In the
Supreme Court of Ohio

STATE OF OHIO, BUREAU OF WORKERS' COMPENSATION,	:	Case No. 2017-0102
Plaintiff-Appellant,	:	On Appeal from the Summit County Court of Appeals, Ninth Appellate District
v.	:	
LORETTA M. VERLINGER, *et al*.,	:	Court of Appeals Case No. 27763
Defendants-Appellees.	:	

MERIT BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO, BUREAU OF WORKERS COMPENSATION

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INTRODUCTION

Like "virtually every jurisdiction," *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 120 (2001), Ohio's Recovery Statute, R.C. 4123.931, directs the Bureau of Workers Compensation ("Bureau") to recover its workers' compensation payments from third-party tortfeasors. This allows the Bureau to help a claimant quickly by providing full workers' compensation payments, while also ensuring that those costs are eventually borne by the ultimate wrongdoer, and, in some instances, making sure a claimant does not recover twice for the same losses. This system requires claimants' cooperation. The Recovery Statute directs claimants to notify the Bureau of potential third-party tortfeasors. R.C. 4123.931(G). And if claimants wish to finalize any settlement with those third parties, they must give the Bureau "prior notice and a reasonable opportunity to assert its subrogation rights." *Id.* If claimants fail to do so, the Recovery Statute makes them jointly and severally liable to pay the Bureau's subrogation interest. *Id.*

Loretta Verlinger was injured by a third-party tortfeasor in an automobile accident. She immediately filed a workers' compensation claim, but the claim was initially denied because she presented insufficient evidence that she was on the job at the time. She appealed, and was actively advocating her (ultimately successful) claim when she finalized her third-party settlements. Nonetheless, she never notified the Bureau about the identity of the third parties. And she finalized her settlement without ever notifying the Bureau or giving it an opportunity to assert its subrogation rights. Although the Recovery Statute imposes these duties on "claimants" and Verlinger had already filed a claim, she says the Recovery Statute definition of "claimant" did not include her when she finalized her third-party settlement and so excuses her decision to keep the Bureau in the dark.

Not so. The text, context, and structure of the Recovery Statute show that Verlinger was a "claimant" throughout the administrative process until she ultimately prevailed, including when she finalized her third-party settlement. *First*, the Recovery Statute gives "claimant" a slightly broader meaning than ordinary usage. It includes not just those who have filed claims (like Verlinger), but also those likely to file successful claims in the near future. A "claimant" is "a person who is eligible to receive" payments under the workers' compensation statute. R.C. 4123.93(A). The word "eligible" points to the factual characteristics that make future selection to receive benefits possible. Employees become "eligible" to receive payments when they are injured. An adverse decision, based on inadequate evidence, does not change that. The facts remain the same: One *is* or *is not* eligible regardless of whether one has already been adjudicated to be entitled to benefits. And filing an appeal ensures that future selection for benefits remains a possibility, as this case shows. Verlinger continued to assert her eligibility on appeal, and the Industrial Commission ultimately held that she was entitled to benefits.

Second, several contextual canons of interpretation confirm the plain text. The workers' compensation statute uses "entitlement" to refer to a *legally adjudicated* right to payment. Different words should be given different meanings, and since eligibility logically precedes entitlement, Verlinger was *eligible* to receive benefits before she was legally *entitled* to payments. The Court can also look to other uses of "eligible" and "claimant" in the workers' compensation statute. Other uses of "eligible" use the term to refer to a general future possibility of benefits, not specific present entitlement to benefits. And other sections give "claimant" its ordinary meaning, *i.e.*, one who has filed a claim. Indeed, Verlinger exercised the right of a "claimant" when she appealed to the Industrial Commission.

Third, the Recovery Statute's structure shows why this outcome is correct. The Recovery Statute prevents double recovery; the Sixth and Ninth Districts concede that their narrow reading

of "claimant" enables double recovery. Similarly, claimants receive a quick recovery without a determination of fault in part because the Recovery Statute directs the Bureau to recover from the ultimate wrongdoer, and directs claimants to cooperate with that recovery. A claimant asserting eligibility for benefits must comply with the corresponding duties. And finally, the Recovery Statute provides a careful mechanism to ensure the Bureau's recovery of its subrogation interest, including estimated *future* benefit payments, from a third-party settlement. It has no offset provision to reduce payments in light of a previous settlement. The lower court's reading improperly excludes future payments from the Bureau's subrogation interest.

The lower court's remaining arguments are unpersuasive. This Court should reverse.

STATEMENT OF THE CASE AND FACTS

A. When a workers' compensation claimant has a right to recover from a third-party tortfeasor, the statute directs the Bureau to recover funds it has paid out for the same injury.

To provide quick and certain compensation for those injured in the course of their employment, Ohio's 1912 Constitution declared that a new regime, not the common law of torts, would govern such claims. From the beginning, then, workers' compensation was a "unique social bargain" governed by different rights and duties for the parties involved. *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St. 3d 156, 2011-Ohio-4432 ¶ 26.

This case is about the parties' rights and duties regarding third-party tortfeasors. Ohio's workers' compensation statute has a "pay first, recover later" structure rather than an offset mechanism. Employees receive nearly "automatic recovery" for certain injury-related costs even when a third party is at fault. *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 120 (2001). In exchange, the Bureau (or other statutory subrogee) receives an "automatic" "right to subrogation" to recover those costs from the third-party tortfeasor. *See* R.C. 4123.931(H). Thus, when a third party is partially or completely at fault for the injury, the Bureau recovers some or

all of its payments from the third-party tortfeasor. R.C. 4123.931(A). This places the cost on the ultimate wrongdoer and guards against double recovery, or, in instances of under-compensation, ensures "a pro rata division of the net amount recovered" from the third party. *Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶ 78; *see also* R.C. 4123.931(B)-(D).

On the "pay first" side, Ohio law pushes for quick entitlement orders to put money in the hands of an injured claimant quickly. Claims are often filed within days, and generally must be filed within a couple years. R.C. 4123.84-.85 (2011). Within seven days of receiving a claim, the Bureau "notif[ies] the claimant and employer . . . of the claim and of the facts alleged," the case number, and the right to representation. R.C. 4123.511(A). Usually within 28 days of the notice, the Bureau then issues an entitlement order stating whether "a claimant is or is not entitled to an award of compensation or benefits." R.C. 4123.511(B)(1). An employee is generally "entitled to receive" payments if the employee "is injured" in the course of employment. R.C. 4123.54(A) (2011). In the event of an adverse decision, a "claimant may appeal the order . . . within fourteen days," and appellate decisions also follow an expedited schedule. R.C. 4123.511(B)(1), (C)-(E). An entitlement decision does not look at fault or, generally, other sources of recovery—it leaves those questions for the parties to sort out later. *State ex rel. Gross v. Indus. Comm'n*, 115 Ohio St. 3d 249, 2007-Ohio-4916 ¶ 22 (citing R.C. 4123.01(C)).

On the "recover later" side, Ohio law requires three built-in protections of the Bureau's right to recover from third-party tortfeasors. The claimant has a Notification Duty: A claimant must notify the statutory subrogee (usually the Bureau) "of the identity of all third parties against whom the claimant has or may have a right of recovery." R.C. 4123.931(G). The Bureau has a Participation Right: A claimant cannot finalize a settlement or judgment against a third party without giving the Bureau "prior notice and a reasonable opportunity to assert it subrogation

rights." *Id*. And the Bureau's right of subrogation is automatic: A claimant cannot stymie the Bureau's right to recover by sitting on his hands or failing to join the Bureau in a related action. R.C. 4123.931(H). The Bureau's subrogation interest expressly includes estimated future payments to the claimant. *See* R.C. 4123.93(D), 4123.931(E).

For purposes of these protective rights, the statute defines the interested parties as follows:

> (A) "Claimant" means a person who is eligible to receive compensation, medical benefits, or death benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.
>
> (B) "Statutory subrogee" means the administrator of workers[']compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services pursuant to division (P) of section 4121.44 of the Revised Code.
>
> (C) "Third party" means an individual, private insurer, public or private entity, or public or private program that is or may be liable to make payments to a person without regard to any statutory duty contained in this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

R.C. 4123.93(A)-(C). A claimant's failure to comply with the Notification Duty and Participation Right makes the claimant and the third party jointly and severally liable to pay the Bureau the full amount of the subrogation interest. R.C. 4123.931(G).

B. Verlinger received both workers' compensation benefits and third-party tort settlements for the same injury, but did not notify the Bureau about the identity of the third parties or give the Bureau notice and opportunity to participate in the settlements.

Loretta Verlinger was badly hurt in a motorcycle accident on August 1, 2011. *Bureau of Workers' Comp. v. Verlinger*, 2016-Ohio-8029 ¶ 2 ("App. Op.). She worked for her spouse's company. The accident occurred around 7:00 p.m. when the two of them rode a motorcycle to a customer's home. App. Op. ¶ 27 (Whitmore, J., dissenting). The other driver—the third-party tortfeasor—was at fault for the accident. Verlinger's employer was not at fault.

Verlinger consistently maintained that she was entitled to workers' compensation payments, beginning on August 17 when she filed her claim. *See* Bureau Claim's Letter (Sept. 6, 2011). Her workers' compensation application was initially disallowed because of insufficient evidence: She did not present "proof [she] was in the course of employment" when the after-hours accident occurred. *Id*. She appealed that denial to the Industrial Commission. Indus. Comm'n Order (Dec. 23, 2011), at 1. There, she testified that she would "go to customer's houses to do leather repairs" "after [the] store closes" and was doing so at the time of the accident. *Id*. Based on that testimony, the Industrial Commission held on December 23 that she was entitled to medical and wage-replacements benefits. *Id*.; *see also* App. Op. ¶ 4.

