MEMORANDUM OF LAW

DATE: August 26, 1998

TO: Cindy Noblit, Claims Representative, Risk Management, via Ed Oliva, Director, Risk Management

FROM: Carrie L. Gleeson, Deputy City Attorney

SUBJECT: Right To Recover Against Third Parties On Long-Term Disability Claims

QUESTION PRESENTED

Where a City employee has suffered an off-the-job accident resulting in receipt of Long-Term Disability [LTD] benefits, and an insured third party was at fault for the accident, does Risk Management have the right to recover lost wages from the third party tortfeasor (or his/her insurer) even if the City employee does not intend to pursue a claim against the third party?

SHORT ANSWER

Yes, the City, as the provider of the LTD benefits, has the right to sue and recover lost wages from the third-party tortfeasor.

DISCUSSION

I. Background

In 1990, this office opined that the City may recover LTD payments from a City employee if the City employee receives compensation for lost wages as part of the employee's lawsuit against a third party. 1990 City Att'y MOL 269 (copy attached). In that case, the employee's disability arose from a car accident, and the employee sued the other party to the accident. The City employee refused to sign an agreement to reimburse the City for LTD benefits she had received out of any damages received by the employee for lost wages from her civil suit, arguing that the LTD Plan did not include a subrogation clause. Because the principle of subrogation is equitable, however, it does not depend upon the contractual language included in the Plan. We concluded that the City had the right to subrogate in that case because the City

employee stood to recover twice for the same injury: first from the City through LTD benefits; and again in damages for lost wages from her lawsuit. *Id*. at 270-71.

Since that Memorandum was written, the LTD Plan was amended to specifically provide for subrogation by the City. Section 5.02 of the LTD Plan now provides:

> The City of San Diego has the right to recover and subrogate from and against Third Parties or persons, as well as their agents or insurers, any payments made by the plan.

City employees are still asked to sign an "Agreement To Reimburse" whereby the employee agrees that the City may recover, from the employee, any monies received by the employee "from the third party or insurance carrier(s) whether by action of law, settlement, or otherwise." As stated in the Memorandum, the City has the right to subrogation and recovery, even without the subrogation language and the "Agreement to Reimburse," but the new language and express agreement leave no doubts as to the extent of the City's rights. 1990 City Att'y MOL at 271.

In the current situation that prompted your question, a City employee suffered injuries from an off-the-job car accident. The City paid the employee LTD benefits during her recuperation to compensate her for wages lost during that time. The employee expects to receive a settlement payment from the third party's insurer and has signed an "Agreement to Reimburse" any of those amounts. Under these facts, the City is clearly entitled to recover from the employee any amounts she may receive from the third party's insurance company as damages for lost wages, to the extent they duplicate the benefits already paid by the City to the employee.

The insurer could pay these funds directly to the City. However, the City's *right* to a direct payment is clouded by the language in the "Agreement to Reimburse." The Agreement refers only to monies *received* by the employee. Under the Agreement, the employee agrees to repay such funds to the City. To make it clear to all that the City has a right to receive this money whether or not it is first paid to the employee, we recommend that the Agreement be amended to state that the employee agrees that such funds will be paid directly to the City, at the City's request.

However, for the sake of your question, you have asked us to assume that the third party is insured and liable to the City employee for damages, but that the City employee has no intent of pursuing the third party for insurance coverage. The question, then, is not whether the City can recover from its employee, but whether the City can pursue the employee's claim against the third party for the sake of recovering the lost wages.

II. The City's Right to Recover From a Third-Party Tortfeasor

The doctrine of subrogation is much broader than simply the right to recover funds received by the employee from an outside source as contemplated in the "Agreement to Reimburse." "It is the universal rule that an insurer who has indemnified his insured for a property loss is subrogated to the insured's right against any person wrongfully causing the loss."

Royal Indem. Co. v. Security Truck Lines, 212 Cal. App. 2d 61, 65 (1963). This means that the insurer that paid the loss (in this case, the City) "steps into the shoes" of the insured (the City employee) and may sue the party at fault for the loss. *State Farm Fire & Casualty Co. v. East Bay Mun. Utility Dist.*, 53 Cal. App. 4th 769, 774 (1997); *see, e.g., Royal Indem. Co.*, 212 Cal. App. 2d 61; *Fireman's Fund Ins. Co. v. Wilshire Film Ventures, Inc.*, 52 Cal. App. 4th 553 (1997). In *Fireman's Fund*, the court described the insurer's burden in such a case:

> When an insurer seeks equitable subrogation after it has paid a claim for an insured, the insurer must establish that (1) the insured suffered a loss for which the defendant is liable, *either* (a) because the defendant is a wrongdoer whose act or omission caused the loss *or* (b) because the defendant is legally responsible to the insured for the loss caused by the wrongdoer; (2) the insurer has compensated the insured for the loss for which the defendant is liable; (3) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted had it not been compensated by the insurer; (4) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (5) justice requires that the loss should be shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and (6) the insurer's damages are in a stated sum, usually the amount paid to its insured.

Fireman's Fund, 52 Cal. App. 4th at 555-56 (citations omitted); *see also State Farm*, 53 Cal. App. 4th at 774. Notably, the third criterion requires that the claim be "assignable"; there is no requirement that the insured have actually assigned the claim to the insurer.

The facts in this case support this burden: (1) The employee lost wages because of a car accident caused by the third party; (2) the City has paid the employee LTD benefits during the employee's recuperation from the accident; (3) the employee has a cause of action against the third party and that cause of action is assignable (Cal. Civ. Code   954); (4) the payments made by the City are because of the accident caused by the third party; (5) because the third party caused the accident, the third party is at fault and should be the one to pay for the lost wages; and (6) the City's damages are the amount paid to the employee. Thus, regardless of what actions the employee takes, and even without an actual assignment of the cause of action, the City is entitled to subrogate and seek recovery on the cause of action from the tortfeasor.

CONCLUSION

The City provides LTD benefits to replace wages lost by employees during times of non-work related disability. Where the employee's disability is caused by the acts or negligence of a third party, the City has the right to seek recovery of the lost wages paid to the employee. If the employee recovers lost wages from the third party, the City may recoup them from the employee. But even when the employee does not intend to pursue his or her claims, the City can sue and/or negotiate with the third party directly to recover the benefits paid to the employee.

CASEY GWINN, City Attorney

By
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Attachment
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