BLWM Bauman Loewe Witt & Maxwell, PLLC Attorneys at Law

JUNE 2013

Welcome to BLWM's Subrogation Newsletter

BLWM is proud to announce that Patrick Howell has joined our firm as an Associate. Patrick is experienced with Workman's Compensation Subrogation, Large Loss Subrogation, Insurance Defense, and Product Liability. He is a member of the Arizona State Bar (2006), U.S. District Court of Arizona (2007), and the United States Court of Appeals for the Ninth Circuit (2010). Patrick graduated from St. Mary's University school of Law where he was a Law Journal Staff Member and on the Board of Advocates.

Please join our discussions about subrogation via our webpage, www.blwmlawfirm.com or, do not hesitate to contact the authors directly. We look forward to hearing from you.

Workers Compensation Subrogation in Arizona
By Patrick Howell
phowell@blwmlawfirm.com

As with other lines of insurance, workers compensation carriers can seek recovery of benefits paid in the event those benefits are necessitate by an injury caused by a third party. In Arizona, the law governing workers compensation carriers' rights to seek recovery of benefits is Arizona Revised Statute section 23-1023. The statue provides the workers' compensation carrier broad rights, and various options, in its pursuit of benefits paid.

Section 23-1023(D) provides the carrier with a lien for compensation, medical, surgical and hospital benefits paid. The lien attaches to the amount actually collectible, which is defined as the total recovery, less reasonable and necessary expenses, including attorneys' fees, actually expended in securing the recovery. As such, the lien is not subject to a collection fee. Additionally, the carrier shall contribute only the deficiency between the amount actually collected and the compensation, medical, surgical and hospital benefits provided or estimated for the case. Essentially, what this means is that the carrier is entitled to a "future credit" in the amount of the recovery paid to the injured worker over and above the lien amount. The future credit acts as a deductible that the injured worker must meet before workers' compensation benefits resume.

Often times, the injured worker or their attorney will request that the carrier compromise or reduce its lien. The statute, and case law, make it clear that the carrier is under no obligation to reduce or compromise its lien. However, the lien is reduced in the event there is a finding of fault placed upon a non-party employer. The finding of fault on the employer must be fixed by verdict.

In terms of the carrier's options for seeking recovery, those options are dependent, somewhat, on the actions of the injured worker.

Specifically, the claim for reimbursement lies first with the injured worker. If the injured worker does not file suit within one year, the claim is automatically assigned to the carrier. At which point, the carrier can either reassign the claim back to the injured worker, or can pursue recovery against the at-fault third party directly. If the carrier reassigns the claim back to the injured worker, its lien is unaffected and it is entitled to recover the amounts set forth in the statute.

The statute also provides the carrier with approval authority in certain situations. Specifically, in the event that the amount of the proposed settlement between the injured worker and the at-fault third party is less than the benefits paid, or to be paid, the injured worker must get written approval of the settlement from the carrier.

As one can see from the above, the statute dealing with workers' compensation liens in Arizona provides the carrier with numerous options for pursuing recovery, and protection of the lien. Timely identification of subrogation opportunities, coupled with a good understanding of section 23-1023 and its application, will allow workers' compensation carriers to maximize their recoveries in Arizona.

There are numerous scenarios that are not clearly addressed by the language in section 23-1023. A careful review, analysis, and understanding of applicable case law is also important when handling workers' compensation subrogation claims.

SCOTTSDALE
8765 E. Bell Road,
Suite 204
Scottsdale, AZ 85260
Tel 480.502.4664
Fax 480.502.4774

RENO
100 N. Arlington Avenue,
Suite 250
Reno, NV 89501
Tel 775.323.8700
Fax 775.323.8707

LAS VEGAS
7575 Vegas Drive,
Suite 110
Las Vegas, NV 89128
Tel 702.462.6300
Fax 702.462.6303

BLWMlawfirm.com

Fire Investigator Selection: Art or Science?

