

How-To

How to address Workers' Compensation issues when settling a personal injury case

by Stephen T. Harper

Whenver a person is involved in an accident while working that is caused by the negligence of a third-party, that person may have both a personal injury claim against the third-party and a workers' compensation claim. The interaction of these two claims and the pitfalls of handling them together are issues that every personal injury attorney needs to address.¹

What happens to the workers' compensation case when the personal injury case settles or is tried to a verdict

A. Lien reduction

The effect on workers' compensation benefits after settlement or a verdict in a personal injury case is often misunderstood. When a personal injury case settles or is tried to a verdict, the injured party is required to pay back a portion of the workers' compensation lien. However, many personal injury attorneys may not realize that this also creates a reduction of future compensation benefits.

The best way to explain this relationship is through an example. Let's assume Larry Lawyer represents Charlie Claimant who was involved in an accident while at work. Larry Lawyer settles the personal injury case for \$150,000. There is an outstanding workers' compensation lien of \$75,000. Larry takes a one-third contingency fee out of the \$150,000 settlement. In addition, Larry seeks reimbursement of his case expenses, which were \$2,500. Larry's fees and expenses represent 35% of the settlement. As a result of Larry's fee and expenses, the compensation carrier will have to reduce their lien by a pro-rata share of said attorney's fee and expenses. That means the \$75,000 lien is reduced by this same ratio of 35 percent (\$50,000 fee and \$2,500 expenses = 35 percent of \$150,000). The result is that the workers' compensation carrier will be entitled to a lien payback of \$48,750.² The end result is that out of the \$150,000, Larry receives \$52,500, the compensation carrier will receive \$48,750 and the client will pocket \$48,750.

B. Post third-party recovery ratio

The difficulty that arises is what happens after Larry settles or tries to a verdict a personal injury claim. Assume Charlie Claimant was still out of work receiving a weekly workers' compensation check and receiving medical care for his injuries at the time of the personal injury settlement. If the workers' compensation claim is not settled at the same time as the personal injury case, then following the settlement of the third-party case, the workers'

compensation carrier typically will file an Application with the Virginia Workers' Compensation Commission to suspend all benefits, including both medical and lost wages. Under Commission rules, this application will result in the stoppage of all workers' compensation benefits.³

Subsequent to this application and after a hearing or by agreement of the parties, the Workers' Compensation Commission will enter an order setting forth what the "recovery ratio" will be in order for Charlie's benefits to continue after the personal injury settlement.⁴ The "recovery ratio" is the rate at which the claimant's future benefits are payable after a third party settlement or verdict.

In order to protect his future benefits, the injured worker may need to file a claim with the Commission to be certain that under Va. Code §65.2-313, the Commission enters an appropriate order setting forth the correct ratio at which the claimant's future compensation benefits are paid, the amount of the lien to be reimbursed and the point at which benefits will ultimately continue in full. What this means in actuality is that not only is the workers' compensation carrier entitled to a portion of the proceeds from settlement, but if there is also any recovery by the plaintiff in excess of the workers' compensation lien, this gross recovery will be credited against future compensation benefits.

In our example, the gross recovery in excess of the original workers' compensation lien was a \$75,000. The statute provides that the employer shall thereafter pay to the employee "a percentage of each future entitlement as it is **submitted** equal to the ratio of the total of attorney's fees and costs compared to the total third-party recovery."⁵ Typically, an order will be entered which will state that Charlie's weekly check and medical benefits are subject to quarterly reimbursement at a reduced rate compared to what it was before.⁶

In our example, if prior to the settlement of the third-party case Charlie was receiving \$600 per week, after the third-party case settlement and after the Commission establishes a recovery ratio of 35 percent in its order, Charlie may be entitled to receive \$210 per week. The other \$390 per week will count as a credit against Charlie's gross recovery (\$75,000). This credit will continue for both lost wages and for medical benefits until such time as the \$75,000 gross recovery has been exhausted.⁷

At that point, Charlie may start to receive workers' compensation benefits in full again if he applies for and obtains an order of the Virginia Workers' Compensation Commission reinstating

benefits in full.⁸ What Larry needs to do before settlement of the personal injury case is prepare Charlie for the news that his workers' compensation check and his medical benefits will stop as soon as his third-party case is settled, until the Commission enters an Order setting forth the appropriate recovery ratio.

