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SUBROGATION OF SUBSEQUENT ATTORNEY'S MALPRACTICE CLAIM ARISING OUT OF SAME INJURY FOR WHICH EMPLOYEE RECEIVED LHWCA BENEFITS.

Employer, who paid benefits to injured worker under the Longshore and Harbor Workers' Compensation Act brought action, seeking subrogation rights to employee's potential malpractice claim against attorneys who represented employee in a Federal Tort Claims Act action against the government which arose out of the same injury for which employee received Longshore and Harbor Workers' Compensations Act benefits.

ITT Federal Services Corp. and Pacific Employers Insurance v. Harry Anduze Montano and Noelma Colon Cordoves
United State Court of Appeals for the First Circuit
474 F.3d 32
(Decided January 26, 2007)

Edgar O. Colon was an employee of plaintiff ITT Federal Services Corp. ("ITT"), stationed in a United States naval installation in Puerto Rico. Colon was seriously injured when a Navy pilot errantly dropped two bombs near the control tower in which Colon was working. Colon hired the defendant attorneys Harry Anduze Montano and Noelma Colon Cordoves to file an "administrative compensation claim against ITT's insurance company, plaintiff Pacific Employers Insurance Co. ("PEI")." Colon brought suit under the Defense Base Act,¹ which included terms of the Longshore and Harbor Workers' Compensation Act ("LHWCA"). Colon eventually settled, receiving a benefit package of \$305,000.00.

Prior to the settlement, defendants, on behalf of Colon, also filed a suit in federal court under the Federal Tort Claims Act (FTCA),² seeking \$12 million in damages. The tort suit named the Navy and ITT as defendants. The district court dismissed this lawsuit for two reasons. First, FTCA §§ 2671 and 2679(a) preclude suits against military departments; the statute only allows suits against the United States. Second, Colon settled his administrative claim and did not amend his claim to include the United States. Once an employee receives a remedy under LHWCA, the employee is not entitled to sue the employer again in tort. Plaintiff in this case filed a legal malpractice lawsuit on the theory that defendant filed an administrative claim and a tort claim. The district court dismissed plaintiff's case, relying on *Moore v. Greenberg*,³ pursuant to Fed.R.Civ.P.12(b)(6).

Subdivision (b) of the LHWCA § 933 provides a limited subrogation right to an employer where its employee recovers under the LHWCA for injuries caused by a third party. If an employee commences an action against the third party within six months after acceptance of the administrative award, as provided by LHWCA, then a "corresponding judicially created lien attaches in favor of the employer for benefits paid up to the amount of the employee's recovery."⁴ If an employee does not commence an action within the six-month period, an employer has ninety days to institute its own suit against the third party. If an employer does not file the suit within ninety days, the right of action reverts back to the employee. "Where an employer's insurance carrier has paid the compensation due under the LHWCA, the Act subrogates the employer's rights to the carrier."⁵

The plaintiff in this case misinterpreted § 933. The plaintiff interpreted § 933 to include a malpractice claim that Colon might have against the defendants. However, "the...injury § 933 addresses

¹ 42 U.S.C. §§ 1651-1654.

² 28 U.S.C. §§ 1346(b), 2401(b), 2671-80.

³ 834 F.2d 1105 (1st Cir. 1987).

⁴ *ITT v. Cordoves*, 474 F.3d 32, 35 (citing U.S.C. §933(b)).

⁵ *Id.*

is the harm Colon sustained in ‘the course of employment’—that is, the harm caused by the Navy pilot’s errant bombing of Colon’s position in the control tower.”⁶ “[A] physical injury arising in the course of a covered worker’s employment is separate and distinct from a legal injury arising out of an attorney’s misfeasance in pursuing a third-party tortfeasor responsible for such injury.”⁷ Any malpractice injury that Colon might have suffered as a result of defendants’ misconduct did not occur in the course of Colon’s employment. Thus, the appellate court affirmed the district court’s decision to dismiss the plaintiff’s claim because the employer had no claim where his employee had none.

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⁶ *Id.*

⁷ *Id.*