COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION

AARON KANZE,	:	MODIFICATION PETITION NO.:
Claimant	:	180-36-3893
	:	
v.	:	BUREAU CLAIM NO.: 2571769
MARVIN E. KANZE, INC.,	:	JUDGE SARAH C. MAKIN
insured through Federated Mutual	:	BARCLAY SQUARE CENTER, 2nd Fl.
Insurance Company,	:	1500 GARRETT ROAD
Defendant	:	UPPER DARBY, PA 19082

MEMORANDUM OF DEFENDANT, MARVIN E. KANZE, INC., INSURED THROUGH FEDERATED MUTUAL INSURANCE COMPANY IN SUPPORT OF AN ORDER GRANTING ITS MODIFICATION PETITION

THE CHARTWELL LAW OFFICES, LLP

Andrew E. Greenberg, Esquire
Attorney I.D. No.: 41334
Attorney for Defendant,
Marvin E. Kanze, Inc.,
insured through Federated Mutual Insurance Company

Valley Forge Corporate Center
2621 Van Buren Avenue
Norristown, PA 19403
(610) 666-7700

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I. INTRODUCTION

Marvin E. Kanze, Inc., insured through Federated Mutual Insurance Company, ("carrier") by and through its attorneys of record, The Chartwell Law Offices, LLP, hereby respectfully requests that its Modification Petition be granted, affording it reimbursement of its subrogation lien, since the uncontroverted evidence of record establishes that Aaron Kanze ("claimant") recovered third-party civil damages arising out of his November 2, 1998 work-related injury, for which he received benefits under the Pennsylvania Workers' Compensation Act.

II. FACTUAL SUMMARY

In November 1998 claimant was employed as President of Marvin E. Kanze, Inc., a Pennsylvania corporation, providing air conditioning/heating service out of its offices located in Havertown, Pennsylvania. (Testimony of Aaron Kanze, taken by deposition on January 21, 2004 at 13-14).

His duties as President involved all aspects of the company's business, including the procurement of insurance. (Kanze, 1/21/04 at 14).

While in the course of his employment duties with the company (Kanze, 1/21/04 at 5) on November 2, 1998, claimant, after leaving a meeting at the company's supply house, was rear-ended by another vehicle while waiting to make a left-hand at an intersection, as he traveled to see a customer. (Kanze, 1/21/04 at 5-6) (See Recorded Statement, dated 1/19/99 submitted of record as Exhibit "D-2" at pp. 2-3); (See Employer's Report of Injury, submitted of record as Exhibit "D-1").

As a result of the accident, claimant tore his left rotator cuff and suffered nerve damage to his left arm. (Kanze, 1/21/04 at 4).

On December 22, 1998, he completed and filed with carrier, an Employer's Report of Occupational Injury or Disease describing the circumstances surrounding his November 2, 1998 work injury. (Kanze, 1/21/04 at 19-20(See Exhibit "D-1"). Two weeks later on January 9, 1999, he participated in a telephone interview that was recorded carrier's claims representative. (Kanze, 1/21/04 at 20)(See Exhibit "D-2").

Three days later, by letter dated January 12, 1999, carrier's claims representative advised the carrier at risk for civil damages arising out of claimant's work injury, of its subrogation lien (See Subrogation Letter dated 1/12/99, submitted of record as Exhibit "D-3").

After having treated his shoulder with physical therapy and after having undergone an MRI study, claimant underwent shoulder surgery one year after his work injury, on December 14, 1999, performed by orthopedic surgeon, Dr. Gerald Williams (Kanze, 1/21/04 at 26). Since he did not miss at least seven days of work, he was informed by carrier that he would not be eligible for disability benefits under the Act, (Testimony of Karen Eberhardt, taken by deposition on January 21, 2004 at 12), prompting carrier to classify the claim as a medical only claim and prompting carrier, in accordance with its normal procedure at the time, not to issue a Notice of Compensation Payable. (Eberhardt, 1/21/04 at 15-16).

Still, carrier accepted liability for claimant's workers' compensation claim (Eberhardt, 1/21/04 at 16) by continuing to provide him medical benefits for all treatment related to his November 2, 1998 work injury for the ensuing four years, through April 30, 2002, while accumulating a total medical benefit lien of $21,105.66 (Kanze, 1/21/04 at 36-37, 46) (See Carrier Payment Detail Sheet, submitted of record as Exhibit "D-6").

In the meantime, claimant filed a third-party civil action against the driver of the vehicle that struck him on November 2, 1998, Natalie Frail, whose carrier at the time was CNA Insurance Company (Kanze, 1/21/04 at 9, 18).

During the litigation of claimant's civil action, carrier communicated with claimant on a regular basis, providing him with whatever information he requested, including a copy of his workers' compensation policy, auto policy and a complete copy of all medical records contained in his workers' compensation file. (Eberhardt, 1/21/04 at 20, 54).