On December 15, 2011, while her administrative appeal was still pending, Verlinger settled with the other driver's insurer and with her own. App. Op. ¶ 3. At no point did Verlinger notify the Bureau about the identity or liability of any third parties or of her settlements with the third parties. And Verlinger did not give the Bureau prior notice of any settlement discussion or a chance to participate in the final settlement. *Id*.

The Industrial Commission's Order held that Verlinger was retroactively entitled to benefits as of August 2, 2011. *See* Indus. Comm'n Order (Dec. 23, 2011), at 1. That is, Verlinger was entitled to benefits starting the day after her accident and throughout the time her appeal was pending, including the day she settled her third-party claims. *Id*. An affidavit filed in the trial court in this case stated that the Bureau has paid over $73,000, and estimated that it would pay another $47,000. Second Aff. of Benjamin Crider, ¶¶ 3, 5.

When the Bureau found out about the settlements, it filed the current suit in July 2013.

C. The lower courts held that Verlinger was not "eligible" for benefits on the date she settled her third-party claims, so she was not required to give the Bureau notice and an opportunity to participate in her settlements.

The common pleas court ruled that Verlinger was not a "claimant" for purposes of the Recovery Statute. As of the day she settled her third-party claims, the court reasoned, her workers' compensation claim had been disallowed, and her appeal with the Industrial Commission was still pending. *Bur. of Workers' Comp. v. Verlinger*, No. CV-2013-08-3707 (Summit C.P. March 31, 2015). Verlinger therefore was not legally required to comply with a claimant's Notification Duty or the Bureau's Participation Right.

The Bureau appealed, and the Ninth District affirmed by issuing four opinions from three judges. A short per-curiam opinion for the court rejected the Bureau's assignment of error. App. Op. ¶ 10. Judge Moore's one-paragraph decision adopted the rationale of the Sixth District in *Ohio Bureau of Workers' Comp. v. Dernier*, 6th Dist. Lucas No. L-10-1126, 2011-Ohio-150. Judge Moore reasoned that, because Verlinger's claim was disallowed when she settled with the insurance companies, she was not a claimant. *Id*. ¶ 11 (Moore, J., concurring in judgment).

Judge Hensal concurred in judgment, but said the meaning of "claimant" was not dispositive. App. Op. ¶ 12 (Hensal, J., concurring in judgment). She posited that the Bureau had no right of recovery because, at the time of the settlements, the Bureau had not yet made any payments to Verlinger. *Id*. ¶ 19. Judge Hensal noted that the Ninth District's judgment would seemingly allow Verlinger to "double dip," but that the Bureau had "other theories of recovery" to avoid that outcome. *Id*. ¶ 20.

Judge Whitmore dissented, rejecting the reasoning of both concurring opinions. She opined both that Verlinger was a claimant under the "plain reading" of the Recovery Statute and that the "timing of the [BWC] payments[s]" did not cut off the Bureau's right of recovery. *Id.* ¶ 22 (Whitmore, J., dissenting). As to the meaning of claimant, Judge Whitmore reasoned that

an injured worker is "qualified" to receive benefits at the "moment she is injured," and therefore meets the definition of a "claimant" as one who is "eligible to receive" benefits. *Id.* ¶ 25 (citing R.C. 4123.93(A)). Eligibility for benefits, she continued, does not fluctuate while the parties appeal a Bureau decision about benefits. *Id.* As to the timing of the benefit payments, Judge Whitmore pointed out that the Recovery Statute makes a claimant liable for "'past, present, and estimated future compensation,'" which indicates that the timing of those payments is irrelevant to the right of recovery. *Id.* ¶ 35 (quoting R.C. 4123.93(D)).

The Bureau appealed to this Court.

ARGUMENT

Appellant Bureau's Proposition of Law:

> *A person applying for workers' compensation benefits (or who may apply in the future) generally must comply with the duties of a claimant under R.C. 4123.931(G) before settling with third-party tortfeasors for the same injury.*

Verlinger concedes she did not comply with her Notification Duty or the Bureau's Participation Right despite recovering both workers' compensation payments and third-party settlements. She applied for workers' compensation benefits in August 2011. She appealed the initial denial of her claim, the Industrial Commission allowed the claim on December 23, 2011, and the Bureau has since made significant payments to her. Nonetheless, she did not notify the Bureau of any potential third-party tortfeasors at any time. R.C. 4123.931(G). And she settled her third-party claims on December 15, 2011—while actively asserting her right to workers' compensation before the Industrial Commission—without notifying the Bureau or giving the Bureau an opportunity to assert its subrogation rights. *Id.* Under these facts, she is jointly and severally liable to pay the Bureau's subrogation interest. *Id.*

The only issue in this appeal is whether Verlinger was a "claimant." She was. A person becomes a "claimant" upon injury, under facts that indicate a workers' compensation case and

not a traditional tort action. R.C. 4123.93(A). And even if injured employees do not become claimants until they file claims, Verlinger was actively litigating her application for workers' compensation benefits at the time she settled with the third parties.

A. The plain text shows that employees generally become "claimants" at the moment of injury and certainly no later than the time that they file workers' compensation claims, and continue to be claimants while their applications are pending.

This Court begins with the text. *State v. Lowe*, 112 Ohio St. 3d 507, 2007-Ohio-606 ¶ 9 ("An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language."); *see also* R.C. 1.42. Verlinger asserts that filing and pursuing a claim did not make her a "claimant" because the Recovery Statute allegedly follows a narrow definition of "claimant" rather than its ordinary meaning of "one who files a claim." In fact, though, the Recovery Statute defines "claimant" *broadly* to encompass not just those who have filed claims, but those who may file claims in the near future.

The Recovery Statute defines a claimant as "a person who is eligible to receive compensation, medical benefits, or death benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code." R.C. 4123.93(A). The generic term "person" indicates not just employees, but those who might make a claim on their behalf, such as spouses or dependents. The "under" clause is equally comprehensive. So both "person" and the "under" clause indicate a broad level of generality.

The key phrase "who is eligible to receive" drives home that broader meaning. "Eligible" means "[f]it and proper to be selected or to receive a benefit; legally qualified for an office, privilege, or status." Black's Law Dictionary (7th Ed. 1999) at 538. Tying "claimant" to *eligibility* shows that an employee becomes a claimant at the moment of injury. At that point, claimants possess the key factual characteristics of a potential beneficiary under the workers' compensation statute: Their employer paid into the fund, they were injured, and the injury

occurred in the course of employment. (The same analysis applies to occupational disease, although it might look slightly different.) These *factual* predicates make injured employees "fit and proper to be selected" to receive payments, so the employees are *eligible* to receive them.

Once eligible, common usage suggests injured employees do not become "ineligible" until some final event makes recovery impossible, even if the claim is initially disallowed. This is certainly true where, as here, the initial denial of benefits was based on insufficient evidence. Eligibility had not changed; it simply had to be demonstrated. This is also true generally. First, if a final adjudication holds that employees are entitled to benefits, it generally must do so based on facts that existed as of the date of injury. If so, then they must have been eligible for benefits when injured, and remain just as eligible after the initial denial of benefits. All the initial disallowance can mean is that they are not entitled to payments without taking further action or presenting more evidence. It is inaccurate, then, to describe such employees as "not qualified to receive benefits." *State Bureau of Workers' Comp. v. Dernier*, 6th Dist. Lucas No. L-10-1126, 2011-Ohio-150 ¶ 32. Second, once eligible, an injured employee does not become "ineligible" until there is no possibility of recovery. An *eligible* person is simply one who, by nature of her current characteristics ("fit and proper"), *may* in the future actually "be selected" or "receive a benefit." Filing an appeal preserves that future possibility. In Verlinger's case, it turns out, the future receipt of benefits was *very* likely—all she had to do was present additional testimony to demonstrate that her injury occurred in the course of her employment.

The Recovery Statute's definition sensibly clarifies that "claimants" include even those who have not had a chance to file a claim yet, so that injured employees know that they must begin protecting the Bureau's right to a third-party recovery right away. As detailed in Part C below, it is "[c]onsistent with the central bargain of workers' compensation regimes," *Roberts v. Sea-Land Servs.*, 566 U.S. 93, 98 (2012), to assume injured employees will receive an all but

"automatic recovery," *Holeton v. Crouse Cartage Co.*, 92 Ohio St. 3d 115, 120 (2001). Defining claimant broadly makes sense in light of that bargain: Injured workers are likely to receive an automatic recovery, so the Bureau's subrogation interest should be protected from the start. *See* R.C. 4123.931(H).

Conversely, the General Assembly's use of "eligible" and "claimant" excludes a narrow reading. The Sixth District suggests that injured employees do not become claimants until their claims have been fully adjudicated. *See Dernier*, 2011-Ohio-150 ¶¶ 29-32. But in ordinary usage, "eligible" and "claimant" refer to the adjudicatory *process* not the adjudicatory *outcome*.

Eligibility is forward-looking: "[T]o be selected" "implies a future determination." App. Op. ¶ 24 (Whitmore, J., dissenting). It assumes that one has *not yet* been selected and is *not yet* receiving a benefit. Actual selection or receipt of benefits are not among the factual predicates that make up eligibility. At the very least, it would be strange to use the broader term "eligible" to refer *exclusively* to the more concrete statuses of actual selection or actual receipt of benefits. As Justice Scalia said about similar "eligible to receive" language:

> It [is] contrary to normal usage to think that the characteristic of "being" eligible consists of "having prevailed in a suit for benefits." Eligibility exists not merely during the brief period between formal judgment of entitlement and payment of benefits. Rather, one *is* eligible whether or not he has yet been adjudicated to be—and, similarly, one can *become* eligible before he is adjudicated to be.

