

# Workers' Compensation: Avoiding the Minefield When Settling a Third Party Case

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# N.J.S.A. 34:15-40 (Section 40)

- Read it, re-read it and then read it again (poorly written and overly complex);



- Prohibits “double recovery” by employee when injured worker has compensation case and third party case;
- Employer/Compensation carrier is reimbursed for workers’ compensation benefits paid to an injured worker, to the extent that the third party recovery exceeds the benefits paid to, or on behalf of, the injured worker by the compensation carrier. Carrier is entitled to up to 2/3rds of its payout in comp less \$750 in costs;

# N.J.S.A. 34:15-40 (Section 40)

- If the recovery in the third party action is less than the net lien, the compensation carrier is entitled to only its net lien.
- i.e. 150K in med/temp/perm paid but third party settles for \$30,000. Comp carrier is entitled to 2/3rds of \$30K less statutory allowable costs. Lien is exhausted.

# UNDERSTAND WHAT COMPRISES THE LIEN

- 1. “**Medical treatment**”—reasonable and necessary medical care supplied to the injured worker by the compensation carrier.
- 2. “**Indemnity payments**”—temporary disability benefits, partial total disability benefits, and/or total disability benefits.

# WHAT'S NOT A COMPONENT OF THE LIEN?

1. Does not include defense IME's;
2. Does not include rehabilitation nursing services unless the compensation carrier can show that the services provided by the nurse were necessary to cure or relieve the injured worker of the effects of the injury. Raso v. Ross Steel, 319 N.J. Super. 373 (App. Div. 1999);
3. Does not include comp carrier: (i) costs; (ii) its defense counsel fees; (iii) its share of the petitioner's counsel fees and costs in the compensation case;

# WHAT SHOULD PLAINTIFF'S COUNSEL DO?

- INITIAL STEPS:
- Communicate with the compensation attorney—do not view your case in a vacuum;
- Communicate with the compensation carrier





# WHAT SHOULD PLAINTIFF'S COUNSEL DO?

## **Strongly consider putting case into suit within a year**

34:15-40(f) allows compensation carrier to effect a settlement with the tortfeasor or file case against the tortfeasor upon 10 days written notice to the employee if suit or settlement is not made within one year of accident date by the employee;

Read Elhelou v. CVS Pharmacy et. als. (App. Div. 2015) holding in part that Section 40(f) effectively grants statutory subrogation rights and cuts off the employee's right to participate in settlement talks or file a lawsuit once carrier has exercised its rights under this section. Comp. carrier has no obligation to settle for more than its lien.

# WHAT SHOULD PLAINTIFF'S COUNSEL DO?

- Plaintiff's counsel must secure a complete itemized copy of the lien. Lien letter is not satisfactory;
- Carrier can and will misstate the lien amount;
- Carrier will include items not lienable (investigators/vendors);
- Carrier will often include respondent's share of the petitioner's counsel fee and costs in lien (Gallagher Bassett and Sedgwick are big time offenders here);

# WHAT SHOULD PLAINTIFF'S COUNSEL DO?

- Do not settle the case without first addressing lien compromise issues;
- It's too late to negotiate with the compensation carrier after you have taken the settlement monies and it is sitting in your trust account;
- Start early when considering negotiating with the carrier;



# WHAT SHOULD PLAINTIFF'S COUNSEL DO?

- Honor the lien!!!!



# IMPORTANT POINTS

- Consider negotiating with the compensation carrier at the outset respecting costs. Statutory costs are \$750. If your costs far exceed the \$750 allowed, they do not come off the top.
- See, Gloucester, Salem and Cumberland Counties Municipal Joint Insurance Fund v. Ferrara, Rossetti & DeVoto, PA (App. Div. 2002). Plaintiff there recovered \$12,500 in the third party case but had incurred costs to litigate the third party in excess of \$6K. Plaintiff's counsel paid the lien back but only after reducing the \$12,500 by his actual costs less the counsel fee. The court held that the compensation lien was 2/3rds of \$12,500 less statutory permitted costs of \$200 (that was statutory max at the time). See also similar 2016 case of Cabrera v. Cousins Supermarket, (App. Div. 2/23/2016)

# IMPORTANT POINTS

- If comp case settled by way of Section 20, no lien on Section 20 monies, however, if med/temp was paid those payments are lienable unless specifically waived;
- Comp lien applies to UM/UIM recoveries. Frazier v. NJM, 142 N.J. 590 (1995);
- There is no comp lien if the third party tortfeasor is a public entity. Travelers v. Collella, 169 N.J. Super. 412 (App. Div. 1979);
- Per Quod recovery is not subject to lien. Weir v. MTF, 318 N.J. Super. 436 (App. Div. 1999)—Consider getting court allocation;
- Understand that a reduction in the counsel fee increases the net lien—the lien payback is the inverse of the counsel fee. i.e. you cut your fee to 25% the compensation carrier gets back 75% of its payments on behalf of the injured worker.

# IMPORTANT POINTS

- Coordinate with the compensation attorney to properly counsel the petitioner/plaintiff about the impact that the comp settlement and/or third party settlement has on the other pending case.

# IMPORTANT POINTS

- Plaintiff must be counseled regarding import of third party settlement:
  - \* Plaintiff should set aside money from third party proceeds in the event he/she requires more treatment.  
Comp carrier may have continuing credits



**DON'T END UP LIKE THIS GUY!**

