



OUTSIDE COUNSEL

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Recent Changes to Workers' Comp and 'Kelly' Negotiations

When an employee is injured on the job, his or her sole remedy against the employer is a claim for workers' compensation benefits.¹ The employee is, however, permitted to bring a personal injury action against any potentially liable third party to the employment relationship.²

Such lawsuits are known as "third-party actions" and may occur as a result of motor vehicle accidents, violations of the Labor Law, premises or product defects, and medical or legal malpractice claims, among other circumstances.³

Attorneys who represent injured workers in third-party actions must be familiar with Workers' Compensation Law §29, which covers the rights and obligations of the attorney and the workers' compensation carrier. As a threshold matter, the attorney may not settle or discontinue the third-party action without the written consent of the carrier.⁴ The carrier has an interest in the third-party action as a matter of law, and thus its rights may not be impaired without its written consent.⁵

The carrier's interests are its right to a lien for payments made prior to the date of settlement or judgment in the third-party action⁶ and its right to take credit for the worker's net third-party recovery against future workers' compensation payments.⁷ These rights are not, however, unlimited.

If the circumstances of the accident would have implicated No-Fault insurance coverage (such as the use and operation of a motor vehicle, or a collision involving two covered persons), then the workers' compensation carrier has neither a lien nor a credit to the extent that its payments are equivalent to basic economic loss under the Insurance Law.⁸

Basic economic loss includes wage-loss payments less than \$2,000 per month within three years of the accident date or a combination of wage loss and medical payments totaling less than \$50,000.⁹ It should be noted, however, that the compensation carrier retains the right to consent even in the absence of a present lien or credit.¹⁰ Failure to obtain consent in these circumstances may result in the forfeiture of future workers' compensation benefits and an action against the erring attorney.¹¹

'Kelly v. State Insurance Fund'

In addition, the compensation carrier's right to recover its lien is offset by its obligation to contribute its equitable share of the litigation expense incurred in obtaining the third-party recovery.¹² The Court of Appeals decision in *Matter of Kelly v. State Insurance Fund* established that where the compensation carrier is relieved from future liability as a result of a third-party settlement,



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In order to apply the *Kelly* principle, the compensation carrier's lien must be added to the present value of its future liability. The combination of the two is considered the "total benefit" to the carrier from the third-party settlement. That total benefit can then be compared to the third-party settlement amount and a ratio obtained. The compensation carrier's lien is then reduced by that ratio multiplied by the litigation expense.

By way of example, assume a third-party action settlement of \$350,000. The third-party attorney's disbursements are \$5,000 and the legal fee is \$115,000, for a total litigation expense of \$120,000. The compensation carrier's lien is \$120,000 and the plaintiff is a 50-year-old man receiving permanent partial disability benefits at a rate of \$300 per week. Using the tables found in the appendix to the Pattern Jury Instructions, the plaintiff's life expectancy is about 26 years and (using a discount rate of 4 percent) the annual benefit amount of \$15,600 has a present value about \$245,000.¹⁴ Thus, the lien (\$120,000) plus the present value of the future liability (\$245,000) exceeds the \$350,000 third-party settlement. As the "total benefit" to the compensation carrier exceeds 100 percent, its equitable share of the litigation expense is 100 percent. Reducing the lien of \$120,000 by the full litigation expense of \$120,000, the lien is entirely extinguished. The plaintiff's net recovery is \$230,000, against which the compensation carrier will take a credit, resuming payments (known as "deficiency compensation") if and when the credit is exhausted.

Negotiations Under 'Kelly'

The recent amendments to the Workers' Compensation Law will have a significant impact on negotiations under *Kelly*. For the past 15 years, the maximum weekly workers' compensation benefit has been \$400. For accidents on or after July 1, 2007 that figure will rise to \$500, with additional increases to \$550 for accidents on or after July 1, 2008 and \$600 for accidents on or after July 1, 2009. As of July 1, 2010, the maximum weekly benefit rate will be tied to the New York State average weekly wage, which is anticipated to result in a maximum benefit rate of at least \$650, which will then rise annually thereafter.¹⁵

One result of the increase in the maximum benefit will be to create workers' compensation liens in motor vehicle cases that did not previously exist. The current \$400 maximum benefit is \$1,733 per month, which is less than the basic economic loss amount of \$2,000 per month. When the weekly benefit rises to \$500, however, the figure is \$2,166 per month—\$166.66 per month more than basic economic loss. At \$550 per week the excess is \$383.33 per

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month, and at \$600 per week it is \$600 per month. To the extent that workers' compensation payments exceed \$2,000 per month, the excess is not equivalent to basic economic loss, and thus becomes a lien on third-party settlements. Practitioners who have become accustomed to the absence of workers' compensation liens in vehicular accidents must beware this new pitfall.

Another result of the increase in the maximum benefit will be to increase workers' compensation lien amounts, particularly for high-wage workers.¹⁶ However, the recent amendments also impose time limits on awards for permanent partial disability. Workers injured after March 13, 2007 who are permanently partially disabled are no longer entitled to lifetime payments. Instead, the law now includes a scale of time limits ranging from four to ten years, depending on the level of permanent disability.¹⁷

Just as the increase in the maximum benefit will increase workers' compensation liens, the time limits on permanent partial disability awards will reduce the present value of future liability. The combination of the two may seriously impair a third-party attorney's ability to negotiate workers' compensation liens under *Kelly*.