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 119 (1989) (Scalia, J., concurring in part and concurring in the judgment). Eligibility precedes, and is independent of, an employee's later application for benefits, selection for benefits, or receipt of benefits. Those later events simply confirm an employee's earlier eligibility.

The General Assembly's choice of the word "claimant" shows this as well. A claimant is "[o]ne who asserts a right or demand, especially formally." Black's Law Dictionary, *supra*, at 241. That is, a claimant is one who makes a claim. If a person becomes a claimant upon

applying for workers' compensation, then this case is easy. "Claimant" is a defined term, of course, so the General Assembly can define however it wishes. But it is one thing to acknowledge that the General Assembly's use of this word is not dispositive, "and quite another to give it no effect whatever." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). The term being defined "has at least the import of showing us what [the General Assembly] had in mind." *Id*. The Recovery Statute's definition of claimant is consistent with its common usage; it simply includes those who are about to file a claim as well. Verlinger only has a case if the General Assembly gave "claimant" an unusual meaning—*i.e.*, one fully adjudicated as *entitled* to benefits, not one who has *applied* for benefits.

In short, Verlinger continued to be a claimant on the day she settled her claims. However, she continued to leave the Bureau in the dark. She did not tell the Bureau about the settlement talks or the settlement, and did not give the Bureau an opportunity to assert its interests before finalizing the settlement. R.C. 4123.931(G).

B. Contextual canons of statutory interpretation confirm the plain meaning of "claimant" and "eligible."

Several contextual canons of interpretation confirm the statute's plain meaning. This demonstrates that Verlinger was a "claimant" throughout the administrative process, including when she finalized her third-party settlements, and so required to comply with a claimant's duties under R.C. 4123.931(G).

1. The statutory context shows that *eligibility* to receive payments is different from *entitlement* to receive payments, confirming that an employee's "eligibility" does not change during the administrative process

When the General Assembly uses "different words," this Court presumes they intend "different meanings." *State ex rel. Rocco v. Cuyahoga Cnty. Bd. of Elections*, 2017-Ohio-4466 ¶ 14. "[D]iffering language" should not be given "the same meaning." *Russello v. United States*,

464 U.S. 16, 23 (1983) ("We would not presume to ascribe this difference to a simple mistake in draftsmanship."). This rule is a specific example of the general canon that the "meaning of an unclear word may be derived from the meaning of accompanying words." *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 2011-Ohio-2720 ¶ 43. If terms "are associated in a context suggesting that the words have something in common," the Court should read them that way. Scalia & Garner, Reading Law: The Interpretation of Legal Texts, 195 (2012).

Here, the workers' compensation statute distinguishes between *eligibility* and *entitlement* to receive benefits. After a claimant submits a claim for compensation, the administrator of the Bureau determines whether "a claimant is or is not *entitled* to an award of compensation or benefits." R.C. 4123.511(B)(1) (emphasis added). The Bureau determines entitlement in accordance with R.C. 4123.54, which provides that a qualifying employee with a qualifying injury in the course of employment generally is "entitled to receive compensation" for the loss sustained. R.C. 4123.54(A) (2011); *see also, e.g.*, R.C. 4123.414 ("Each person determined *eligible* . . . to participate in the disabled workers' relief fund is *entitled* to receive payments" (emphasis added)); R.C. 4123.511(K) (referring to payments a claimant was "entitled" or "not entitled" to); R.C. 4123.53(B)(1) ("when an employee initially receives temporary total disability compensation" the employee must "schedule a medical examination to determine the employee's continued *entitlement* to such compensation" (emphasis added)). These statutory provisions show that an individual becomes *entitled* to benefits when an application for benefits is granted and the claim allowed.

Reading these statutes together with the definition of "claimant" shows that eligibility and entitlement are not the same thing, and that eligibility precedes entitlement. "[W]here the [statute] has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." Scalia and Garner, *supra*, at 170;

Rocco, 2017-Ohio-4466 ¶ 14. And the definitions of the two terms show that eligibility necessarily precedes entitlement. Eligibility is forward-looking—"fit or proper *to be selected*." Entitlement comes from the verb "entitle," "[t]o grant a legal right to or qualify for." Black's Law Dictionary, *supra*, at 553. *Eligibility* points to a future grant of benefits, and *entitlement* is that future grant of benefit. *Cf., e.g.*, *Cabell Huntington Hosp. v. Shalala*, 101 F.3d 984, 987 (4th Cir. 1996) (explaining the "clear difference between eligibility for Medicaid payments . . . and entitlement to them"); *Kemp v. Republic Nat'l Life Ins. Co.*, 649 F.2d 337, 339 (5th Cir. 1981) (distinguishing eligibility to enroll and actual enrollment).

This confirms the plain text. If the General Assembly intended to limit "claimant" to "those who have been determined qualified for benefits, it would have used the term 'entitled' rather than 'eligible.'" App. Op. ¶ 26 (Whitmore, J., dissenting). On December 23, 2011, the Industrial Commission determined that Verlinger was *entitled* to benefits. If eligibility precedes entitlement, then Verlinger must have been eligible to receive benefits eight days earlier when she finalized her third-party settlements.

2. The statute's other uses of "eligible" confirm that an injured employee remains a claimant throughout the administrative process

The Court should also presume that the workers' compensation statute uses terms consistently absent any contextual indication that the General Assembly used them differently. *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); Scalia & Garner, *supra*, at 170. Two other sections of the workers' compensation statute also use the phrase "eligible to receive compensation." Both sections use it at a high level of generality to refer to possible future claims, not a specific entitlement decision. A third section uses "eligible" alone, and points to the same meaning.

Start with R.C. 4123.26(B). Federal law provides for workers' compensation for workplace injuries on federal waters or nearby harbor areas. *See* 98 Stat. 1639, 33 U.S.C. 901 *et seq*. So for some workers, federal law governs potential injuries for work in those areas, while Ohio law governs potential injuries for other work. The statute uses "eligible to receive" to reference this division. Workers' compensation employers must submit an annual payroll report that separates wages paid for labor and services "for which the employees are *eligible to receive* compensation and benefits under the federal 'Longshore and Harbor Workers' Compensation Act,'" and "for which the employees are *eligible to receive* compensation and benefits under [Chapter 4123] and Chapter 4121." R.C. 4123.26(B)(5)(a)(i)-(ii) (emphasis added). Similarly, R.C. 4123.32(C) uses "eligible to receive" to refer to the same federal-state division. There, the statute directs the Bureau to issue a rule governing how much an employer must pay into Ohio's workers' compensation fund on behalf of employees who are "eligible to receive compensation" under both federal and state law. R.C. 4123.32(C). These provisions support the Bureau's plain text reading of "eligible to receive." They use eligibility to refer categorically to those who could be entitled to benefits in the future.

The death-benefits provisions also use "eligible." *See* R.C. 4123.59 & .60. When an occupational disease causes an employee's death and the employee is receiving total disability compensation at the time, a "wholly dependent person is eligible for the maximum compensation provided for in this section." R.C. 4129.59(B). Here, too, eligibility refers to the possibility of receiving the maximum compensation provided, not entitlement to it. A worker's dependents become eligible for compensation upon the employee's death. They still must file a claim and get an entitlement order before they will be entitled to compensation.

3. The workers' compensation statute's other uses of "claimant" confirm that the Recovery Statute uses "claimant" to include those who have filed a claim

As explained above, the General Assembly's decision to use the word "claimant" in the Recovery Statute is itself instructive: It suggests that the statutory definition of "claimant" generally *includes*, rather than *excludes*, those who have filed claims and are working their way through the administrative process. Now, R.C. 4123.93(A) defines "claimant" only for the Recovery Statute, not the workers' compensation statute as a whole. But the workers' compensation statute uses "claimant" in other sections as well. Those sections consistently use it to refer collectively to all persons who have filed claims.

These other uses of "claimant" are important. It makes sense for the later-enacted Recovery Statute to define "claimant" slightly more broadly than the pre-existing statute. It is less likely that the later-enacted Recovery Statute would use the *same word* and define it to *exclude* those otherwise acting as claimants. *See, e.g.*, *Cleveland v. State*, 138 Ohio St. 3d 232, 2014-Ohio-86 ¶ 13 (reversing appeals court because "an in pari materia reading of the statute" revealed the error of viewing one piece of the statute alone).

Take R.C. 4123.511. It says the Bureau must give the "claimant and the employer" notice that a claim has been filed, and "advise the claimant" of the claim number and "the claimant's right to representation in the processing of a claim." R.C. 4123.511(A). The Bureau must determine if "a claimant is or is not entitled to" payments, and the "claimant may appeal" an adverse order. R.C. 4123.511(B). These references show two things. Consistent with the plain meaning of "claimant," the statute uses the term to refer to a person who files a claim. The statute also shows that a person does not cease to be a claimant after receiving an adverse ruling. Indeed, it is the claimant who has the right to appeal the initial order. In both instances, "claimant" means a person currently adjudicating a claim.

If the Recovery Statute uses "claimant" in a way consistent with its use in the workers' compensation statute as a whole, then Verlinger remained a claimant after the Bureau's adverse order, and she exercised the rights of a claimant by appealing that order. Just as she exercised the rights of a claimant under R.C. 4123.511, she was required to comply with the obligations of a claimant under R.C. 4123.931(G) by notifying the Bureau about potential third-parties and giving the Bureau an opportunity to participate in her third-party settlement.