Even though the Commission's Order setting forth the recovery ratio may be in place, medical benefits will no longer be automatically paid by the workers' compensation carrier. Instead, Charlie will be required to pay all the medical charges for his injury out of pocket and then submit those to the workers' compensation carrier on a quarterly basis for reimbursement at the recovery ratio set forth by the Commission.⁹ This could be quite a shock to Charlie when after the settlement of the third-party case, he goes down to the pharmacy and his prescriptions are no longer being paid for by the carrier. Hopefully, Larry warns Charlie of this in advance to prevent any ugly phone calls. The reality is that many injured plaintiffs cannot abide by this compli-

cated process following a third-party recovery. They cannot pay for their medical treatment out of pocket, maintain receipts and records and submit them on a quarterly basis for reimbursement at the reduced recovery ratio by the workers' compensation carrier.

Therefore, many injured workers may be better served by settlement of the workers' compensation claim at the same time as the third-party personal injury case to avoid the endless litigation and complication of this post-third party recovery ratio. It is also important for the personal injury attorney to realize that a significant recovery in the personal injury case can effectively result in a permanent reduction of the claimant's workers' compensation benefits. If in our example, Larry settles Charlie's personal injury case for a \$500,000, the gross recovery would be over \$425,000. Charlie may never effectively burn off the credit for his "gross recovery" and may only have the right to receive medical and loss wages at the reduced recovery ratio in the future. In addition, settlement of the personal injury case in such a situation can effectively reduce the

Sample Calculations of Settlement of the Third Party Case With Workers' Compensation Lien

A. SETTLEMENT TERMS:

Settlement	\$150,000	
Lien before reduction	\$ 75,000	
Attorney Fee & Expenses	\$ 52,500	(\$50,000 Attorney Fee + \$2,500 Costs)

B. RESUMPTION AMOUNT:

Amount Spent By Claimant Before Comp. Resume	= Gross Recovery – Carrier Lien
\$75,000	= \$150,000 – \$75,000

C. CARRIER'S SHARE OF ATTORNEY FEE/COST:

% of Fees Owed by Carrier At Time of Recovery	= $\frac{\text{Total Attorney Fee} + \text{Cost}}{\text{Gross Recovery}}$
35%	= $\frac{52,500}{150,000}$

Amount of Fees and Expenses Paid by Carrier at Time of Recovery	= % of Fees and Expenses x Lien
\$26,250	= 35% x \$75,000

D. FINAL SETTLEMENT STATEMENT:

Total Third Party Recovery	\$150,000
Minus Attorney Fee and Expenses	\$52,500
Minus Reduced Workers' Compensation Lien (after 35% deduction)	\$48,750
Net Recovery to Client	\$48,750

E. AMOUNT OF SUBSEQUENT REIMBURSEMENT TO CLAIMANT:

Claimant pays a medical bill of \$1,000 and seeks reimbursement of share of attorney fees/cost

Reimbursement Amount	= % of Fees x Additional Medical or Compensation
\$350.	= 35% x 1,000

value of the workers' compensation case to about one-third of its original value. The chart below summarizes these issues in detail.

Hopefully, this discussion will impress upon the personal injury attorney the importance of the workers' compensation claim and the effect their personal injury claim could have on the workers' compensation case. Although you may not be representing the injured party in the workers' compensation claim, your actions in handling the third-party personal injury case can result in a stoppage or a reduction of the lost wage check and the medical benefits. A failure to warn the plaintiff of this or discuss this with them prior to settlement can easily result in a very dissatisfied client.

Things to watch out for with the workers' compensation carrier's lien

In every case you should ask for an itemized breakdown setting forth where this number was derived from. More often than not the itemized lien contains items which are not reimbursable to the workers' compensation carrier such as vocational medical case management fees, independent medical exam charges, administrative costs paid by the carrier on the workers' compensation claim, or attorney's fee paid to defense counsel defending the workers' compensation claim. The carrier is only entitled to reimbursement for charges for items "paid to or for the benefit of the injured worker."¹⁰

Additional important things to know and remember about settlement of workers' compensation claims

A. The requirement to obtain the workers' compensation carrier's approval for settlement

Most personal injury attorneys are aware that they cannot settle the personal injury case when there is a related workers' compensation case without the workers' compensation carrier's prior approval.¹¹ Some personal injury attorneys assume that as long as they pay back the workers' compensation lien this rule can be ignored. **That is not correct.** As discussed above, the workers' compensation lien extends not only to benefits they have paid in the past but benefits in the future. Failure to obtain the workers' compensation carrier's approval before settling the workers' compensation claim can jeopardize the workers' compensation case and result in a permanent stoppage of any and all benefits (lost wage, medical, permanent partial disability benefits, etc.).¹² In addition, although this author found no cases on point, it is believed that an agreement to arbitrate the personal injury case or an agreement to a high/low may also jeopardize the workers' compensation claim and should be agreed to only after getting the workers' compensation carrier's prior approval.