In April 2002, claimant settled his third-party civil action for $35,000.00.

Although claimant had been advised by the attorney litigating his civil action, Allen Mandelbaum, that carrier "might" seek reimbursement of its subrogation lien, (Kanze, 1/21/04 at 13), when carrier asserted its lien in early 2003, claimant, through the attorney, refused to honor the request, citing a series of incorrect assertions that carrier was forced to dispel over the course of a number of months. For example, claimant maintained that : (1) at the time of his November 2, 1998 motor vehicle accident, he was not acting in the course of his employment (Kanze, 1/21/04 at 42); (2) as of November 2, 1998, he had opted out of workers' compensation coverage (Kanze, 1/21/04 at 43); and (3) he did not file a workers' compensation claim (Kanze, 1/21/04 at 42).[1]

Ultimately, because of claimant's refusal to honor its lien, carrier filed the instant Modification Petition on November 21, 2003 asserting its entitlement to subrogation reimbursement as provided for under Section 319 of the Act.

[1] Claimant has since conceded that none of the foregoing allegations is accurate, though he maintains that he did not know that he had filed a workers' compensation claim. (Kanze, 1/21/04 at 42).

In an Answer filed with the WCJ on December 15, 2003, claimant denied carrier's entitlement to subrogation, alleging that carrier "has never filed a Notice of Compensation Payable or an Agreement, and, accordingly, there exists no 'compensable injury.'"

In response to claimant's Answer, carrier, recognizing that the time period for the filing of a petition by either party had been extended - through its payment of compensation - to **April 30, 2005**, and mindful of the Commonwealth Court of Pennsylvania's recent sanctioning of its use, issued a "Medical Only Notice of Compensation Payable" form on December 22, 2003, formally accepting claimant's claim as compensable under Act.

III. EXHIBITS

CLAIMANT'S EXHIBITS

"C-1" Deposition of Aaron Kanze dated 1/21/04

CARRIER'S EXHIBITS

"D-1"	Employer's Report of Occupational Injury dated 12/22/98
"D-2"	Transcript of claimant's recorded statement dated 1/5/99
"D-3"	Carrier subrogation letter dated 1/12/99
"D-4"	Adjuster's running notes
"D-5"	Carrier insurance policy
"D-6"	Workers' Compensation Payment Detail Report
"D-7"	Medical bills
"D-8"	Carrier letter to claimant dated 2/25/02
"D-9"	Medical only Notice of Compensation Payable
"D-10"	Claimant's Civil Complaint
"D-11"	Loss run documentation
"D-12"	Deposition of Karen Eberhardt dated 1/21/04

BUREAU EXHIBITS

None

IV. ARGUMENT

A. SINCE THE UNCONTROVERTED EVIDENCE OF RECORD ESTABLISHES THAT CLAIMANT RECOVERED DAMAGES ARISING OUT OF HIS NOVEMBER 2, 1998 WORK-RELATED INJURY, DEFENDANT IS ENTITLED TO ASSERT ITS SUBROGATION RIGHTS, PROVIDED UNDER SECTION 319 OF THE ACT.

Section 319 of the Act provides that the defendant in cases such as this one, has an absolute right to reimbursement of its subrogation lien:

> "Where the compensable injury is caused in whole or in part by the act or omission of a third-party, the employer shall be subrogated to the right of the employe…against such third-party to the extent of the compensation payable under this article by the employer…"

As noted, the right to subrogation is an **absolute** one that may not be challenged, even where the employer was partially responsible for the employee's injury. Winfree v. Philadelphia Electric Company, 520 Pa. 392, 554 A.2d 45 (1989); Growth Horizons, Inc. v. Workers' Compensation Appeal Board (Hall), 767 A.2d 619 (Pa. Cmwlth. 2001).

In addition, it is well-settled that in enforcing its subrogation lien, the defendant may seek future credit against the claimant by filing a Modification Petition, Wheeling-Pittsburgh Steel Corp. v. Workmen's Compensation Appeal Board (McFadden), _____ Pa. Cmwlth. _____, 587 A.2d 852 (1991) and that under such circumstances, the defendant can also request that the WCJ order immediate reimbursement of those indemnity/medical benefits made as of the date of the third-party settlement. Cox v. Workmen's Compensation Appeal Board (Otis Elevator, Division of United Technologies), 150 Pa. Cmwlth. 205, 615 A.2d 878 (1992) a*ppeal denied*, 533 Pa. 663, 625 A.2d 1196 (1993).