C. The structure of the statute as a whole confirms that an injured worker cannot bypass the Bureau's subrogation interest and potentially receive a double recovery simply by settling his third-party claims without the Bureau.

Reading the statute as a whole also confirms the plain text. This Court "evaluate[s] a statute 'as a whole and giv[es] such interpretation as will give effect to every word and clause in it.'" *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St. 3d 510, 2009-Ohio-2550 ¶ 21 (citation omitted). "[W]ords cannot be read in a vacuum," *O'Toole v. Denihan*, 118 Ohio St. 3d 374, 2008-Ohio-2574 ¶ 59, rather a court "consider[s] the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner, *supra*, at 167; *see, e.g.*, *State ex rel. Bunch v. Indus. Comm'n*, 62 Ohio St. 2d 423, 426 (1980) (interpreting the workers' compensation statute in light of its structure).

No double recovery. As this Court has said in another context, "[t]he law of Ohio is well-settled that an injured party is entitled to only one satisfaction for his injuries." *Seifert v. Burroughs*, 38 Ohio St. 3d 108, 110 (1988). The Recovery Statute is based on this sensible principle. Workers injured on the job should have their medical expenses and lost wages paid once, but should not "double recover" for the same injury by collecting from both the workers' compensation system and from a tortfeasor for the same costs. Thus, the Bureau has a right to recover its costs from any third-party tortfeasor. R.C. 4123.931(A). And any "net amount recovered" by a claimant from a third-party tortfeasor "is subject to" the Bureau's right of

recovery. *Id*. In cases of third-party under-compensation the statute provides for the Bureau and the claimant to share the loss. R.C. 4123.931(B)-(D). Thus, a claimant must notify the Bureau of any potential claims against third-party tortfeasors, and must give the Bureau an opportunity to participate in, and be reimbursed by, any third-party settlements. R.C. 4123.931(G).

Here, double recovery is prevented *only* by reading "claimant" to include those have filed claims or are likely to file claims in the near future. Timing aside, individuals like Verlinger receive both third-party tort settlements and workers' compensation benefits for the same injury. The sequence of those payments should not matter. They receive workers' compensation benefits, so the Bureau should be able to recoup some of that cost. That is why the Recovery Statute makes the sequence irrelevant by defining "claimant" to include those likely to file claims in the near future. R.C. 4123.93(A). In this way, the Bureau's reading "discourages gamesmanship in the claims process." *Roberts*, 566 U.S. at 107. The lower court's judgment, however, lays out a clear blueprint for employees to retain double recoveries. Any employee could get around the Recovery Statute simply by settling third-party claims before receiving workers' compensation payments. That would cut off an important source of recovery for the Bureau (and therefore all State Fund employers). There is no free lunch. If employees recover twice, or third-party tortfeasors underpay, all Ohioans ultimately bear the cost.

No-fault payments. The structure of Ohio's workers' compensation statute ensures an injured worker a rapid and "no-fault" recovery. *State ex rel. Gross v. Indus. Comm'n*, 115 Ohio St. 3d 249, 2007-Ohio-4916 ¶ 22 (citing R.C. 4123.01(C)). But that no-fault structure is only between an employer and injured employee. Fault is critical when a third-party is involved. Indeed, "virtually every" workers' compensation statute provides a way for the fund administrator to recover workers' compensation payments from third-party tortfeasors, *Holeton*,

92 Ohio St. 3d at 120, and Ohio's is no exception. The statute just saves fault determinations for later.

Claimants' Notification Duty and the Bureau's Participation Right make this "pay first, recover later" structure possible because they ensure the Bureau can impose costs on the ultimate wrongdoer. Claimants must notify the Bureau of potential third-party tortfeasors under R.C. 4123.931(G) so the Bureau can later seek recovery from them under R.C. 4123.931(A) & (H). Claimants can then pursue third-party tortfeasors before the Bureau does, but must notify the Bureau and give it an opportunity to participate in the settlement. R.C. 4123.931(G). Practically speaking, the Bureau has a hard time recovering later if claimants do not identify the third-party tortfeasors, or if claimants settle third-party claims without the Bureau. Claimants cannot have it both ways. They seek no-fault payments, so they must take on the corresponding duties that enable the Bureau to pursue recovery from the ultimate wrongdoer. *See Corn v. Whitmere*, 183 Ohio App. 3d 204, 2009-Ohio-2737 ¶ 40 (2nd Dist.) (a "[claimant] cannot bargain away the rights of [the Bureau] to be subrogated to third-party proceeds recovered by [the claimant]").

No offset determination. The General Assembly structured Ohio's workers' compensation statute around a future-looking subrogation interest rather than a statutory offset. The General Assembly provided that injured workers receive an "automatic recovery," *Holeton*, 92 Ohio St. 3d at 120, and the Bureau a corresponding "automatic" "right of subrogation," R.C. 4123.931(H). Again, this structure is claimant-friendly because it guarantees full payments to qualifying injured workers immediately. But the General Assembly did not have to adopt that structure. It could have prevented double recovery by using an offset instead. Rather than push recovery to the back end, an offset would have reduced a claimant's workers' compensation payments upfront by the amount the third-party owed (or the amount of a third-party settlement).

Because the workers' compensation statute contains no offset provision, the Bureau did not have the option to reduce Verlinger's workers' compensation payments in light of the earlier third-party settlements. (And, of course, Verlinger did not tell the Bureau about the settlements.) The statute directs the Bureau to pay the full amount. This shows why the Bureau's subrogation interest must extend to *all* third-party settlements, even early ones that precede any workers' compensation payments. And indeed, the statute defines the Bureau's subrogation interest to include not just past payments, but also "estimated future payments." R.C. 4123.93(D). If the Bureau had a subrogation interest, then Verlinger should have given the Bureau an opportunity to participate in her third-party settlement.

One last thing. This issue is not unique to cases like Verlinger's, where the third-party settlement precedes any payment of benefits. Even when a third-party settlement comes after some benefits are paid, it frequently *precedes* the payment of *some* future benefits. The General Assembly anticipated this and provided a detailed statutory mechanism to deal with it. Again, the Bureau's subrogation interest includes estimated future payments. R.C. 4123.93(D). When a claimant settles, it can negotiate with the Bureau to determine how much of the third-party settlement the Bureau should recover, and the claimant has the option of placing those funds in a trust account. R.C. 4123.931(B)-(E). As the Bureau makes those payments, R.C. 4123.931(A), the claimant would then make payments from the trust account to the Bureau, R.C. 4123.931(E). Like in any of those cases, if it turned out that the Bureau did not made any future workers' compensation payments to Verlinger, then she could have retained the full settlement amount from the trust account. *Id.*

D. The lower court's reading mistakenly allows for double recovery.

1. The lower court's reading changes the statutory language from "is eligible to receive" payments to "is entitled to receive" payments

The temporal focus of the lower court on the moment of settlement misreads the definition of "claimant" in R.C. 4123.93(A) and suffers from an incomplete reading of a claimant's duties under R.C. 4123.931(G).

Injured employees are eligible to receive benefits before they are adjudicated to be entitled to benefits, but the lower court conflates the two. *Cf. Ohio Bureau of Workers' Comp. v. Petty*, 6th Dist. Lucas, 2016-Ohio-5753 ¶¶ 14-16 (distinguishing *Dernier* on this ground). Judge Moore's lead opinion "found dispositive the temporal requirement of the definition of 'claimant' due to the definition's use of the word 'is.'" App. Op. ¶ 11 (citing *Dernier*, 2011-Ohio-150). Following *Dernier*'s reasoning, Verlinger "was not qualified to receive benefits" "at the time" of settlement, so Verlinger was not a "claimant." *Dernier*, 2011-Ohio-150 ¶ 32. That reasoning contradicts normal usage. "[O]ne *is* eligible whether or not he has yet been adjudicated to be." *Firestone Tire*, 489 U.S. at 119 (Scalia, J., concurring in part and concurring in the judgment). Eligibility to receive benefits and entitlement to receive benefits are different things.

Alternatively, *Dernier* could be read to say that the initial denial of benefits *cut off* eligibility until the Industrial Commission reversed—that a person can be eligible to receive benefits upon applying, not eligible after presenting inadequate evidence (as here), and become eligible again after a successful appeal. The facts show Verlinger did not think that the decision made her ineligible to receive benefits: She continued to assert her eligibility before the Industrial Commission. And such a reading would produce arbitrary outcomes. Consider "two employees who . . . suffer the same injury on the same day," *Roberts*, 566 U.S. at 106, one of whom presented sufficient testimony and had his claim allowed, and a second who had their

claim disallowed because of inadequate evidence. The first would be a claimant required to include the Bureau in a third-party settlement, the second would not be a claimant and so would receive a double recovery. There is "no reason why [the General Assembly] would have intended . . . such an arbitrary criterion." *Id*. Instead, an employee's "claimant"-status should not change during the administrative process. If Verlinger's injury made her eligible to receive benefits on the day of injury, then she continued to be eligible on the day of settlement.

Finally, a narrow temporal focus on the moment of settlement suffers from an incomplete reading of R.C. 4123.931(G). A claimant's duties are not limited to the moment of settlement. For instance, a claimant's duty to notify the Bureau of potential third-party tortfeasors certainly applies before settlement and arguably also applies after the claimant has recovered. Verlinger did not notify the Bureau about potential third-party tortfeasors or about her third-party settlements at *any time*.