B. Statutory subrogation under Va. Code §65.2-309

Whenever an employee is injured at work and becomes entitled to workers' compensation benefits, any third-party case arising out of the accident is partially assigned to the employer by statute¹³. In fact, the employer/carrier is entitled to file a third-party lawsuit in their own name or in the name of the injured worker to recover any workers' compensation benefits that they have paid. If they obtain recovery in excess of the lien, those amounts must be held for the benefit of the injured worker. Just as the injured worker cannot settle their third-party without the carrier's consent, the carrier cannot settle the third-party case without the injured worker's consent.¹⁴

Remember that under Va. Code §65.2-309.1, the subrogation right of the carrier applies to any motor vehicle policy carried by and at the expense of the employer. The only time the workers' compensation carrier is not entitled to a subrogation lien is for coverages carried by the plaintiff on their own personal vehicle's policy. For example, assume Charlie Claimant is driving a company vehicle within the scope of his employment when he is hit by an uninsured driver. The company vehicle had a \$25,000 policy, but Charlie's own personal policy was \$100,000. In that case, the workers' compensation lien would apply to the \$25,000 company vehicle policy, but there would be no lien against the additional \$75,000 of UIM coverage that Charlie had available.

Until several years ago, the workers' compensation carrier could refuse to consent to settlement of the third-party case in an attempt to force a trial of the third-party case. The law has changed now that Va. Code §8.01-424.1 permits the injured worker to seek the approval of a Circuit Court of the settlement to avoid unnecessary trials without jeopardizing future workers' compensation benefits.

C. Yellow Freight option closed by statute

Yellow Freight Systems, Inc. v. Courtaulds Performance Films, Inc., et al., 226 Va. 57, 580 S.E. 2d 812 (2003) held that because the workers' compensation carrier had not perfected the lien, they forfeited their subrogation lien against the third-party proceeds. This ruling arguably allowed claimants and injured workers to not pay back the workers' compensation lien and retain the full proceeds from their personal injury case. The potential downside was a loss of future compensation benefits and a potential civil claim against the claimant based on an equitable lien.¹⁵ This potential loophole for plaintiffs was closed by statutory amendment which became effective July 1, 2004. Va. Code §65.2-309 now requires that this lien must be protected. Under Va. Code §65.2-311B, if the employer is required to institute an action against any party to recovery

some or all of its lien pursuant to Va. Code §65.2-309, the employer is not required to pay a pro-rata share of attorney fees and costs.

D. Procedural issues and workers' compensation settlements

Petitions and Orders

Workers' compensation settlements involve a Petition and Order being signed by both the injured worker and the employer/carrier. The Petition and Order are filed with the Commission for its approval. The Commission requires supporting medical records and an informational letter requesting approval of the settlement before the Commission will enter the Order approving the settlement. Typically the Commission will award the claimant's attorney a fee of 20 percent or less of the lump sum settlement.¹⁶ In a case where there is no cash paid on the workers' compensation claim, but a lien reduction was agreed to by the carrier, the claimant's attorney may be able to request a fee for a percentage of the lien reduction, to be paid out of the third-party proceeds.

In addition, many plaintiffs who are injured significantly may be on Social Security disability. Monthly social security disability benefits are sometimes reduced or offset in part by the amount of workers' compensation benefits.¹⁷ Often this off-set can be reduced or eliminated as part of the settlement of the workers' compensation claim if the appropriate language is placed in the Order approved by the Commission. Without the appropriate language, the social security disability benefits might be drastically reduced or completely eliminated until a credit for the lump sum is exhausted.¹⁸

Medicare approval

One of the toughest issues facing many attorneys and injured workers is the need for Medicare approval of some workers' compensation cases. Medicare has set out guidelines as to when the Center for Medicare Services (CMS) should approve an amount to be set aside out of the workers' compensation settlement money, in order to protect Medicare's interest.¹⁹

The basic guidelines suggest if the injured worker is currently Medicare-eligible and the claimant is settling for more than \$25,000, Medicare has an interest which needs to be protected. In that event, it may be advisable to have the settlement approved and a set-aside established by the Center for Medicare Services prior to approval of the settlement by the Virginia Workers' Compensation Commission. In addition, if the claimant is currently not Medicare eligible but he has an expectation of being declared Medicare eligible within the next 30 months and the settlement is more than \$250,000, then Medicare has an interest to be protected.²⁰ In that case, it is probably advisable to have the settlement reviewed and a set-aside established by

the Center for Medicare Services prior to approval of the workers' compensation settlement by the Virginia Workers' Compensation Commission. Another pitfall for attorneys occurs when the workers' compensation carrier waives their lien against the personal injury case in exchange for the claimant waiving all future benefits under the workers' compensation system. This type of settlement may also require CMS's interest to be protected if the value of the lien waiver is perceived as the equivalent of a lump sum settlement under the CMS guidelines discussed above.