To return to the example above, the increase in the maximum benefit could well result in a compensation lien of \$150,000 instead of \$120,000. If the worker was found to be 50 percent disabled, then he would only be entitled to 300 weeks of permanent partial disability benefits—20 years less than his life expectancy. The present value of the future liability is

now only about \$83,000, making the total benefit to the carrier \$233,000 (compared to the former \$365,000), which is 66 percent of the value of the third-party settlement. The compensation carrier is thus responsible for 66 percent of the litigation expense of \$120,000, or \$80,000, reducing the lien from \$150,000 to \$70,000. The plaintiff's net third-party recovery is now \$160,000, against which the carrier will take credit as discussed above. This is, of course, a substantially lower net recovery to the plaintiff.

Other Effects on Settlements

There are other ways that the changes in the Workers' Compensation Law will impact third-party settlements. It is anticipated that the new time limitations on permanent partial disability awards, combined with other statutory amendments, will result in a significant increase in the final settlement of workers' compensation claims. Should this occur, workers' compensation liens will increase dramatically due to the up-front payment of the settlement amount, and the compensation carrier's future liability will simultaneously be eliminated in its entirety. This is the "perfect storm" from the perspective of the third-party attorney, because the combination of dramatically increased lien amounts and the removal of *Kelly* leverage may render many third-party cases incapable of settlement.

It is likely to be several years before the effects of the recent amendments to the Workers' Compensation Law are seen either at the Workers' Compensation Board or in third-party actions. However, in evaluating a potential third-party case

today, it would be wise to consider the extent and negotiability of the lien that will exist tomorrow.

1. WCL §11. An exception is where the injury was the result of an intentional tort. See, e.g., *Oben v. Charmer Ind.*, 37 AD3d 791; 2007 N.Y. App. Div. LEXIS 2320 (2nd Dept. 2007)

2. WCL §29(1)

3. See, e.g., *Buck v. Graphic Arts Mutual Ins. Co.*, 19 AD3d 966; 799 N.Y.S.2d 289 (3rd Dept. 2005) (motor vehicle); *Reinitz v. Arc Elec. Constr. Co., Inc.*, 104 AD2d 247; 483 N.Y.S.2d 821 (3rd Dept. 1984) (Labor Law); *Place v. Ryder*, 2 AD3d 961; 767 N.Y.S.2d 689 (3rd Dept. 2003) (premises liability); *General Aniline & Film Corp. v. A. Schrader & Son, Inc.*, 13 AD2d 359; 215 N.Y.S.2d 861 (3rd Dept. 1961) (products liability); *Prentice v. Levy*, 27 AD3d 970; 813 N.Y.S.2d 234 (3rd Dept. 2006) (medical malpractice); *McDowell v. LaVoy*, 63 AD2d 358; 408 N.Y.S.2d 148 (3rd Dept. 1968) (legal malpractice).

4. WCL §29(5)

5. See, e.g., *Durham v. Barker Chem. Corp.*, 151 AD2d 887; 543 N.Y.S.2d 182 (3rd Dept. 1989)

6. WCL §29(1)

7. WCL §29(4)

8. WCL §29(1-a). See also *Dietrick v. Kemper Ins. Co.*, 76 NY2d 248; 556 N.E.2d 1108; 557 N.Y.S.2d 301 (1990)

9. *Dietrick*, supra, *Johnson v. Buffalo & Erie County Private Ind. Council*, 84 NY2d 13; 636 N.E.2d 1394; 613 N.Y.S.2d 861 (1994)

10. *Parmelee v. Int'l Paper Co.*, 157 AD2d 878; 550 N.Y.S.2d 150 (3rd Dept. 1990); *Durham v. Barker Chem. Corp.*, 151 A.D.2d 887; 543 N.Y.S.2d 182 (3rd Dept. 1989); *Burton v. ITT Cont. Baking Co.*, 93 A.D.2d 921; 462 N.Y.S.2d 335 (3rd Dept. 1983).

11. *Id.*

12. WCL §29(1); *Matter of Kelly v. Commissioners of the State Insurance Fund*, 60 N.Y.2d 791; 456 N.E.2d 131; 468 N.Y.S.2d 850 (1983).

13. *Kelly*, supra.

14. The recent decision of the Appellate Division, Third Department in *Burns v. Varriale*, 34 AD3d 59; 820 N.Y.S.2d 655 (3rd Dept. 2006) casts some doubt on whether a *Kelly* calculation is appropriate in a case of permanent partial disability. However, the Court of Appeals has granted leave to appeal this decision. 2007 N.Y. LEXIS 136 (Feb. 15, 2007)

15. WCL §15(6), as amended March 13, 2007.

16. An injured worker's maximum benefit rate is two-thirds of his or her average weekly wage. Therefore, those who earn \$600 per week or less do not benefit from the increased maximum benefit.

17. WCL §15(3)(w), as amended March 13, 2007.