2. The lower court's reading assumes that the Bureau is not able to recover future workers' compensation payments from a present third-party settlement, but the statute provides an express mechanism for doing so

No more persuasive is Judge Hensal's argument that the Bureau "had no right to subrogation" at the time of the settlement because it had not made any workers' compensation payments. App. Op. ¶ 12. This is, in many ways, just another version of the argument this Court rejected in *Groch*, 2008-Ohio-546. The Recovery Statute can and does provide that the Bureau can recover from a third-party settlement for workers' compensation payments, even if the Bureau has not made those payments yet. *Id*. at ¶¶ 56-58. Judge Hensal mistakes the Bureau's right to recoup money with its subrogation right: Its subrogation right "is automatic," R.C. 4123.931(H), and its subrogation interest extends to "estimated future payments," R.C. 4123.93(D). The claimant may set up a trust account after the third-party settlement to hold such

funds. R.C. 4123.931(E). Then, as the Bureau makes payments to the claimant, the claimant "make[s] reimbursement payments" to the Bureau from a trust account. *Id.*

In response, Judge Hensal points to language in R.C. 4123.931(G) saying that a settlement should not "exclude[] any amount paid by" the Bureau, and "paid by" suggests that the settlement must only account for past payments. App. Op. ¶ 19. This case is not about that language. Verlinger made *no* attempt to include the Bureau in the settlement at all. At any rate, Judge Hensal's reading is mistaken. The "paid by" language is modified by an expansive "any," the scope of the Bureau's subrogation interest is expressly defined to include future payments, and the statute's trust account mechanism assumes that settlement funds will be used to reimburse payments that have not been made yet.

Judge Hensal's reading is not only contrary to the statute's text, it is manifestly contrary to the statute as a whole. Her reading arguably provides a blueprint for a claimant to extinguish the Bureau's interest in advance and ensure a double recovery. As *Dernier* suggested, by settling without the Bureau, an injured worker and third-party '"extinguish[]'" third-party liability, so that the Bureau will be unable to '"claim a subrogation right'" at any point in the future. App. Op. ¶ 17 (quoting *Dernier*, 2011-Ohio-150 ¶ 36). The statute, on the other hand, provides an automatic subrogation right, and says the claimant cannot destroy that right simply by not joining the Bureau. R.C. 4123.931(H). Claimants must notify the Bureau of potential third-party tortfeasors and give the Bureau an opportunity to participate in the settlement *precisely* to avoid the outcome reached by the court below.

CONCLUSION

The Court should reverse the Ninth District's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merits Brief of Plaintiff-Appellant State of Ohio, Bureau of Workers' Compensation, was served by U.S. mail this 20th day of November, 2017, upon the following counsel:

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APPENDIX

In the
Supreme Court of Ohio

STATE OF OHIO, BUREAU OF WORKERS' COMPENSATION, Plaintiff-Appellant, v. LORETTA M. VERLINGER, *et al.*, Defendants-Appellees.	:	Case No. _____ On Appeal from the Summit County Court of Appeals, Ninth Appellate District Court of Appeals Case No. 27763

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO, BUREAU OF WORKERS' COMPENSATION

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NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO, BUREAU OF WORKERS' COMPENSATION

Plaintiff-Appellant State of Ohio, Bureau of Workers' Compensation, gives notice of this discretionary appeal to this Court, pursuant to Ohio Supreme Court Rules 5.02 and 7.01, from a decision of the Ninth District Court of Appeals captioned *State of Ohio, Bureau of Workers' Compensation v. Loretta M. Verlinger, et al.*, No. 27763, issued and journalized on December 7, 2016.

Date-stamped copies of the Ninth District's Decision and Journal Entry and the Judgment Entry of the Summit County Common Pleas Court are attached as Exhibits 1 and 2, respectively, to the Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is of public and great general interest.

Respectfully submitted,

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I certify that a copy of the foregoing Notice of Appeal of Plaintiff-Appellant State of Ohio, Bureau of Workers' Compensation, was served by U.S. mail this 23rd day of January, 2017, upon the following:

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STATE OF OHIO) IN THE COURT OF APPEALS

) NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT)

STATE OF OHIO, BUREAU OF WORKERS' COMPENSATION C.A. No. 27763

Appellant

v.

LORETTA M. VERLINGER, et al.

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV-2013 08 3707

DECISION AND JOURNAL ENTRY

Dated: December 7, 2016

PER CURIAM

{¶1} Appellant, the State of Ohio, Bureau of Workers' Compensation ("BWC"), appeals from the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On August 1, 2011, Loretta Verlinger was injured in a motorcycle accident. Ms. Verlinger applied for benefits with the BWC. Her application was disallowed on September 6, 2011. She appealed to the Industrial Commission.

{¶3} While the matter was pending with the Industrial Commission, Ms. Verlinger settled claims with the other driver's insurance company, Metropolitan Group Property and Casualty Insurance Company ("Metropolitan"), and her own insurance company, Foremost Property and Casualty Insurance Company ("Foremost"), (jointly "Insurers"). She signed both settlements on December 15, 2011. Ms. Verlinger did not notify the BWC of the settlements.

{¶4} Following a hearing on December 23, 2011, an Industrial Commission district hearing officer allowed Ms. Verlinger's claim. Thereafter, she received medical and wage benefits from the BWC.

{¶5} In July 2013, the BWC filed a complaint in the Summit County Court of Common Pleas seeking the amount it had paid and would pay in the future on Ms. Verlinger's claim. The BWC alleged that Ms. Verlinger had settled her claims with the Insurers in violation of R.C. 4123.931(G)[1]. The statute provides:

> A claimant shall notify a statutory subrogee and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery, except that when the statutory subrogee is a self-insuring employer, the claimant need not notify the attorney general. No settlement, compromise, judgment, award, or other recovery in any action or claim by a claimant shall be final unless the claimant provides the statutory subrogee and, when required, the attorney general, with prior notice and a reasonable opportunity to assert its subrogation rights. If a statutory subrogee and, when required, the attorney general are not given that notice, or if a settlement or compromise excludes any amount paid by the statutory subrogee, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest.

R.C. 4123.931(G). A "[c]laimant" is "a person who is eligible to receive compensation, medical benefits, or death benefits under [relevant Chapters] of the Revised Code." R.C. 4123.93(A).

{¶6} The BWC and Ms. Verlinger filed cross-motions for summary judgment[2]. The BWC argued that Ms. Verlinger was a "claimant" who had failed to comply with R.C.

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[1] The BWC also brought a claim against the driver of the other vehicle under R.C. 4123.931(H). Metropolitan filed a cross-claim for indemnity against Verlinger. Those claims are not at issue in this appeal.

[2] The BWC's initial complaint named Verlinger and Metropolitan. Metropolitan opposed the BWC's motion, but did not file a motion for summary judgment itself. Following Verlinger's motion for summary judgment, the BWC filed an amended complaint adding Foremost and moved for summary judgment against Foremost. Foremost opposed the BWC's motion and moved for summary judgment "incorporat[ing]" Verlinger's arguments.

4123.931(G). Ms. Verlinger argued that she was not a "claimant" at the time that she settled with the Insurers because the BWC had denied her claim. Ms. Verlinger also argued that the BWC could not avail itself of the protections of R.C. 4123.931 because, at the time of her settlements, it had not yet paid any compensation or benefits on her claim.

{¶7} The trial court reviewed two cases with similar facts that reached opposite results, namely *Ohio Bur. of Workers' Comp. v. Kidd*, Franklin C.P. No. 07CVH08-10619 (Oct. 1, 2008) and *Ohio Bur. of Workers' Comp. v. Dernier*, 6th Dist. Lucas No. L-10-1126, 2011-Ohio-150. Both Dernier and Kidd were injured in traffic accidents and had their initial applications for workers' compensation benefits denied. Before being granted benefits on appeal, Dernier and Kidd settled with insurance companies. As in the instant case, the BWC filed suit for amounts that it paid on the claims. The *Kidd* court concluded that the employee was a claimant because she was seeking benefits. The *Dernier* court, on the other hand, concluded that the employee was not a claimant because her claim was denied at the time of the settlements.

{¶8} The trial court ultimately granted Ms. Verlinger's motion for summary judgment. Relying on *Dernier*, the trial court found that, "[a]t the time [Ms. Verlinger] settled with the Insurer[s], her application had been rejected by the BWC and she was not qualified to receive benefits." Therefore, the trial court concluded that she was not a "claimant" under the statute.

{¶9} The BWC appeals raising one assignment of error.

II.

Assignment of Error

THE TRIAL COURT ERRED BY RULING THAT LORETTA VERLINGER WAS NOT A "CLAIMANT," AS THAT TERM IS DEFINED IN R.C. § 4123.01 *ET SEQ.*, WHEN SHE SETTLED HER THIRD-PARTY CLAIMS, THEREBY DEPRIVING APPELLANT OF ITS SUBROGATION INTEREST IN THOSE SETTLEMENTS.

{¶10} The BWC's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

MOORE, J.
CONCURRING IN JUDGMENT.