It is further well-settled that a formal adjudication of the third-party's negligence is not required when the workers' compensation defendant invokes its right to

subrogation against the employee or the fund received by the employee from the alleged third-party tortfeasor. Light v. General Battery Corp., 398 Pa. Super. 255, 580 A.2d 1337 (1990).[2]

In this case, there is no dispute that all of the elements necessary to support a claim for subrogation under the Act have been satisfied:

(1) It is uncontroverted that on November 2, 1998, claimant was an "employee" of a corporate entity, Marvin E. Kanze, Inc. (Testimony of Aaron Kanze, taken by deposition on January 21, 2004 at 13, 17);

(2) It is uncontroverted that on November 2, 1998, claimant was involved in a motor vehicle accident while in the course and scope of his employment duties with Marvin E. Kanze, Inc. (Kanze, 1/21/04 at 17-18);

(3) It is uncontroverted that claimant's November 2, 1998 motor vehicle accident occurred as a result of the carelessness of the driver of the other vehicle, Natalie Frail (Kanze, 1/21/04 at 18) (See Exhibit "D-2" at pp. 2-3);

(4) It is uncontroverted that as a result of his November 2, 1998 work-related incident, claimant tore his left rotator cuff and suffered nerve damage to his left upper extremity (Kanze, 1/21/04 at 4);

(5) It is uncontroverted that as a result of his November 2, 1998 work-related incident, claimant filed an Employer's Report of Occupational Injury or Disease with carrier, outlining the circumstances of his work injury and identifying the workers' compensation policy period of February 1, 1998 through February 1, 1999 (Kanze, 1/21/04 at 19) (see Exhibit "D-1");

(6) It is uncontroverted that carrier provided claimant, as an employee of Marvin E. Kanze, Inc., with

[2] As noted, carrier submitted correspondence to the third-party defendant's insurance carrier, CNA Insurance, invoking its right to subrogation against claimant's claim for third-party civil damages arising out of his November 2, 1998 motor vehicle accident (See Exhibit "D-3").

workers' compensation insurance coverage on November 2, 1998 (See Insurance Policy, submitted of record as part of Exhibit "D-5");

(7) It is uncontroverted that as a result of his November 2, 1998 work incident, claimant received various forms of medical treatment including surgery, through April, 2002, which carrier administered under the Pennsylvania Workers' Compensation Act (Kanze, 1/21/04 at 36-37)(See Payment Detail Sheet, "D-6"); and

(8) It is uncontroverted that through April 30, 2002, carrier provided claimant medical benefits totaling $21,105.66 (Eberhardt, 1/21/04 at 18).

Although claimant does not dispute any of the foregoing, he nevertheless, refuses to provide subrogation reimbursement because, as noted above, carrier "never filed a Notice of Compensation Payable or an Agreement, and, accordingly, there exists no 'compensable injury'."

In response to claimant's latest response it reimbursement request, carrier issued a Medical Only Notice of Compensation Payable on December 22, 2003, formally accepting claimant's claim as compensable under the Act. (Eberhardt, 1/21/04 at (See Exhibit "D-9").

Claimant, however, has persisted in his refusal to provide reimbursement, urging presumably that carrier's filing of the Notice was not timely. (See Cross-Examination of Karen Eberhardt, 1/21/04 at 24)

Although it has never been articulated, it is presumed that claimant's timeliness defense refers to the three-year limitations period set forth in Section 315 of the Act[3].

[3] There is nothing in the Act that stands for the proposition that an insurance carrier is prohibited from accepting a claim more than 21 days following a work injury under Section 406.1.

In other words, claimant apparently maintains that the WCJ in this case does not have the authority to grant the relief carrier is seeking because the workers' compensation claim at issue is in repose[4].

Carrier respectfully submits, however, that claimant's characterization of his claim and his assessment of the WCJ's authority under Section 315 of the Act are meritless.

In fact, just the opposite of his position is true – the plain language of the provision contemplates the kind of procedural history that has ensued since the occurrence of claimant's November 2, 1998 work injury; it allows for its continued vitality and it confirms the WCJ's authority to adjudicate defendant's Petition.

Section 315 of the Act instructs, in pertinent part, as follows:

> "In cases of personal injury all claims for compensation shall be forever barred, unless, within three years after the injury, the parties shall have agreed upon the compensation payable under this Article; or unless within three years after the injury, one of the parties shall have filed a petition as provided in Article IV hereof…where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of three years from the time of the making of the most recent payment prior to the date of filing such petition…"(emphasis supplied).

The plain language of the provision sets forth, of course, the above-referenced three-year limitations period, and instructs that the period will be **extended** where the workers' compensation carrier provides compensation benefits to the injured worker, in the absence of any agreement or petition, following the occurrence of the work injury. In

[4] It is well-settled that Section 315 of the Act is a **statute of repose** meaning that an agreement to pay or an implied promise to do so, following the expiration of the expressed time period cannot revive a claim, which is not the case with a true statute of limitations provision. See McDevitt v. Workmen's Compensation Appeal Board (Ron Davison Chevrolet), 106 Pa. Cmwlth. 207, 525 A.2d 1252 (1987), *appeal granted* 518 Pa. 629, 541 A.2d 1140 (1988), *appeal dismissed* 520 Pa. 119, 552 A.2d 1048 (1989).

other words, the payment of compensation **tolls** the three-year period to which claimant apparently refers.

