

WHAT PERSONAL INJURY ATTORNEYS NEED TO KNOW WHEN SETTLING A LAWSUIT WITH A RELATED WORKERS' COMPENSATION CLAIM

By Alissa Gardos

An employee who is injured on the job may not sue the employer for negligence; the sole remedy against the employer is a claim for workers' compensation benefits. However, the employee can sue a third party to the employment relationship. The attorney representing such an individual in a "third-party action" must be fully familiar with Section 29 of the Workers' Compensation Law, that grants rights and obligations in connection with third-party actions to both the employee and the compensation carrier.

First and most importantly, a third-party action cannot be settled, discontinued, or otherwise compromised without the written consent of the compensation carrier. If an injured worker has an established workers' compensation claim, monetary benefits and medical coverage may continue for the worker's lifetime. A settlement without consent results in forfeiture of these valuable rights, and subjects the attorney to malpractice liability.

Should the carrier unreasonably refuse to consent to a third party settlement, or if the case is settled without consent through oversight or necessity (as in a case on trial), WCL Section 29(5) provides that an application for a compromise order nunc pro tunc may be made within three months of the settlement. Untimely motions may be made later upon good cause shown.

Second, the compensation carrier may have a lien for payments made prior to the date of the third-party settlement. In general, the lien is for all monies paid to the injured worker and his or her health care providers. An exception to this rule is where the worker was injured in a motor vehicle accident. If the worker would have been eligible for No-Fault benefits had the accident occurred off the job, then under WCL Section 29(1-a), the compensation carrier has no lien to the extent that its payments are equivalent to basic economic loss as that term is defined under the no fault statute (three years of wage loss or \$50,000 of combined wage loss and medical expense). But beware, despite the fact that the compensation carrier may not be entitled to a lien, their written consent to settle is still required.

In addition, the compensation carrier's lien is to be reduced by the carrier's equitable share of the litigation expense. Where workers' compensation benefits are not being paid on an ongoing basis, the reduction is ordinarily a percentage of the lien equal to the percentage that the attorneys fees, plus disbursements, are of the gross third-party recovery. This combined figure is ordinarily somewhat more than a simple one-third reduction. Where compensation benefits are ongoing, as in the case of the permanently partially or permanently totally disabled worker, a more substantial reduction in the lien can be achieved, see the Court of Appeals decision in *Matter of Kelly v. State Insurance Fund*. A full analysis of the Kelly decision is beyond the scope of this article.

Third, the compensation carrier is entitled to a credit, or offset, for the injured worker's net third party recovery against

any future or additional claim for workers' compensation benefits or medical expense. In the motor vehicle scenario, despite the fact that there may be no present lien at the time of the third-party settlement, should the claim reach the point where the expenses are no longer equivalent to basic economic loss, the compensation carrier's credit begins at that point in time. Once a third-party action is settled with the compensation carrier's consent, after the credit is exhausted (when the claimant's entitlement to compensation and medical benefits equals the net third-party settlement), workers' compensation coverage resumes. This is known as "deficiency compensation" because it accounts for the deficiency between the workers' third-party recovery and his or her entitlement under the Workers' Compensation Law. If there was a failure of consent, however, the right to deficiency compensation is lost and the worker may look to the personal injury attorney for recourse.

The careful personal injury attorney will be aware of these rights and obligations in third-party actions and will obtain written consent from the compensation carrier, as well as the advice of experienced Workers' Compensation Counsel.