{¶11} In her motion for summary judgment, Ms. Verlinger argued, in part, that she was not a "claimant[,]" as that term is defined in R.C. 4123.93(A) and used in R.C. 4123.931(G), at

the time of the settlements. Similarly, in *Ohio Bur. of Workers' Comp. v. Dernier*, 6th Dist. Lucas No. L-10-1126, 2011-Ohio-150, an injured worker maintained that, at the time that the injured worker settled with the third party insurer, the injured worker's claim for worker's compensation had been rejected. *Id.* at ¶ 24. There, the injured worker argued, "and the trial court concluded, that [the injured worker] was not a statutorily defined 'claimant' when the third party settlement was reached." *Id.* at ¶ 20. As set forth in the lead opinion, R.C. 4123.93(A) defines a "[c]laimant" as one "who is eligible to receive compensation, medical benefits, or death benefits under [relevant Chapters] of the Revised Code." The Sixth District noted that "eligible" means "qualified to be chosen," and found dispositive the temporal requirement of the definition of "claimant" due to the definition's use of the word "is[.]" *Dernier* at ¶ 28-29. The Sixth District determined "[t]he plain language of the statute defines a 'claimant' for purposes of the subrogation statutes as one presently eligible to receive benefits." *Id.* at ¶ 31. Applying this definition to the case before it, the Sixth District determined that the injured worker was not eligible to receive benefits after the BWC rejected her claim and prior to the decision of the BWC being overruled. *Id.* at ¶ 5, 25-32. I am persuaded by the Sixth District's rationale, which I believe squarely applies to the issues as framed and argued by the BWC in the instant appeal. Accordingly, I would affirm the decision of the trial court on this basis.

HENSAL, P. J.
CONCURRING IN JUDGMENT.

{¶12} While I agree that the trial court's judgment must be affirmed, I write separately to address why I believe Ms. Verlinger's status as a "claimant" is not dispositive. The dissent would hold that because Ms. Verlinger was a "claimant" at the time she settled with the Insurers, she was required to provide notice to the BWC under R.C. 4123.931(G). Addressing the fact

that the BWC had not paid any benefits or compensation on Ms. Verlinger's behalf at the time of the settlement, the dissent would hold that such a payment is not a prerequisite to the notice requirement under R.C. 4123.931(G). I, however, would hold that the BWC had no right to subrogation at the time Ms. Verlinger settled with the Insurers and, therefore, was not entitled to notice under R.C. 4123.931(G).

{¶13} Because this is an appeal of the trial court's grant of summary judgment, I will begin my analysis by discussing the arguments presented to the trial court. The BWC moved for summary judgment on its first cause of action only (i.e., that Ms. Verlinger and the Insurers were jointly and severally liable under R.C. 4123.931(G)), arguing that Ms. Verlinger was a "claimant," and that it was entitled to subrogation because it paid her benefits (albeit after the settlement).

{¶14} Ms. Verlinger, on the other hand, moved for summary judgment on both of the BWC's claims, arguing that the right to subrogation is dependent upon two factors: (1) that the BWC pay compensation or benefits; and (2) that the individual be a "claimant." She argued that she was not a "claimant" because the BWC had denied her claim at the time she settled with the Insurers, and further that the BWC did not have a statutory right to subrogation because it had not paid any compensation or benefits at that time. She, therefore, asked the trial court to rule that the BWC was not entitled to reimbursement for any monies it paid on her behalf. Ms. Verlinger's insurer simply adopted her motion and did not set forth any additional arguments on its own behalf. The tortfeasor's insurer did not move for summary judgment.

{¶15} In response to Ms. Verlinger's motion, the BWC argued that its right to subrogation vested when it paid her benefits, regardless of when those payments took place, because the statute does not require the payments to take place *prior* to a claimant's settlement

with a third-party. The trial court's order, however, did not address this issue. Instead, it focused solely on Ms. Verlinger's status as a "claimant." Because Ms. Verlinger's claim had been denied, the trial court held that she was not qualified to receive benefits at the time she settled and, therefore, was not a "claimant" for purposes of the statute. On appeal, the parties assert substantially the same arguments that were presented below.

{¶16} The Franklin County Court of Common Pleas' decision in *Ohio Bur. of Workers' Comp. v. Kidd*, and the Sixth District Court of Appeals' decision in *Ohio Bur. of Workers' Comp. v. Dernier* are directly on point, but reach opposite conclusions. The trial court in *Kidd* held that the injured worker was a "claimant" because she was navigating through the BWC system. Franklin C.P. No. 07CVH08-10619 (Oct. 1, 2008). Further, despite the fact that the BWC had yet to pay her benefits, the court held that the injured worker was required to provide the BWC with notice under R.C. 4123.931(G).

{¶17} The *Dernier* court, on the other hand, held the opposite. In doing so, it cited R.C. 4123.931(A), which provides: "*The payment of compensation or benefits * * * creates a right of recovery in favor of a statutory subrogee against a third party*, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The net amount recovered is subject to a statutory subrogee's right of recovery." (Emphasis added.). The court went on to state:

> The meaning of this provision is clear, once workers' compensation payments to a claimant begin, the administrator of the Bureau of Workers' Compensation or the self insured employer is vested with the same right to pursue and recover on any claim that the claimant has against a third party. On the facts of this case, this provision is unavailing to [the BWC] with respect to [the insurer]. *Once payments on this claim began, any liability from [the insurer] to [the injured worker] had long since been extinguished by the settlement. Consequently, [the BWC] cannot claim a subrogation right against [the insurer] premised on this provision.*

(Emphasis added.) *Ohio Bur. of Workers' Comp. v. Dernier*, 6th Dist. Lucas No. L-10-1126, 2011-Ohio-150, ¶ 36. In conclusion, the *Dernier* court held that "[a]t the very least, this absolves [the insurer] from statutory joint and several liability[,]" and "[w]hile [the BWC] may have recourse to other theories of recovery for [the injured worker], [the injured worker] is not liable under the statutory subrogation provisions." *Id.* at ¶ 38-39.

{¶18} The plain language of the statute supports the conclusion that payment of compensation or benefits is a prerequisite to the notice requirement under R.C. 4123.931(G). As previously noted, the first sentence of R.C. 4123.931 provides that "*[t]he payment of compensation or benefits * * * creates a right of recovery* in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party." (Emphasis added.) R.C. 4123.931(A). While the BWC argues that any payment, regardless of when it is made, creates a right of subrogation in favor of the BWC, its merit brief cites no supporting case law. In fact, case law supports the opposite conclusion. For example, federal case law applying Ohio law suggests that in order to have a right to subrogation, the BWC must be making (or have made) payments on the injured worker's behalf. *See, e.g., McClain v. HON Co.*, S.D.Ohio No. CIV.A.2:06-CV-311, 2007 WL 915198, *3 (Mar. 26, 2007) ("To the extent that the OBWC has paid the medical bills associated with plaintiff's injury and plaintiff recovers damages from the tortfeasor for those medical bills, OBWC has a subrogation interest in that recovery."); *Johnson v. Ohio Bur. of Workers' Comp.*, N.D.Ohio No. 1:13CV1199, 2014 WL 296875, *4 (Jan. 27, 2014) ("Ohio law provides that when a claimant who has received benefits from the BWC recovers from a tortfeasor, BWC may assert its right to its share of the recovered amount."). *See also* Baldwin's Ohio Handbook Series, Personal Injury Practice, Section 1:34 (2015 Ed.) ("If a client is receiving compensation or benefits from the

Bureau, they are required to notify the Bureau and the Attorney General (unless the client is receiving benefits from a self-insured company) and to provide the identity of any third parties the client is seeking recovery. * * * If your client has or is receiving benefits and attempts to circumvent the Bureau, and not provide notice and the opportunity to assert their interest, the third party and your client are jointly and severally liable to pay back the full amount of the Bureau's interest.").

{¶19} Additionally, R.C. 4123.931(G) provides that "[n]o settlement * * * shall be final unless the claimant provides the statutory subrogee * * * with prior notice and a reasonable opportunity to assert its subrogation rights." It further provides that "[i]f a statutory subrogee * * * [is] not given that notice, or if a settlement or compromise excludes any amount *paid by* the statutory subrogee, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest." (Emphasis added.). "[P]aid by" clearly indicates past payments, not possible future payments, thereby supporting the conclusion that the BWC did not have a right to subrogation at the time Ms. Verlinger settled with the Insurers. Further, while this provision is written in the disjunctive (i.e., that liability attaches if the claimant fails to provide notice *or* the settlement excludes any amount paid by the statutory subrogee), the sentence immediately preceding this provision specifically states that notice is required in order to give the statutory subrogee "a reasonable opportunity to assert its subrogation rights." *Id.* R.C. 4123.931(G), therefore, presupposes a right to subrogation, which, in this case, the BWC did not have at the time Ms. Verlinger settled with the Insurers.

{¶20} In light of the foregoing, I would hold that the issue of whether Ms. Verlinger was a "claimant" at the time she settled with the Insurers is not dispositive. Rather, I would hold that the BWC did not have a right to subrogation at the time Ms. Verlinger settled with the Insurers

because the BWC had not paid any compensation or benefits on her behalf. Accordingly, I would hold that Ms. Verlinger had no obligation to provide notice to the BWC under R.C. 4123.931(G). While this conclusion seems to allow Ms. Verlinger to "double dip" and receive a double recovery, the court in *Dernier* aptly noted that the BWC could pursue other theories of recovery against the injured worker. *Dernier* at ¶ 39.

{¶21} Thus, while I do not agree with the trial court's reasoning, I would nonetheless affirm its decision to the extent that it holds that the BWC is not entitled to subrogation under the statute. *See State v. Rubes*, 11th Dist. No. 2012-P-0009, 2012-Ohio-4100, ¶ 33 (noting that "[r]eviewing courts affirm and reverse judgments, not reasons.") (Citation omitted.).

WHITMORE, J.
DISSENTING.