By Christopher Brennan
cbrennan@blwmlawfirm.com

NPFA 921, *Guide for Fire and Explosion Investigations*, was developed by the Technical Committee on Fire Investigations to assist in improving the fire investigation process and the quality of information on fires resulting from the investigative process[1]. NFPA 921 is often referred to as a "guide" by fire investigators retained as expert witnesses who do not follow its methodology. But testifying experts who do not employ the Scientific Method set forth in NFPA 921 do so at their own risk, and potential at the expense of their client's case.

Selecting a fire investigator is arguably one of the most important decisions in a fire case. It is true that a fire investigator's training, education, experience and certifications lay the foundation for the expert's trial testimony. However, an experienced CFI[2] or CFEI[3] can still be excluded from offering opinions at trial if he or she cannot get by the "gate keeper." The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*[4] made it clear that the trial judge serves as the gate keeper in determining whether the proffered scientific testimony or evidence satisfies the standard of evidentiary reliability[5]. In doing so, the judge must ascertain whether the scientific testimony or evidence is "ground[ed] in the methods and procedures of science."[6] Although general acceptance of the methodology within the scientific community is no longer dispositive, it remains a factor to be considered by the judge.[7,8]

NFPA 921 is the only peer reviewed methodology for fire and explosion investigations[9]. Thus, adhering to NFPA 921's Scientific Method in determining the origin and the cause of a fire is the best way to avoid or defeat a *Daubert* challenge. It is all of our roles to carefully select fire investigators that are suited for the particular fire at issue and then ensure that they do a thorough, methodical investigation in accordance with NFPA 921 to prevent the potential preclusion of scientific testimony or evidence at trial. Spending this time at the beginning of the case will hopefully prevent your case from falling apart right before or during trial.

[1] Origin and Development of NFPA 921, 921-1 (2011 Ed.)
[2] Certified Fire Investigation through the International Association of Arson Investigators
[3] Certified Fire and Explosion Investigator through National Association of Fire Investigators
[4] 509 U.S. 579 (1993).
[5] *Id.* at 590.
[6] *Id.*
[7] *Id.* at 594 (Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." [Internal cites omitted]. Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," [cite omitted] may properly be viewed with skepticism.)
[8] *Frye v. United States,* 293 F. 1013, 1014 (D.C. Cir. 1923), jurisdictions similarly require that the expert's opinion be based on a scientific technique that is "generally accepted" as reliable in the relevant scientific community.
[9] See e.g., *Royal Ins. Co. of Am. v. Joseph Daniel Constr.*, Inc., 208 F. Supp. 2d 423, 426 (S.D.N.Y. 2002) (holding that expert's testimony was based on his investigation of the cause of the fire, an investigation which was conducted in accordance with the professional standards and scientific methodology used by experts in fire and explosion investigations, and set forth in the National Fire Protection Association, Inc.'s "Guide for Fire and Explosion Investigations" ("NFPA 921")); *Travelers Prop. & Cas. Corp. v. GE*, 150 F. Supp. 2d 360, 366 (D. Conn. 2001) (finding NFPA 921 a peer reviewed and generally accepted standard in the fire investigation community.); *Price v. Home Depot U.S.A., Inc.,* 2008 U.S. Dist. LEXIS 61628, 7 (W.D. Tenn. Mar. 6, 2008) (utilizing NFPA 921 to determine the origin and cause of a fire is a sufficiently reliable method.); *Ledbetter v. Blair Corp.*, 2012 U.S. Dist. LEXIS 88789, 36 (M.D. Ala. June 27, 2012) (NFPA 921 is an accepted methodology for the investigation and analysis of fires and explosives.); *Tunnell v. Ford Motor Co.*, 330 F. Supp. 2d 707, 725 (W.D. Va. 2004) (observing that many courts have recognized NFPA 921 as "'a peer reviewed and generally accepted standard in the fire investigation community'"); *United States v. Aman,* 748 F. Supp. 2d 531, 536 (E.D. Va. 2010) (NFPA 921 is sufficiently reliable to pass muster under *Daubert*; noting that courts examining the reliability of NFPA 921 have recognized that the methodology is a "peer reviewed and generally accepted standard in the fire investigation community.")