New York Law Journal

NO. 101 • $3.00 NEW YORK, MONDAY, NOVEMBER 26, 2007 ©2007 ALM Pr

OUTSIDE COUNSEL

BY ROBERT E. GREY

'Kelly's' Application for Permanent Partial Disability Ends

On Oct. 11, 2007, the Court of Appeals limited its 1983 decision in *Matter of Kelly v. State Insurance Fund*[1] to cases of permanent total disability and death, ending its application in cases involving permanent partial disability. This decision, *Matter of Burns v. Varriale*,[2] will have a significant impact on attorneys, injured workers, and workers' compensation carriers involved in personal injury litigation.

Where an injured worker pursues a workers' compensation claim against the employer and also sues a third party as permitted by Workers' Compensation Law §29(1), the compensation carrier has a lien for benefits paid prior to the date of the third-party settlement (or judgment) and is also entitled to take credit for the injured worker's net third-party recovery against future workers' compensation benefits.[3] The compensation carrier thus reaps two benefits from the third-party recovery and is obligated to pay its proportionate share of the litigation expense associated with obtaining that recovery.

The rule in *Kelly* called for this to be accomplished by adding the compensation carrier's lien to the present value of its future liability, comparing the total to the third-party recovery, and charging the compensation carrier with a like percentage of the third-party litigation expense. The compensation carrier's lien was then reduced by the resulting figure.

> *'Burns' result is that, in cases of permanent partial disability, the compensation carrier's lien can't be reduced by reference to the present value of the compensation carrier's future liability. It is the end of 'Kelly' in such cases.*

The 'Burns' Case

In *Burns*, the Court of Appeals upheld a determination by the Third Department[4] that the present value of future workers' compensation benefits payable for permanent partial disability is speculative and that, therefore, the compensation carrier's lien should not be reduced by the present value of its future liability. The Court observed that a permanently partially disabled worker may return to work, or may be found to have "voluntarily withdrawn from the labor market" and that these eventualities may result in the reduction or suspension of workers' compensation benefits.

The result of this holding is that in cases of permanent partial disability, the compensation carrier's lien can no longer be reduced by reference to the present value of the compensation carrier's future liability. In short, it is the end of *Kelly* in such cases.

The Court recognized, however, that there are likely to be cases in which the injured worker would have remained entitled to workers' compensation benefits but for the third-party recovery, and that in such circumstances the compensation carrier must still be charged with its proportionate share of the third-party litigation expense. The Court suggests that the "trial court, in the exercise of its discretion, can fashion a means of apportioning litigation costs as they accrue." In the decision below, however, the Third Department had suggested that this be left to the Workers' Compensation Board, and this may be the more effective procedure.

An example may be instructive in differentiating the difference between the *Kelly* mechanism and a likely *Burns* mechanism.

Assume that the injured worker is a 45-year-old man and that he has been found to be permanently partially disabled with a weekly benefit rate of $300. Assume further that the third-party action has been settled (with the compensation carrier's consent) for $150,000 and that the third-party litigation expense (legal fee and disbursements) is $53,333. Lastly, assume a workers' compensation lien of $75,000.

Under *Kelly*, the present value of the compensation carrier's future liability would exceed $75,000, and thus the lien plus the present value of the future liability would exceed the third-party settlement.[5] The compensation carrier would therefore be responsible for the entire litigation expense of $53,333, and its lien would be reduced from $75,000 to $21,666. As a result, the plaintiff's net third-party recovery after deduction of the litigation expense and the compensation lien would be $75,000 and the compensation carrier would make no further payments for 250 weeks (250 weeks x $300=$75,000). In week 251, workers' compensation payments would resume at $300 per week.[6]

Carrier's Lien Under 'Burns'

Under *Burns*, however, the compensation carrier's lien is only reduced by the percentage that the third-party litigation expense bears to the third-party recovery, without regard to the present value of future liability. In our example, the third-party litigation expense is 35.56 percent of the recovery ($53,333/$150,000). Therefore, the compensation carrier's lien is reduced by $26,670 ($75,000 x 0.3556) to $48,330. As a result, the plaintiff's net recovery is now $48,446 instead of $75,000.

As before, the compensation carrier is entitled to take credit for the net third-party recovery, but it is now obligated to reimburse the claimant its share of the remaining third-party litigation expense as workers' compensation payments become due. In our example, the carrier has only paid $26,670 (the amount of the lien reduction) towards the third-party litigation expense of $53,333. This leaves the carrier with a potential outstanding obligation of $26,663. The extent to which the carrier must meet this obligation depends on how long the claimant remains entitled to compensation.

If the claimant's entitlement to compensation benefits continues, then under the Third Department's mechanism the carrier would initially have to pay the claimant $106.68 for each week that the $300 rate is in effect. This figure results from the fact that $106.68 is 35.56 percent of $300, which is the ratio the third-party litigation expense bears to the third-party recovery.

If there is no change in the claimant's entitlement to compensation benefits, the carrier would continue to pay $106.68 per week for 250 weeks before its payments ($26,633) plus the amount of its lien reduction ($26,670) reach the third-party litigation expense of $53,333. During this period the unpaid portion of the weekly compensation award would be $193.32 per week ($300 minus $106.68 = $193.32), which after 250 weeks would total $48,330, nearly exhausting the claimant's net third-party recovery. Thus, just as in the *Kelly* scenario, under *Burns*, compensation payments would resume at the full $300 weekly rate 251 weeks after the third-party settlement.

'Burns' Principal Effect

It will therefore be seen that the principal effect of the Court of Appeals decision in *Burns* will be to reduce the net third-party recoveries of permanently partially disabled workers, possibly impacting the ability of personal injury practitioners to settle cases. In addition, the decision is likely to require post-settlement proceedings before the Workers' Compensation Board to adjust the compensation carrier's obligation to pay the third-party litigation expense.

Taken together with recent amendments to the Workers' Compensation Law,[7] it appears that we have reached the end of *Kelly* and the beginning of the next chapter of workers' compensation lien litigation.

Robert E. Grey *is a partner in the firm of Grey & Grey, located in Manhattan, Queens and Long Island.*

1. 60 NY2d 791, 456 NE2d 131, 468 NYS2d 850 (1983).
2. 2007 NY Slip Op 7498; 2007 N.Y. LEXIS 2710 (NY Court App. Oct. 11, 2007).
3. WCL §29(4).
4. *Burns v. Varriale*, 34 AD3d 59, 820 NYS2d 655 (3rd Dept. 2006).
5. This would render the case a so-called "deficiency" case.
6. Assuming that the worker remained entitled to benefits during the entire period.
7. See "Recent Changes to Workers' Comp and 'Kelly' Negotiations," NYLJ May 23, 2007.