{¶22} I respectfully dissent. The trial court and one concurring judge from this Court rely on the Sixth District's decision in *Ohio Bur. of Workers' Comp. v. Dernier*, 6th Dist. Lucas No. L-10-1126, 2011-Ohio-150, and find that Ms. Verlinger was not a "claimant" at the time that she settled with the Insurers, and therefore, she was not subject to the notice requirements of R.C. 4123.931(G). The other concurring judge from this Court reasons that, until the BWC makes a payment, it has no subrogation rights and that, Ms. Verlinger's notice requirements likewise were non-existent until a payment was made. In my opinion, both of these positions are contrary to a plain reading of R.C. 4123.93 and R.C. 4123.931. I would hold that Ms. Verlinger was a claimant. In addition, I would hold that Ms. Verlinger's notice requirements were not dependent on the timing of the payment from the BWC to Ms. Verlinger.

Claimant

{¶23} I would not follow the Sixth District's *Dernier* decision as I find its analysis of the definition of a "claimant" incomplete. R.C. 4123.93(A) defines "[c]laimant" as "a person who is eligible to receive compensation, medical benefits, or death benefits under [relevant Chapters] of the Revised Code." The *Dernier* court noted that "eligible" means "qualified to be chosen." *Dernier* at ¶ 28, citing *Merriam Webster's Collegiate Dictionary* 374 (10th Ed.1996). The court continued:

> Although an application for benefits is a prerequisite, in and of itself the application does not qualify an applicant to be chosen for benefits. More is clearly required. Moreover, at the time she settled with appellee insurer, appellee Dernier's application had been rejected and she was certainly not qualified for benefits.

Id. at ¶ 29. The court then focused on the word "is" immediately preceding "eligible" in the statutory definition. *Id.* at ¶ 30. Because "is" is a present tense verb, the court concluded a "claimant" is someone who is "presently eligible to receive benefits." *Id.* at ¶ 30-31. While "is" does refer to a present status, the court did not fully analyze the meaning of "eligible." The court noted that "eligible" means "qualified to be chosen," but did not examine the meaning of the word "qualified" or the phrase "to be chosen." *See id.* at ¶ 28.

{¶24} "To be chosen" implies a future determination. Using *Dernier*'s language at ¶ 29, the "[m]ore" that is required following the application for benefits is that the applicant's qualifications be determined. If proven qualified, the applicant is chosen.

{¶25} "[Q]ualified" means "[p]ossessing the necessary qualifications." Black's Law Dictionary 1275 (8th Ed.2004). Within the workers' compensation context an individual is qualified if, inter alia, she is injured "in the course of, and arising out of, the injured employee's employment." *See* R.C. 4123.01(C) (defining "[i]njury" for purposes of R.C. Chapter 4123). An

employee possesses that qualification the moment she is injured. The injury either did or did not occur during the course of employment. The existence of this qualification does not change while an employee is awaiting a determination of her entitlement to benefits, nor does it change while the parties pursue appeals from that determination[3].

{¶26} Likewise, an employee's status as a claimant should not fluctuate throughout the appeals process. I would find that a "claimant" remains a "claimant" until a final determination is reached that is no longer subject to appeal. This interpretation comports with the plain language of the statute and the legislature's choice of the term "eligible" when defining "claimant" in R.C. 4123.93(A). Had the legislature intended to limit the definition of claimant to only those who had been determined qualified for benefits, it would have used the term "entitled" rather than "eligible." *See, e.g.*, R.C. 4123.414 ("Each person *determined eligible*, pursuant to R.C. 4123.413 of the Revised Code, to participate in the disabled workers' relief fund *is entitled* to receive payments * * * ." (Emphasis added.)).

{¶27} In the present case, Ms. Verlinger filed a first report of injury with the BWC stating that her regular work hours were from 9:30 a.m. to 6:00 p.m. and that the injury occurred at 7:00 p.m. while she was "driving to a customer's house to perform work at the customer's location." The BWC disallowed the claim because there was "no proof claimant was in the course of employment when the accident occurred." At the district hearing officer level, Ms. Verlinger testified that she often goes to customers' homes to do repairs after her shop closes for the day. The district hearing officer found that she was injured "in the course of and arising out

[3] The BWC's determination can be appealed to the Industrial Commission where there are three levels of review – district hearing officer, staff hearing officer, and full commission. R.C. 4123.511(B)-(E). The matter can be further appealed to the common pleas court, which can be appealed in the same manner as other civil appeals. *See* R.C. 4123.512(A) & (E).

of her employment." The fact that Ms. Verlinger was injured "in the course of and arising out of her employment" and, thus, qualified to receive benefits did not change between when the BWC disallowed her claim and when the district hearing officer allowed it. Rather, it appears that Ms. Verlinger's testimony before the district hearing officer provided the "proof" that was lacking when the BWC made its initial determination.

{¶28} The BWC's initial denial of Ms. Verlinger's application for benefits did not change her eligibility status. She remained "qualified to be chosen" and, in fact, was chosen by the Industrial Commission to receive benefits. Although Ms. Verlinger's claim for workers' compensation benefits was initially denied, "she was navigating the BWC appeals process in the hopes of receiving" and "had a reasonable expectation that she would" receive benefits. *See Ohio Bur. of Workers' Comp. v. Kidd*, Franklin C.P. No. 07CVH08-10619 (Oct. 1, 2008). Thus, I would find that she was a "claimant" at the time of her settlements and had a statutory obligation to provide notice to the BWC.

Timing of Payment

{¶29} The second concurring opinion would hold that Ms. Verlinger was not obliged to provide notice under R.C. 4123.931(G) because the BWC had not made a payment and, therefore, had no subrogation rights under R.C. 4123.931(A). I disagree as these sections address different parties and different rights and obligations.

{¶30} R.C. 4123.931(A) addresses a right of recovery the BWC has against a third party. It does not address rights and obligations between the BWC and a claimant. Section (A) provides: "The payment of compensation or benefits pursuant to [relevant Chapters] of the Revised Code creates a right of recovery *in favor of a statutory subrogee against a third party* * * *." (Emphasis added.) R.C. 4123.931(A).

{¶31} By contrast, R.C. 4123.931(G) imposes an obligation on a claimant to provide notice to the BWC. Section (G) provides: "*A claimant shall notify a statutory subrogee* and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery, except that when the statutory subrogee is a self-insuring employer, the claimant need not notify the attorney general." (Emphasis added.) R.C. 4123.931(G).

{¶32} R.C. 4123.931(A) sets forth "a standard subrogation arrangement." *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, ¶ 42 (Pfeifer, J., concurring). But, "R.C. 4123.931(G) * * * provides something completely different * * *." *Id.* at ¶ 46. "R.C. 4123.931(G) makes the statutory subrogee a mandatory player in settlement discussions between the claimant and the third party." *Id.* "A claim brought under R.C. 4123.931(G) is not a subrogation claim. It is a unique claim created by statute that punishes claimants and third parties for failing to include statutory subrogees in settlement negotiations." *Id.* at ¶ 47.

{¶33} Even *Dernier*, 2011-Ohio-150, recognized that section (A) is distinct from section (G). It stated, "there are two statutory provisions that might give rise to liability" for the insurer. *Id.* at ¶ 34. After concluding that the BWC did not have a subrogation right against the insurer under R.C. 4123.931(A), the court stated, "[t]he *other* provision by which liability might arguably attach to [the insurer] is R.C. 4123.931(G)." (Emphasis added.) *Id.* at ¶ 37. The court, then, concluded that there was no liability under section (G) because Dernier was not a claimant.

> The application of this provision to the present facts comes back to our discussion of the definition of a "claimant." The R.C. 4123.931(G) notification requirement applies wholly to the "claimant." * * * Since the claim against the tortfeasor was extinguished prior to [Dernier] becoming a statutorily defined "claimant," she had no duty to inform or otherwise act in conformity with these provisions.

Id. at ¶ 38-39. The *Dernier* court did not conclude that the BWC must make a payment in order to be entitled to notice under section (G). Rather, it relied on its earlier conclusion that the employee was not a claimant. As discussed above, I would hold that Ms. Verlinger was a claimant and, therefore, subject to the requirements of R.C. 4123.931(G).

{¶34} The plain and straightforward language of R.C. 4123.931(G) requires a claimant provide notice of third parties who may be liable to a statutory subrogee. In the first sentence, it states, "A claimant shall notify a statutory subrogee and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery, except that when the statutory subrogee is a self-insuring employer, the claimant need not notify the attorney general." R.C. 4123.931(G). This provision contains no language requiring prior payment from the statutory subrogee to trigger the mandatory notification from the claimant.

{¶35} Although liability can attach if a settlement excludes an amount paid by the BWC, liability also attaches from the failure to provide notice alone. The statute is phrased in the disjunctive imposing liability, "[i]f a statutory subrogee and, when required, the attorney general are not given that notice, *or* if a settlement or compromise excludes any amount paid by the statutory subrogee." (Emphasis added.) R.C. 4123.931(G). The second concurring opinion notes that "notice is required in order to give the statutory subrogee 'a reasonable opportunity to assert its subrogation rights.'" Citing R.C. 4123.931(G). Subrogation rights, however, are not defined. Section (G) concludes that if notice is not given "the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest." R.C. 4123.931(G). "'Subrogation interest' includes past, present, and estimated future compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee * * *." R.C. 4123.93(D).

The inclusion of future compensation and benefits within the statutory definition indicates that payment will not necessarily occur prior to the interest arising. Therefore, payment is not a prerequisite to the notice requirements of R.C. 4123.931(G).

