



THE SUFFOLK LAWYER

THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION

DEDICATED TO LEGAL EXCELLENCE SINCE 1908

website: www.scba.org

Vol. 26 No 9
May 2010

Increased Workers' Compensation Benefit Rates Create New Liens in Motor Vehicle Cases

By Robert Grey

Workers' Compensation Liens

When a work-related accident gives rise to a personal injury claim in addition to a workers' compensation claim, Workers' Compensation Law § 29 gives the workers' compensation carrier the right to consent to any compromise or discontinuance of the personal injury claim (the "third-party action"), the right to a lien for payments made prior to the date of settlement, and the right to a credit against its future obligation to make payments.

These rights may be modified in some circumstances. The right to consent may

be obviated if a judicial compromise order is obtained pursuant to WCL § 29(5). The right to a lien is subject to equitable apportionment of the litigation costs pursuant to WCL § 29(1) and (in cases involving death or permanent total disability) *Matter of Kelly v. State Insurance Fund*, 60 N.Y.2d 791, 456 N.E. 2d 131, 468 N.Y.S.2d 850 (1983). The right to a credit is now subject to equitable apportionment of the third-party litigation expense pursuant to *Matter of Burns v. Varriale*, 9 N.Y.3d 207 (2007).

Until July 1, 2007, the most common circumstance in which the compensation carrier's lien right was modified involved accidents concerning the use or operation of a motor vehicle. In such cases, WCL § 29(1-a) provides that the workers' compensation carrier does not have a lien against a third-party recovery for benefits paid equivalent to basic economic loss under Insurance Law Section 5102 ("the No-Fault Law"). Thus, to the extent that



Robert Grey

benefits paid do not exceed \$2,000 per month for lost wages during the first three years, or \$50,000 in the aggregate between lost wages and medical expenses, the workers' compensation carrier has no recoverable lien.¹

An injured worker may receive workers' compensation benefits up to two-thirds of his or her pre-injury wage, subject to the maximum rate in effect for the date of accident. WCL § 15. From July 1, 2002 to July 1, 2007, the maximum workers' compensation benefit rate was \$400 per week, which was equivalent to \$1,750 per month. As this figure was less than the

\$2,000 per month No-Fault threshold, workers' compensation benefits for wage loss within the first three years were almost always equivalent to No-Fault benefits, and there were usually no workers' compensation liens in motor vehicle cases settled before the three-year mark in which compensation and medical payments totaled less than \$50,000.²

Beginning July 1, 2007, the maximum workers' compensation benefit rates now exceed \$2,000 per month. For accident dates between July 1, 2007 and June 30, 2008, the maximum rate is \$500 per week; between July 1, 2008 and June 30, 2009 it is \$550 per week; between July 1, 2009 and June 30, 2010 it is \$600 per week; and

(Continued on page 21)

FOCUS ON
WORKERS'
COMPENSATION
SPECIAL EDITION

Increased Workers' Compensation Benefit Rates Create New Liens in Motor Vehicle Cases (Continued from page 9)

from July 1, 2010 to June 30, 2011 it will be \$739.83 per week.³ These maximum rates exceed basic economic loss by \$38.46 per week, \$88.46 per week, \$138.46 per week, and \$278.29 per week, respectively.

As a result, a portion of payments made by compensation carriers in motor vehicle cases within the first three years may now exceed basic economic loss, and thus constitute a lien on third-party recoveries. Personal injury practitioners can no longer rely on the "three years or \$50,000" rule to assume that there is no workers' compensation lien in a motor vehicle case. Rather, the practitioner must determine whether the client's workers' compensation payments exceeded \$2,000 in any month. To the extent that they do, the compensation carrier will have a lien for payments in excess of that figure.

Schedule Loss Cases

The increased maximum rates also

affect "schedule loss" cases involving permanent injury to limbs. In these cases, the compensation award is translated into weeks of benefits. Even if the aggregate award does not exceed three years or \$50,000 of benefits, where the benefit rate exceeds \$461.53 per week (equivalent to \$2,000 per month), the excess weekly payments may constitute a lien on the third-party recovery. By way of example, a schedule loss award equivalent to 36.6 weeks of benefits could result in a lien of \$1,384.56 if paid at a \$500 rate, or as much as \$10,185.41 if paid at a \$739.83 rate.

Continuing Compensation Benefits

In cases where the third-party action is settled within three years of the accident and the \$50,000 limit has not been reached, workers' compensation payments may continue, subject to certain limitations. Just as benefits in excess of \$2,000 per month constitute a lien if paid prior to settlement of the third-party action, benefits in excess of \$2,000 are

subject to the compensation carrier's credit after settlement of the third-party action. The credit is, in turn, subject to reduction pursuant to *Burns, supra*. By way of example, in a case with a \$550 compensation rate and a litigation expense of 33 1/3 %, benefits would be payable up to \$461.53 per week as equivalent to basic economic loss. One-third of the remaining \$88.47 would then be payable against the carrier's remaining share of the third-party litigation expense (\$29.49 per week), with the remaining \$58.98 applied against the carrier's credit.

The increased maximum workers' compensation benefit rate affects personal injury and workers' compensation litigation arising out of motor vehicle accidents. As the weekly maximum rate will be adjusted annually into the future, the impact may be expected to be more significant in the future. Careful practitioners will consider the effect of workers' compensation liens and credits at an early stage

in order to properly evaluate their cases.

Note: Robert E. Grey is the managing partner of Grey & Grey, LLP and is a frequent author and lecturer on the subject of workers' compensation. The firm represents injured and disabled workers throughout the metropolitan area.

¹ Provided that the claim involves "covered persons" under the No-Fault Law. It must also be noted that the compensation carrier's written consent to settlement must still be obtained, regardless of whether there is an existing lien at the time of the third-party settlement.

² See *Dietrick v. Kemper Insurance*, 76 N.Y.2d 248, 557 N.Y.S.2d 301, 556 N.E.2d 1108 (1990) for other workers' compensation benefits that are deemed equivalent to basic economic loss. Wage loss paid beyond the three-year mark is, of course, lienable because it is no longer equivalent to basic economic loss. See *Johnson v. Buffalo & Erie County Private Industry Council*, 84 N.Y.2d 13, 613 N.Y.S.2d 861, 636 N.E.2d 1394 (1994).

³ The maximum rate is adjusted annually to two-thirds of the State Average Weekly Wage as determined by the NYS Department of Labor, commencing July 1, 2010.