Indeed, both Pennsylvania Supreme Court and the Commonwealth Court have made clear that the **payment of medical expenses** tolls the three-year limitations period set forth in Section 315 of the Act provided the payments are made, as they were in this case - with the intent to compensate for the effects of a work-related injury. Schreffler v. Workers' Compensation Appeal Board (Kocher Coal Company), 567 Pa. 512, 788 A.2d 963 (2002); Golley v. Workers' Compensation Appeal Board (AAA Mid-Atlantic, Inc.), 747 A.2d 1253 (Pa. Cmwlth. 2000); Levine v. Workers' Compensation Appeal Board (Newell Corp.), 760 A.2d 1209 (Pa. Cmwlth. 2000).[5]

There is no dispute in this case, that as a result of claimant's November 2, 1998 work injury, carrier, with the intent to compensate claimant for the effects of the work injury, provided him with medical benefits under the Act through **April 30, 2002** (See Payment Detail Report, submitted of record as Exhibit "D-7") (Eberhardt, 1/21/04 at 16) (Kanze, 1/21/04 at 46).

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[5] Carrier is mindful of the fact that the cases cited refer to fact patterns where the injured workers were afforded time to file Claim Petitions beyond the three-year limitations period, following the payment of medical expenses for the purpose of compensating their work-related injuries. That procedural distinction does not disfavor carrier's position in this case, but fully supports carrier's position because the courts' treatment of the tolling language of Section 315 of the Act contemplates and addresses the extended vitality of a workers' compensation claim. In other words, the courts have ruled that the language of Section 315 **prolongs the life** of a workers' compensation claim beyond the normal three-year period where medical payments are made for the purpose of compensating that work injury. By prolonging or extending the life of the claim, the payment of medical compensation affords claimant additional time to file a petition. Simultaneously, the payment of compensation necessarily exposes the defendant to workers' compensation liability, and therefore necessarily affords the defendant additional time to either officially accept the claim or to file its own petition seeking to clarify the nature and extent of its liability under the Act. Indeed, it necessarily follows that since under Section 315 of the Act, **both** the claimant and defendant have the power to establish compensability either by Agreement or by adjudication, where the defendant provides medical benefits to the claimant, **both parties** are afforded additional time to address the compensability of the injury, by Agreement or through adjudication.

Accordingly, though it would now be unnecessary given carrier's filing of a Notice of Compensation Payable, claimant has until **April 30, 2005** to file a Claim Petition seeking a WCJ adjudication, declaring his November 2, 1998 work injury compensable under the Act and procuring whatever additional medical benefits and indemnity benefits he might believe he is entitled to on the basis of his November 2, 1998 work injury.

Because carrier faces workers' compensation liability/exposure through April 30, 2005, it necessarily has the right under Section 315 of the Act, to administratively accept claimant's claim by way of Agreement or through the issuance of a Notice of Compensation Payable, or, as is discussed below, to adjudicate the compensability of claimant's work injury by filing its own petition.

Having responding to the various allegations that claimant made in refusing to provide subrogation reimbursement for months, – he opted out of workers' compensation coverage and he did not file a workers' compensation claim – carrier finally was confronted with claimant's claim viability argument.

Recognizing claimant's latest position, and facing workers' compensation exposure through **April 30, 2005**, by virtue of its payment of medical compensation through April 30, 2002, carrier issued a Medical Only Notice of Compensation Payable on December 22, 2003, accepting formally claimant's claim as compensable, while confirming that his November 2, 1998 work injury did not result in a compensable period of disability. (Eberhardt, 1/21/04 at 15);(See Notice of Compensation Payable, submitted of record as Exhibit "D-9," 2/23/04 at 6).

The Notice of Compensation Payable was issued in accordance with the recent Commonwealth Court holding in Waldameer Park, Inc. v. Workers' Compensation

Appeal Board (Morrison), 819 A.2d 164 (2003) which sanctioned, for the first time, the acceptance of a work injury where no compensable wage loss results, through the filing of a "Medical Only Notice of Compensation Payable[6]."

Accordingly, although carrier has always taken the position that it accepted claimant's claim as compensable from the outset, (Eberhardt, 1/21/04 at) **as evidenced by its willingness to continue to provide claimant with medical coverage under the Act through April 30, 2002 – nearly six months after the expiration of the three-year period following claimant's November 2, 1998 work injury,** - carrier respectfully submits that since the three-year statute of limitations period set forth in Section 315 of the Act was tolled by virtue of its continued payment of medical benefits through April 30, 2002, its filing of the Medical Only Notice of Compensation Payable on December 22, 2003 lays to rest claimant's continued refusal to provide subrogation reimbursement.

Even if one were to ignore carrier's filing of its Medical Only Notice of Compensation Payable, the result would, nevertheless, be the same since, as noted above, Section 315 of the Act **allows both parties to file petitions** during the three-year period following a work injury in order to address its compensability.