Normally the carrier and the injured worker draft a Petition and Order for approval by the Virginia Workers' Compensation Commission. In that Order, the parties propose an amount out of the workers' compensation settlement which will be set aside in a separate account to be used for the payment of future medical expenses incurred by the injured worker for his work injuries. CMS may approve or revise this self-administered set-aside amount. This approval process typically takes 4-5 months from submission and may delay approval of the settlement of the workers' compensation case by the Virginia Workers' Compensation Commission. Although the workers compensation case may settle prior to CMS approval, that choice can have dire consequences if Medicare determines that the proposed set-aside amount is not enough to cover future medical needs for the work-related injuries. For example, if the claimant settles their workers' compensation claim for \$50,000 with a proposal that \$15,000 be placed in a Medicare Set-aside account, the Center for Medicare Services may decide the set-aside amount needs to be \$30,000. The claimant's incentive to settle his workers' compensation claim may disappear because of the increase in the set-aside and his incentive to settle the related third-party case may change as well.

Conclusion

As you can see, the interaction between workers' compensation and personal injury cases is complicated and filled with pitfalls. The personal injury attorney would be wise to set up a standard procedure for advising their clients of their rights, and the issues discussed above. Any personal injury attorney who deals with combined workers' compensation / personal injury cases needs to either be very careful with these issues or have the name of a competent workers' compensation expert available to call upon to advise and discuss these issues when they arise.

Endnotes

1. See "What You Might Need to Know About Workers' Compensation Even If You're Not Going To Be An Expert In The Area," *The Journal of the Virginia Trial Lawyers Association*, Spring 2004, authored by Andrew J. Reinhardt and Stephen T. Harper.
2. Va. Code §65.2-311.
3. Commission Rule 1.4; *Painter v. Home Renu, Inc.*, 06 WC UNP 2097510 (2006).
4. Va. Code §65.2-313, which states that after third party settlement claimant remains entitled to a "percentage of each further entitlement."
5. *Id.*
6. *Lance v. School for Contemporary Education*, 73 O.W.C. 209 (1994); The order can provide that the weekly checks continue on a weekly basis at the reduced rate. See *Kimbrough v. AETS Waste Management*, VWC File No. 194-54-96 (Susan R. Stevick, July 31, 2001).
7. *Eghbal v. Boston Coach, Corp.*, 75 O.W.C. 147 (1996) Aff'd 23 Va. App. 634, 478 S.E. 2d 732 (1996); Va. Code §65.2-313.
8. *Id.*
9. *Kern v. Logistic Express, Inc.*, 74 Va.WC. 106 (1995).
10. Va. Code §65.2-310; *Lockwood v. Automatic Control of Tidewater*, 63 O.I.C. 219 (1984); *Washington v. Miller & Rhoads*, 68 O.I.C. 250 (1989).
11. See *Overhead Door Company of Norfolk v. Lewis*, 29 Va. App. 52, 509 S.E. 2d 535 (1999).
12. *Barnes v. Wise Fashions*, 16 Va. App. 108, 428 S.E. 2d 301 (1993).
13. Va. Code §65.2-309.
14. *Id.*
15. *Michigan Mut. Ins. Co. v Smoot*, 129F. Supp.2d 912 (E.D. VA 2000).
16. *King v. Boggs & Sloce Municipal Services*, 77 O.I.C. 160,161 (1998).
17. §424a(a), 42 U.S.C.A
18. *Sanfilippo v. Barnhart*, 325 F. 3d 391 (3rd Cir. 2003).
19. See CMS website at www.cms.hhs.gov/WorkersCompAgencyServices/04_wcsetaside.asp
20. *Id.* Note that these are CMS's suggested thresholds for when CMS approval should be sought. Theoretically, Medicare's interest still needs to be considered even if the "threshold" for CMS review is not met.

Stephen T. Harper is a partner in the law firm of Kerns, Kastensbaum & Reinhardt, PLC in Richmond. He received his BA degree from the University of North Carolina and his JD degree from the University of Richmond. Mr. Harper's practice primarily consists of personal injury litigation and representation of claimants before the Workers' Compensation Commission. He is an active member of the Virginia Trial Lawyers Association and the Richmond Bar Association.