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HOUSE BILL NO. 864

Offered January 14, 2004

Prefiled January 14, 2004

A BILL to amend and reenact §§ 65.2-309 through 65.2-311 of the Code of Virginia, relating to perfection of employer's subrogation rights.

Patron—Byron

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 65.2-309 through 65.2-311 of the Code of Virginia are amended and reenacted as follows:

§ 65.2-309. Lien against settlement proceeds or verdict in third party suit; subrogation of employer to employee's rights against third parties; evidence; recovery; compromise.

A. A claim against an employer under this title for injury, *occupational disease,* or death benefits shall ~~operate as an assignment to~~ *create a lien on behalf of* the employer ~~of~~ *against any verdict or settlement arising from* any right to recover damages which the injured employee, his personal representative or other person may have against any other party for such injury, *occupational disease,* or death, and such employer *also* shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages.

B. Any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer or for which he is liable shall be held by the employer for the benefit of the injured employee, his personal representative, or other person entitled thereto, less a proportionate share of such amounts as are paid by the employer for reasonable expenses and attorney's fees as provided in § 65.2-311.

C. No compromise settlement shall be made by the employer in the exercise of such right of subrogation without the approval of the Commission and the injured employee or the personal representative or dependents of the deceased employee being first obtained.

D. If an injured employee, his personal representative, or a person acting on behalf of the injured employee receives the proceeds of the settlement or verdict and the employer's lien pursuant to subsection A has not been satisfied, the employer shall have the right to recover its lien either as a credit against future benefits or though a civil action against the person who received the proceeds.

§ 65.2-309.1. Creation of lien and subrogation of employer to employee's rights to recover uninsured or underinsured motorist benefits pursuant to insurance coverage carried by and at the expense of employer.

A. A claim against an employer under this title for injury or death benefits shall create a *lien and* right of subrogation on behalf of the employer, *as set forth in § 65.2-309,* against proceeds recovered by the injured employee pursuant to the uninsured or underinsured motorist provisions of a policy of motor vehicle insurance carried by and at the expense of the employer. In any action by an employee against any person other than the employer, the court shall, ~~on petition or motion of the employer at any time prior to verdict~~ *after reasonable notice to the parties and the employer,* ascertain the amount of compensation paid and expenses for medical, surgical and hospital attention and supplies, and funeral expenses incurred by the employer under the provisions of this title and deduct therefrom a proportionate share of such amounts as are paid by the plaintiff for reasonable expenses and attorney's fees as provided in § 65.2-311; and, in the event of judgment against such person other than the employer, the court shall, in its order, require that the judgment debtor pay such compensation and expenses of the employer, less said share of expenses and attorney's fees, so ascertained by the court out of the amount of the judgment, so far as sufficient, and the balance, if any, to the judgment creditor.

B. If an injured employee is entitled to underinsured motorist coverage under more than one policy, the order of priority shall be as provided by subsection B of § 38.2-2206.

§ 65.2-310. Protection of employer when employee sues third party.

In any action by an employee, his personal representative or other person against any person other than the employer, the court shall, ~~on petition or motion of the employer at any time prior to verdict~~ *after reasonable notice to the parties and the employer,* ascertain the amount of compensation paid and expenses for medical, surgical and hospital attention and supplies, and funeral expenses incurred by the

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employer under the provisions of this title and deduct therefrom a proportionate share of such amounts as are paid by the plaintiff for reasonable expenses and attorney's fees as provided in § 65.2-311; and, in event of judgment against such person other than the employer, the court shall in its order require that the judgment debtor pay such compensation and expenses of the employer, less said share of expenses and attorney's fees, so ascertained by the court out of the amount of the judgment, so far as sufficient, and the balance, if any, to the judgment creditor.

§ 65.2-311. Expenses and attorney's fees in action under § 65.2-309 or § 65.2-310.

~~In~~ *A. Except as provided in subsection B,* any action, or claim for damages, by an employee, his personal representative or other person against any person other than the employer, and in any such action brought, or claim asserted, by the employer under his right of subrogation provided for in § 65.2-309, if a recovery is effected, either by judgment or voluntary settlement, the reasonable expenses and reasonable attorney's fees of such claimants shall be apportioned pro rata between the employer and the employee, his personal representative or other person, as their respective interests may appear.

B. In any action instituted by an employer to recover its lien pursuant to subsection D of § 65.2-309, the employer shall not be required to pay any share of the reasonable expenses or attorney fees of the employee, his personal representative or other person.