Accordingly, while facing workers' compensation exposure through April 30, 2005, carrier had the right, by statute, to file the instant Petition seeking reimbursement of its lien, and necessarily requesting an adjudication of the compensability of claimant's work injury.

[6] Seizing upon the ruling in the case, the Bureau has since produced a new Notice of Compensation Payable form that more specifically provides for a Medical Only acceptance of a claim.

In this case, defendant filed its Modification Petition on November 12, 2003 well within the exposure to liability period established by its continued payment of compensation through April 30, 2002.

Since there is no dispute between the parties that claimant suffered a work-related injury on November 2, 1998 while acting in the course and scope of his employment duties with his employer that prompted the filing of a claim with his employer's workers' compensation carrier and that prompted carrier to provide claimant with medical benefits through April 30, 2002, there can be no question that claimant's November 2, 1998 work injury represents a compensable claim for which defendant must be afforded subrogation reimbursement under Section 319 of the Act.

Carrier has completed a Third-Party Settlement Agreement, attached as the next page of this Memorandum, setting forth the calculation of its net subrogation recovery totaling $13,507.62 based upon a total lien of $21,105.66.

Carrier is mindful that having no legal basis for his refusal to provide defendant the subrogation it is seeking, claimant has offered a transparent response that he did not know he was provided workers' compensation benefits from carrier on the basis of his November 2, 1998 work injury until he was notified that carrier was asserting its subrogation lien in the spring of 2003 (Kanze, 1/21/04 at 12).

In fact, almost immediately after presenting his contention, claimant unwittingly perhaps, quickly admitted that while he was litigating his third-party civil action, he and his attorney were well aware of carrier's subrogation lien, but hoped that it would not be pursued:

> Q. And at any time before [carrier requested subrogation in 2003] had you ever been made aware that [carrier] was asserting its workers'

compensation lien, assuming that one existed in this case?

A. My attorney in the civil action arising out of my work injury Allen Mandelbaum said that it might happen. He said he didn't expect it would, but he said it might.

(Kanze, 1/21/04 at 12)(emphasis supplied).

Accordingly, the evidence of record establishes that claimant was aware of and sensitive to carrier's lien, but made a calculated determination to simply ignore it.

There are a series of facts of record that firmly refute any notion that claimant did not know that he had filed a workers' compensation claim:

(1) On December 22, 1998, claimant completed and filed with carrier an **Employer's Report of Occupational Injury or Disease with carrier that includes a series of references to the Bureau of Workers' Compensation** and to the requirement that that information contained in the report be complete and accurate in accordance with the terms of the Pennsylvania Workers' Compensation Act and that made reference to the corresponding workers' compensation policy period of February 1, 1998 through February 1, 1999 (See Exhibit "D-1,");

(2) During the course of a recorded interview with carrier's original claims representative, Roy Franklin on January 5, 1999, claimant was asked whether he had **ever before filed a workers' compensation claim,** leaving no doubt that the interview was conducted pursuant to a workers' compensation claim he was filing on the basis of his November 2, 1998 work injury (See Exhibit "D-2," at p. 5);

(3) On July 5, 2001, carrier faxed to claimant's attorney a copy of the **workers' compensation insurance policy covering claimant's November 2, 1998 work injury** (See Exhibit "D-5," 2/23/04 at 5);

(4) Numerous notations are contained in the various medical records that were mailed directly to

claimant by carrier on February 25, 2002, confirming that the medical bills incurred by claimant arising out of his November 2, 1998 work injury were **audited in accordance with the workers' compensation fee schedule guidelines** (See Exhibit "D-7," at pp. 1, 3, 6);

(5) As noted, on February 25, 2002, carrier's claims representative, Karen Eberhardt, mailed directly to claimant his medical records indicating in pertinent part **"enclosed please find the medical records you requested from your workers' compensation file"** (See Letter dated 2/25/02, submitted of record as Exhibit "D-8," 2/23/04 at 6);

(6) On December 10, 1999, claimant called Ms. Eberhardt and asked her whether, on the basis of the surgery that he was planning to undergo during the week of December 13, 1999, he would be entitled to wage loss benefits (see Running Notes, submitted of record as Exhibit "D-4," at p. 4) (Eberhardt, 1/21/04 at 11);

(7) Twelve days later on December 22, 1999 claimant called Ms. Eberhardt again advising that the surgery he had undergone went well and that he had missed three and a half days of work. **Ms. Eberhardt, in turn, explained that he would not be entitled to workers' compensation benefits because he had not missed at least seven days of work** as a result of his work injury thereby precluding him from recovering such benefits under the Pennsylvania Workers' Compensation Act (See Exhibit "D-4," at p. 5) (Eberhardt, 1/21/04 at 12);

(8) On February 20, 2002, claimant called Ms. Eberhardt again during which Ms. Eberhardt advised him that carrier did not have an auto file relating to the November 2, 1998 work injury and that the information he was seeking regarding repairs made to claimant's automobile would not be contained in her **workers' compensation file** for which she was responsible (See Exhibit "D-4," at p. 6) (Eberhardt, 1/21/04 at 13); and

(9) On a yearly basis, carrier provided claimant with **loss runs clearly identifying claimant's receipt of**

> **workers' compensation benefits on the basis of his November 2, 1998 work injury** (Eberhardt, 1/21/04 at 63-64) (See Loss Run documentation supplied by claimant, submitted of record as Exhibit "D-11," 2/23/04 at 6).

