IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

SEDGWICK CLAIMS MANAGEMENT SERVICES, a/s/o MICHELLE VEET, Plaintiff	:	
v.	:	No. 12-0227
CAPRIOTTI'S, INC., CAPRIOTTI'S, INC., d/b/a CAPRIOTTI'S, CAPRIOTTI'S, INC., d/b/a CAPRIOTTI'S CATERING, THOMAS E. TRELLA, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, AND ERICA'S, L.L.C., Defendants	:	

Civil Law - Workers' Compensation Benefits - Subrogation - Third Party Recovery by Workers' Compensation Carrier - Need to Join Employee

1. Subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.

2. Section 319 of the Workers' Compensation Act subrogates the employer to whatever sum he pays the employee or his dependents on account of any injury for which a third party is responsible. As construed by case law, this section also permits the insurer of the employer to sue to enforce these subrogation rights.

3. The right of subrogation provided under Section 319 of the Workers' Compensation Act is derivative from the employee's cause of action and may not be split. This underlying cause of action is for one indivisible wrong, possessed by the employee alone, through whom the insurer must work out its rights upon payment of the insurance, the insurer being subrogated to the rights of the employee upon payment being made.

4. For an employer or its insurer to enforce its subrogation rights, it must proceed in an action brought on behalf of the injured employee in order to determine the liability of the third party to the employee. Once such liability is

determined, then the employer or its insurer may recover, out of this award, the amount it has paid in workers' compensation benefits.

5. Section 319 of the Workers' Compensation Act does not subrogate a workers' compensation carrier to the injured employee's cause of action, but only to any fund of money created by the employee asserting its cause of action and receiving either a verdict or settlement therefore.

6. Section 319 of the Workers' Compensation Act, as construed by the appellate courts of this Commonwealth, does not provide the employer, or its insurer, with a cause of action against a third party in its own right.

7. An action commenced by a workers' compensation carrier as subrogee of an injured employee is not an action by the employee or on his behalf. As such, the third-party defendants' preliminary objections in the nature of a demurrer to the plaintiff workers' compensation carrier's suit brought in its capacity as subrogee, and which seeks only recovery of workers' compensation benefits it paid to an injured employee, will be dismissed.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

SEDGWICK CLAIMS MANAGEMENT SERVICES, a/s/o MICHELLE VEET, Plaintiff	:	
v.	:	No. 12-0227
CAPRIOTTI'S, INC., CAPRIOTTI'S, INC., d/b/a CAPRIOTTI'S, CAPRIOTTI'S, INC., d/b/a CAPRIOTTI'S CATERING, THOMAS E. TRELLA, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, AND ERICA'S, L.L.C., Defendants	:	

Jennifer L. Ruth, Esquire — Counsel for Plaintiff
Shawna R. Laughlin, Esquire — Counsel for Defendants

MEMORANDUM OPINION

Nanovic, P.J. – January 18, 2013

Herein, Sedgwick Claims Management Services ("Sedgwick"), a workers' compensation carrier, has commenced suit, as the subrogee of an injured employee, seeking reimbursement from a third party for what it has paid in workers' compensation benefits. The controlling question of law addressed below is whether the right of subrogation granted to an employer by Section 319 of the Workers' Compensation Act, 77 P.S. § 671, allows an employer, or, as here, its insurance carrier, to sue a third-party tortfeasor responsible for injuries to an employee directly and independently of any claim made on behalf of the injured employee to recover wage and medical benefits it paid to the employee. Because we conclude that a workers' compensation carrier has no standing to commence a third-party action for these purposes in the absence of any claims made on behalf of the injured employee, Defendants' demurrer to the complaint will be sustained and the action dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

On February 5, 2010, Michelle Veet ("Veet"), an employee of Sedgwick's insured, was injured in the course and scope of her employment while attending a work-related function at Capriotti's Restaurant in Tresckow, Carbon County, Pennsylvania.

Veet injured her back when she slipped and fell on ice which had accumulated in the restaurant parking lot. Defendants, Capriotti's, Inc., Capriotti's, Inc., d/b/a Capriotti's, Capriotti's, Inc., d/b/a Capriotti's Catering, Thomas E. Trella, in his official and individual capacity, and Erica's, L.L.C. (hereinafter collectively referred to as "Capriotti's"), are claimed to be responsible for the maintenance and safety of the parking lot. As the workers' compensation carrier for Veet's employer, Sedgwick paid indemnity and medical benefits to Veet and on her behalf in an amount in excess of $102,562.76.

Veet did not commence a private cause of action against Capriotti's. Instead, on February 3, 2012, Sedgwick, as the subrogee of Veet, commenced the instant proceedings by filing a praecipe for a writ of summons. Sedgwick's complaint was filed on June 1, 2012. Capriotti's preliminary objections in the nature of a demurrer were filed on June 11, 2012. Therein, Capriotti's contended that Pennsylvania law does not permit a workers' compensation carrier to subrogate against an alleged tortfeasor by filing a third-party action in its own right.

DISCUSSION

The question before us is one of law and procedure. To understand the answer to this question, we begin with Section

319 of the Workers' Compensation Act which provides, in pertinent part, as follows:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employe, his personal representative, his estate or his dependents. The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employe, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation.

