bureau of Workers' Compensation, a self-insured employer or an employer that contracts for direct payment of medical services. The claimant has an affirmative duty to inform the subrogee of the third-party claim, and no settlement or judgment is final unless notice is given. If no notice is given, the claimant and the third-party tortfeasor are jointly and severally liable to the subrogee. Presumably, the new statute is constitutional, as it applies to both settlements before suit, settlements after suit and judgments.

- Frederick P. Vergon, Jr.
Smith Marshall, LLP
May 2004