The overwhelming evidence of record leaves no doubt, therefore, that claimant filed for and received workers' compensation benefits on the basis of his November 2, 1998 work injury; repeatedly telephoned carrier in order to assure that he received all workers' compensation benefits to which he was entitled and requested that carrier assist him and his attorney in litigating his third-party civil action arising out of his November 2, 1998 work injury, by supplying him with information from his workers' compensation file.

Finally, carrier feels that it is important that one element of claimant's refusal to provide subrogation reimbursement be addressed in these proceedings.

It will be recalled that during the course of his questioning of carrier's claims representative, claimant's counsel seemed to suggest that carrier's administration of claimant's workers' compensation claim was designed to insulate insurance carrier from workers' compensation liability following the expiration of the three-year period following claimant's November 2, 1998 work injury – that had claimant sought benefits beyond the three-year period, carrier would have refused to provide coverage. (Cross Examination of Eberhardt, 1/21/04 at 43-44, 45).

The concern contemplated by counsel's questions – legitimate ones, carrier concedes – has already been answered by carrier through its good faith administration of claimant's claim.

It will be recalled that **more than six months after the completion of the three-year period** that followed claimant's November 2, 1998 work injury, **carrier continued to cover claimant's medical costs** incurred on the basis of his November 2, 1998 work

injury through late April 2002 (See Payment Detail Report, Submitted of record as Exhibit "D-6"):

> Q. Now, with respect to this document, D-6, tell the judge please what it indicates, in terms of the time period during which Federated continue to make payment of behalf of Mr. Kanze with respect to his November 2, 1998 work injury .
>
> A. to the left side would be the date that the check was made payable to the provider, and you can see that we made payments from February 2nd, 1999 through April 30th, 2002.

(Eberhardt, 1/21/04 at 16).

Accordingly, the concerns expressed by claimant's counsel have been laid to rest – carrier continued to provide workers' compensation benefits to claim through late April, 2002 even though the three-year period following the work injury had long since expired.

Throughout the administration of claimant's claim, carrier has acted with diligence and in good faith, providing claimant with all benefits to which he is entitled, and at all times, cooperating with his efforts to pursue civil damages.

Carrier respectfully requests, therefore, that its subrogation rights under the Act be honored through the WCJ's adoption and circulation of carrier's Proposed Third-Party Settlement Agreement.

V. CONCLUSION

Since the uncontroverted evidence of record establishes that on November 2, 1998 claimant suffered a work injury in the course and scope of his employment duties with his employer for which he received workers' compensation benefits under the Act, carrier, by virtue of its payment of those benefits and its effective administration of

claim, should be provided with the subrogation relief to which it is entitled under Section 319 of the Act.

VI. PROPOSED FINDINGS OF FACT

1. The WCJ finds from a review of the evidence that carrier filed the instant Modification Petition with the Bureau on November 21, 2003 seeking subrogation for those benefits it alleges to have provided claimant on the basis of his alleged November 2, 1998 work-related injury.

2. The WCJ finds from a review of the evidence that on or about December 15, 2003, claimant filed an Answer to carrier's Modification Petition challenging carrier's entitlement to subrogation, alleging that carrier "never filed a Notice of Compensation Payable or an Agreement, and, accordingly, there exists no 'compensable injury'."

3. In support of its Modification Petition, carrier presented the deposition testimony of claims representative, Karen Eberhardt. Based on a review of Ms. Eberhardt's testimony, this Workers' Compensation Judge finds the following facts: (a) carrier received an Employer's Report of Occupational Injury or Disease by fax on December 22, 1998 alleging that while in the course of his employment duties with Marvin E. Kanze, Inc., claimant suffered injury to his left shoulder and left upper extremity as a result of a November 2, 1998 motor vehicle accident that occurred in the course of his employment duties; (b) on January 5, 1999 claimant participated in a recorded interview with carrier's assigned claims representative, during which claimant described the circumstances surrounding his work injury and the treatment he received for the work injury as well as the property damage reimbursement he received from CNA Insurance; (c) on January 12, 1999, carrier issued a letter to CNA Insurance