{¶36} The legislature's decision to mandate notice irrespective of the timing of payments is logical as the claimant is uniquely situated to know of the existence of a third-party tortfeasor and a workers' compensation claim. Moreover, the claimant, to a large extent, controls the timing of her application for workers' compensation benefits and her attempts to settle or pursue claims against third parties.

{¶37} I would sustain the BWC's assignment of error and reverse the trial court's decision.

APPEARANCES:

EDWARD T. SAADI, Attorney at Law, for Appellant.

NICHOLAS A. PAPA, Attorney at Law, for Appellee, Loretta M. Verlinger.

KALLEN L. DEARNBARGER, Attorney at Law, for Appellee, Metropolitan Group Property and Casualty Insurance Company.

CRAIG S. COBB, Attorney at Law, for Appellee, Foremost Property and Casualty Insurance Company.

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STATE OF OHIO, BUREAU OF WORKERS COMPENSATION	)	**CASE NO. CV-2013 08 3707**
Plaintiff	)	**JUDGE AMY CORRIGALL JONES**
-vs-	)	
LORETTA M. VERLINGER, et al.	)	**ORDER FINAL AND APPEALABLE**
Defendants	)	

- - -

This cause came before the Court on the parties' joint motion for reconsideration of the Court's order of January 9, 2015 denying all Motions for Summary Judgment on the issue of whether or not Defendant, Loretta M. Verlinger is a "claimant" under O.R.C. 4123.93. All parties have stipulated that there are no factual issues in dispute and the issue of "claimant" in dispute is "purely legal."

Plaintiff seeks subrogation from Defendant Verlinger pursuant to R.C. 4123.931. Plaintiff asserts that Defendant is a claimant according to R.C. 4123.93 which states:

"*A person who is eligible to receive compensation, medical benefits or death benefits****".

Plaintiff claims that Defendant became a claimant when she filed for benefits. Defendant contends that although Verlinger made an application for benefits, the application was denied by the BWC. This Court agrees. Using the clear and unambiguous definition of a claimant per R.C. 4123.93, Defendant, as a result of the BWC's denial of benefits, was NOT eligible to receive compensation, medical benefits or death benefits.

See *Ohio Bureau of Workers Compensation v. Dernier*, 2011-Ohio-150. At the time Defendant settled with the Insurer, her application had been rejected by the BWC and she was not qualified to receive benefits. Thus she was not a "claimant" for purposes of subrogation pursuant to R.C. 4123.931.

Given the parties stipulation that no factual issues are in dispute and in accordance with the detailed analysis in *Dernier*, this Court finds that Defendant, Verlinger was not a claimant, under O R.C. 4123.93. Defendant, Verlinger's Motion for Summary Judgment is GRANTED.

This is a final and appealable Order.

There is no just cause for delay.

IT IS SO ORDERED.

JUDGE AMY CORRIGALL JONES

cc: Attorney Nicholas Papa
Attorney Edward Sadi
Attorney Eric Grinnell
Attorney Rebecca L. Campbell

cvd
13-3707mo

§ 4123.93 Definitions.

As used in sections 4123.93 to 4123.932 of the Revised Code:(A) "Claimant" means a person who is eligible to receive compensation, medical benefits, or death benefits under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

(B) "Statutory subrogee" means the administrator of workers" compensation, a self-insuring employer, or an employer that contracts for the direct payment of medical services pursuant to division (P) of section 4121.44 of the Revised Code.

(C) "Third party" means an individual, private insurer, public or private entity, or public or private program that is or may be liable to make payments to a person without regard to any statutory duty contained in this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

(D) "Subrogation interest" includes past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee pursuant to this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.

(E) "Net amount recovered" means the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney's fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery. "Net amount recovered" does not include any punitive damages that may be awarded by a judge or jury.

(F) "Uncompensated damages" means the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest.

§ 4123.931 Subrogation right of statutory subrogee against third party.

(A) The payment of compensation or benefits pursuant to this chapter or Chapter 4121., 4127., or 4131., of the Revised Code creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The net amount recovered is subject to a statutory subrogee's right of recovery.

(B) If a claimant, statutory subrogee, and third party settle or attempt to settle a claimant's claim against a third party, the claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, except that the net amount recovered may instead be divided and paid on a more fair and reasonable basis that is agreed to by the claimant and statutory subrogee. If while attempting to settle, the claimant and statutory subrogee cannot agree to the allocation of the net amount recovered, the claimant and statutory subrogee may file a request with the administrator of workers' compensation for a conference to be conducted by a designee appointed by the administrator, or the claimant and statutory subrogee may agree to utilize any other binding or non-binding alternative dispute resolution process.

The claimant and statutory subrogee shall pay equal shares of the fees and expenses of utilizing an alternative dispute resolution process, unless they agree to pay those fees and expenses in another manner. The administrator shall not assess any fees to a claimant or statutory subrogee for a conference conducted by the administrator's designee.

(C) If a claimant and statutory subrogee request that a conference be conducted by the administrator's designee pursuant to division (B) of this section, both of the following apply:

(1) The administrator's designee shall schedule a conference on or before sixty days after the date that the claimant and statutory subrogee filed a request for the conference.

(2) The determination made by the administrator's designee is not subject to Chapter 119. of the Revised Code.

(D) When a claimant's action against a third party proceeds to trial and damages are awarded, both of the following apply:

(1) The claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered.

(2) The court in a nonjury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories that specify the following:

(a) The total amount of the compensatory damages;

(b) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents economic loss;

(c) The portion of the compensatory damages specified pursuant to division (D)(2)(a) of this section that represents noneconomic loss.

(E) (1) After a claimant and statutory subrogee know the net amount recovered, and after the means for dividing it has been determined under division (B) or (D) of this section, a claimant may establish an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, reduced to present value, from which the claimant shall make reimbursement payments to the statutory subrogee for the future payments of compensation, medical benefits, rehabilitation costs, or death benefits. If the workers' compensation claim associated with the subrogation interest is settled, or if the claimant dies, or if any other circumstance occurs that would preclude any future payments of compensation, medical benefits, rehabilitation costs, and death benefits by the statutory subrogee, any amount remaining in the trust account after final reimbursement is paid to the statutory subrogee for all payments made by the statutory subrogee before the ending of future payments shall be paid to the claimant or the claimant's estate.

(2) A claimant may use interest that accrues on the trust account to pay the expenses of establishing and maintaining the trust account, and all remaining interest shall be credited to the trust account.

(3) If a claimant establishes a trust account, the statutory subrogee shall provide payment notices to the claimant on or before the thirtieth day of June and the thirty-first day of December every year listing the total amount that the statutory subrogee has paid for compensation, medical benefits, rehabilitation costs, or death benefits during the half of the year preceding the notice. The claimant shall make reimbursement payments to the statutory subrogee from the trust account on or before the thirty-first day of July every year for a notice provided by the thirtieth day of June, and on or before the thirty-first day of January every year for a notice provided by the thirty-first day of December. The claimant's reimbursement payment shall be in an amount that equals the total amount listed on the notice the claimant receives from the statutory subrogee.

(F) If a claimant does not establish a trust account as described in division (E)(1) of this section, the claimant shall pay to the statutory subrogee, on or before thirty days after receipt of funds from the third party, the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits.

(G) A claimant shall notify a statutory subrogee and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery, except that when the statutory subrogee is a self-insuring employer, the claimant need not notify the attorney general. No settlement, compromise, judgment, award, or other recovery in any action or claim by a claimant shall be final unless the claimant provides the statutory subrogee and, when required, the attorney general, with prior notice and a reasonable opportunity to assert its subrogation rights. If a statutory subrogee and, when required, the attorney general are not given that notice, or if a settlement or compromise excludes any amount paid by the statutory subrogee, the third

party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest.

(H) The right of subrogation under this chapter is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party. A statutory subrogee may assert its subrogation rights through correspondence with the claimant and the third party or their legal representatives. A statutory subrogee may institute and pursue legal proceedings against a third party either by itself or in conjunction with a claimant. If a statutory subrogee institutes legal proceedings against a third party, the statutory subrogee shall provide notice of that fact to the claimant. If the statutory subrogee joins the claimant as a necessary party, or if the claimant elects to participate in the proceedings as a party, the claimant may present the claimant's case first if the matter proceeds to trial. If a claimant disputes the validity or amount of an asserted subrogation interest, the claimant shall join the statutory subrogee as a necessary party to the action against the third party.

(I) The statutory subrogation right of recovery applies to, but is not limited to, all of the following:

(1) Amounts recoverable from a claimant's insurer in connection with underinsured or uninsured motorist coverage, notwithstanding any limitation contained in Chapter 3937. of the Revised Code;

(2) Amounts that a claimant would be entitled to recover from a political subdivision, notwithstanding any limitations contained in Chapter 2744. of the Revised Code;

(3) Amounts recoverable from an intentional tort action.

(J) If a claimant's claim against a third party is for wrongful death or the claim involves any minor beneficiaries, amounts allocated under this section are subject to the approval of probate court.

(K) Except as otherwise provided in this division, the administrator shall deposit any money collected under this section into the public fund or the private fund of the state insurance fund, as appropriate. Any money collected under this section for compensation or benefits that were charged pursuant to section 4123.932 of the Revised Code to the surplus fund account created in division (B) of section 4123.34 of the Revised Code and not charged to an employer's experience shall be deposited in the surplus fund account and not applied to an individual employer's account. If a self-insuring employer collects money under this section of the Revised Code, the self-insuring employer shall deduct the amount collected, in the year collected, from the amount of paid compensation the self-insured employer is required to report under section 4123.35 of the Revised Code.