77 P.S. § 671. This section "subrogates the employer to whatever sum he pays the employee or his dependents on account of any injury for which a third party is responsible." Scalise v. F.M. Venzie & Co., 152 A. 90, 92 (Pa. 1930). An insurer of the employer, like Sedgwick, may also sue to enforce these subrogation rights. Reliance Insurance Co. v. Richmond Machine Co., 455 A.2d 686, 688 n.4 (Pa.Super. 1983).

"Subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other." Olin Corporation v. W.C.A.B. (Lawrence), 324 A.2d

813, 816 (Pa.Cmwlth. 1974). It is "a doctrine governed by equity-the basis of the doctrine is the doing of complete, essential and perfect justice between all parties without regard to form." Travelers Insurance Co. v. Hartford Accident and Indemnity Co., 294 A.2d 913, 916 (Pa.Super. 1972) (citation and quotation marks omitted). Under the provisions of Section 319 of the Workers' Compensation Act, subrogation is enforceable by the employer only after compensation is paid or is payable. Olin Corporation, 324 A.2d at 816.

The employer's right of subrogation is derivative from the employee's cause of action and may not be split.

> The right of action is for one indivisible wrong, and this abides in the insured, through whom the insurer must work out his rights upon payment of the insurance, the insurer being subrogated to the rights of the insured upon payment being made. This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. . . . In support of this rule, it is commonly said that the wrongful act is single and indivisible and can give rise to but one liability.

Moltz v. Sherwood Bros., 176 A. 842, 843 (Pa.Super. 1935) (citations and quotation marks omitted).

"[A]n injured party must consolidate into a single action against a wrongdoer all damages arising out of a tort. As a subrogee derives his right to recovery from the injured party, the prohibition against splitting of actions is no less binding where the interest of a subrogee is involved." Travelers

Insurance Co., 294 A.2d at 915 (citations omitted). Section 319 of the Workers' Compensation Act, as construed by the appellate courts of this Commonwealth, does not provide the employer, or its insurer, with a cause of action against a third party in its own right. Reliance Insurance Co., 455 A.2d at 690.

On this question, the Pennsylvania Supreme Court in Scalise stated:

> The right of action remains in the injured employee; suit is to be brought in his name; the employer may appear as an additional party plaintiff, as in Gentile v. Phila. & Reading Ry., 274 Pa. 335, 118 A. 223; or, as use plaintiff, as in Mayhugh v. Somerset Telephone Co., [265 Pa. 496, 109 A.2d 213], may intervene for the purpose of protection or he may do as suggested in Smith v. Yellow Cab Co., [288 Pa. 85, 135 A. 858], notify the tortfeasor of the fact of employment and of the payments made or to be made. The employer, moreover, is not to be denied his right of suit because the employee does not sue, but may institute the action in the latter's name.

Scalise, 152 A. at 92.

"[F]or an employer or its insurer to enforce its subrogation rights, it must proceed in an action brought on behalf of the injured employee in order to determine the liability of the third party to the employee. If such liability is determined, then the employer or its insurer may recover, out of an award to the injured employee, the amount it has paid in worker's compensation benefits." Reliance Insurance Co., 455 A.2d at 690; *see also* Sentry Insurance, a/s/o Donald J. Rettman

v. Van DeKamp's, No. 15346-2007 (CCP Erie 2007) (dismissing workers' compensation insurer's suit, as subrogee of an injured employee, against allegedly negligent third party on basis that suit was not brought on behalf of the insured employee), *affirmed*, 4 A.3d 669 (Pa.Super. 2010). Recovery is thus contingent upon the injured employee recovering compensation from the third party, either in suit or by settlement. Olin Corporation, 324 A.2d at 817; *see also* Liberty Mutual Insurance Co., a/s/o George Lawrence v. Domtar Paper Co., No. 2011-485 (CCP Elk 2012) ("Section 319 of the Worker's Compensation Act does not subrogate [a workers' compensation carrier] to the injured employee's cause of action, but only to any fund of money created by the employee asserting its cause of action and receiving either a verdict or settlement therefore . . . .").

Here, Sedgwick has filed suit against Capriotti's in its own right as subrogee of Veet and claims only those benefits it has conferred upon her. There has been no recovery against a third party, nor has there been a compromise settlement. As presented by Sedgwick, this claim is untenable. Further, it impermissibly seeks to split the employee's cause of action, if any, for injuries sustained.

CONCLUSION

Because Sedgwick's complaint seeks only to enforce derivative rights, whose collection is dependent on the successful recovery of compensation by Veet, or on her behalf, from the responsible party, it fails to state a cause of action. Moreover, as the statute of limitations on Veet's claim is two years, 42 Pa.C.S.A. § 5524(2), it appears unlikely that the complaint can be amended to include Veet as a new party at this stage of the proceedings. Previsch v. Northwest Medical Center-Oil City Campus, 692 A.2d 192, 200-01 (Pa.Super. 1997) ("[A]n amendment the effect of which is to bring in new parties after the running of the statutes of limitations will not be permitted.") (citation omitted); *see also* Reliance Insurance Co., 455 A.2d at 690 (holding that where the cause of action derives from the injured employee's negligence claim, the applicable statute of limitations is that which applies to the employee's cause of action against the third party tortfeasor).

BY THE COURT:

_____
P.J.