Company asserting its subrogation lien against any third-party civil recovery that claimant might obtain on the basis of his November 2, 1998 work injury; (d) during the course of numerous conversations with claimant, she and claimant discussed his potential entitlement to disability benefits under the Act and his various requests for information from his workers' compensation file; (e) on multiple occasions, she provided claimant and his attorney with information that he requested in order to assist in the prosecution of claimant's third-party civil action; (f) although carrier did not provide claimant with indemnity benefits because he did not miss at least seven days of work following his November 2, 1998 work injury, carrier did cover claimant's reasonable and necessary medical bills totaling $21,105.66 through April 30, 2002; (g) since claimant's claim was a "medical only claim" she did not initially issue a Notice of Compensation Payable or a compensation Agreement, but once it was determined in 2003 that a carrier could do so, she issued a Medical Only Notice of Compensation Payable, on December 22, 2003; and (h) at no time did claimant suggest to her that he did not wish to receive workers' compensation benefits and (i) in accordance with normal policy, claimant would, on a yearly basis, receive "Loss Run" information detailing benefits paid pursuant to the workers' compensation policy of Marvin E. Kanze, Inc.

4. In support of its Modification Petition, carrier also submitted a series of documents. Based on a review of the various documents that carrier submitted, this Workers' Compensation Judge finds the following facts: (a) defendant submitted an Employer's Report of Occupational Injury or Disease containing information normally included upon the filing of a Pennsylvania workers' compensation claim; (b) defendant submitted a transcript from claimant's January 5, 1999 interview with carrier which

suggests that claimant was pursuing a workers' compensation claim and that does not include any statement by claimant that he was seeking auto benefits or did not wish to receive workers' compensation benefits; (c) a letter dated January 12, 1999 from carrier to CNA Insurance Company, the auto carrier for the individual whose automobile struck claimant's motor vehicle on November 2, 1998, asserting carrier's subrogation lien; (d) running notes documenting carrier's interactions with claimant following his November 2, 1998 work injury which indicate that carrier's claims representatives and claimant had multiple conversations during which claimant's entitlement to benefits under the Pennsylvania Workers' Compensation Act was discussed and explained; (e) a fax cover sheet dated July 5, 2001 prepared by carrier's claims representative and submitted to claimant's attorney, Allen Mandelbaum, enclosing copies of Marvin E. Kanze, Inc.'s workers' compensation policy and business auto policy; (f) a detailed transactions form confirming carrier's payment of medical bills incurred by claimant on the basis of his November 2, 1998 work injury totaling $21,105.66 and continuing through April 30, 2002; (g) a packet of medical bills, many of which include statements indicating that many of the bills were reduced in accordance with Pennsylvania Workers' Compensation Fee Schedule Guidelines; (h) a letter dated February 25, 2002 indicating that carrier's claims representative was enclosing to claimant "medical records you requested from your workers' compensation file"; (i) the Medical Only Notice of Compensation Payable that carrier filed with the Bureau on or about December 22, 2003 which references the Commonwealth Court ruling in Waldameer Park, Inc. v. Workers' Compensation Appeal Board (Morrison) and the case law supporting its contention that the Notice of Compensation Payable was issued in a timely fashion under Section 315 of the Act; (j) the Civil Complaint filed by claimant

against Natalie Frail alleging that claimant suffered injury on November 2, 1998 as approximate result of the "negligent, careless, wanton, and reckless manner in which [Ms. Frail] operated her motor vehicle"; and (k) loss history information provided by claimant which indicates that his November 2, 1998 work injury was administered as a workers' compensation claim.

5. In opposition to carrier's Modification Petition, claimant did not present any documentary evidence, but offered his own deposition testimony. Based on a review of claimant's testimony, this Workers' Compensation Judge finds the following facts: (a) on November 2, 1998, claimant was working in the employ of Marvin E. Kanze, Inc., a corporate entity incorporated in the Commonwealth of Pennsylvania; (b) on November 2, 1998, while in the course of his employment duties with his employer, claimant was involved in a motor vehicle accident that occurred when, while stopped at a stop light, he was rear-ended through the carelessness of another driver, causing him to suffer injury to his left upper extremity; (c) in December 1999, claimant filed an Employer's Report of Occupational Injury or Disease setting forth the details of his work-related injury to his employer's workers' compensation carrier, Federated Mutual Insurance Company; (d) thereafter, he provided a recorded statement outlining the circumstances of his November 2, 1998 work-related motor vehicle accident; (e) the medical treatment he received as a result of his work-related incident, was paid for by his employer's workers' compensation carrier, Federated Mutual Insurance Company; (f) he made multiple telephone calls to Federated Mutual Insurance Company providing information, requesting information, and in July 2001, received a letter from the workers' compensation carrier's claims representative that specifically advised him that he was being provided with all medical records from his workers' compensation file; (g)

although he claims that until the spring of 2003, he did not know that the benefits he received were provided on the basis of a workers' compensation claim, he admitted that prior that time, he and his attorney discussed the possibility that carrier would seek reimbursement of its subrogation lien at some point in the future though his attorney advised him that that possibility was unlikely; (h) he continued to treat for his work-related injury through April 2002 at which time he settled his third-party civil action arising out of his November 2, 1998 work injury for $35,000.00;

6. This Workers' Compensation Judge has carefully reviewed the documentary evidence and finds that they establish the following: (a) on November 2, 1998, claimant was employed by Marvin E. Kanze, Inc. and was, on that date, acting in the course and scope of his employment duties; (b) on November 2, 1998, claimant suffered injury to his left upper extremity as a result of the motor vehicle accident that occurred while he was acting in the course and scope of his employment duties with Marvin E. Kanze, Inc. as a result of the carelessness of a third-party motor vehicle operator; (c) as a result of his November 2, 1998 work-related injury, claimant submitted the claim to his employer's workers' compensation carrier, Federated Mutual Insurance Company through the submission of an Employer's Report of Occupational Injury or Disease; (d) as a result of his November 2, 1998 work-related injury, defendant did not provide claimant with indemnity benefits because he did not suffer a compensable period of disability, but did provide claimant medical benefits totaling $21,105.66 and continued to provide claimant with medical benefits through April 30, 2002; and (e) as a result of his November 2, 1998 work-related injury, claimant filed a third-party civil action against the operator of the vehicle that struck him on that date and, settled the law suit in the spring of 2002 for $35,000.00.

7. This Workers' Compensation Judge has carefully reviewed and compared the testimony of carrier's claims representative, Karen Eberhardt, and finds her testimony credible. The testimony of Ms. Eberhardt is credible because: (a) she answered all questions directed to her without in a forthright manner that has not been refuted by any documentation; (b) her testimony is corroborated by the running notes that she prepared while administrating claimant's claim, well-before the dispute between the parties became apparent in 2003; and (c) much of her testimony regarding her interaction with claimant and the administration of claimant's claim is corroborated by claimant's testimony and the documentation that claimant does not dispute.

8. This Workers' Compensation Judge has carefully reviewed the testimony of claimant. The testimony of claimant regarding the facts surrounding his November 2, 1998 work injury, the treatment he received and the basis for and recovery of civil damages arising out of his work injury are credible because it is corroborated by the testimony of Ms. Eberhardt and the content of the documentary evidence described above. The suggestion of claimant that he did not know that his claim was being administered as a workers' compensation claim and was not aware of carrier's subrogation lien until 2003 is not credible because he admitted that well before that date he and his attorney discussed the possibility that carrier would pursue its lien and because the documentary evidence submitted of record establishes that claimant was provided multiple documents confirming that his claim was being administered as a workers' compensation claim and there is no documentation of record supporting claimant's contention that he was unaware of the nature and character of the benefits that he received through April 30, 2002.

9. Accordingly, the WCJ finds from a review of the evidence that defendant has met its burden of establishing that claimant suffered a compensable work-injury under the Pennsylvania Workers' Compensation Act on November 2, 1998 and that the compensability of the work injury was preserved through carrier's continued payment of compensation benefits through April 30, 2002.

VII. PROPOSED CONCLUSIONS OF LAW

1. Both claimant and carrier are bound by the provisions of the Pennsylvania Workers' Compensation Act 77 P.S. §§ 1 *et seq* (Purdon's 2003).

2. Defendant has met its burden of establishing that claimant suffered a compensable work injury on November 2, 1998 thereby entitling defendant to assert its subrogation rights under Section 319 of the Act.

3. The WCJ hereby incorporates the Third-Party Settlement Agreement prepared on the basis of claimant's receipt of workers' compensation benefits and the settlement of his third-party civil action arising out of his November 2, 1998 work-related injury.

VIII. PROPOSED ORDER

AND NOW, this _____ day of _____, it is hereby ORDERED and DECREED that defendant, having met its burden of proof, is entitled to all subrogation rights to which it is entitled under Section 319 of the Act. It is further hereby ORDERED and DECREED that the parties' Third-Party Settlement Agreement is adopted and is to be effectuated in accordance with this Order.

_____
Judge Sarah C. Makin

CERTIFICATE OF SERVICE

I, ***Andrew E. Greenberg, Esquire***, attorney for defendant/employer, do hereby certify that I served a true and correct copy of ***Defendant's Brief In Support of an Order Granting Its Modification Petition*** upon the following individuals:

The Honorable Sarah C. Makin
Bureau of Workers' Compensation
Barclay Square Center, 2nd Floor
1500 Garrett Road
Upper Darby, PA 19082

Mark J. LeWinter, Esquire
Anapol, Schwartz, Weiss, Cohan, Feldman, Smalley, P.C.
1900 Delancey Place
Philadelphia, PA 19103
Attorney for Claimant

Andrew E. Greenberg, Esquire
Attorney for Defendant,
Marvin E. Kanze, Inc.,
insured through Federated Mutual Insurance Company

Date: April 30, 2004