

ADDRESSING WORKERS' COMP ISSUES WHEN SETTTLING A PERSONAL INJURY CLAIM

- A “Combined Case” is a case that involves both a personal injury case (or “third party claim”) and an underlying workers’ compensation claim.
- We start from the premise that when handling a Combined Case, there are twin goals: (1) Avoiding Malpractice, and (2) Maximizing Recovery for your client. These two goals are generally aligned, although the potential exists for them to deviate under certain circumstances.
 - Avoiding Malpractice: as in any other area of the law a certain level of proficiency is required in order to comply with the legal standard of care when handling the combined case (both the work comp and the personal injury case) or when handling the personal injury case when the client/plaintiff does not have a separate work comp attorney.
 - Meeting this level of proficiency likely requires that the personal injury attorney not take any action in the personal injury case that prejudices the client’s work comp claim unless the impact of such actions were fully explained to and understood by the client.
 - Thus, taking some action in the personal injury case that leads to the termination of the client’s work comp benefits likely falls below that standard if the client was unaware of the resulting consequences.
 - The most obvious example –discussed in more detail below -- would be failing to obtain permission from the work comp carrier before settling the personal injury case which will terminate the client’s entitlement to future work comp benefits and prohibit reduction of the work comp subrogation lien.
 - Maximizing Recovery: The premise is that clients in combined cases are not as concerned with the gross amount of their personal injury settlement as they are with their net recovery from the resolution of both cases and/or the effect receipt of personal injury proceeds will have on their ongoing work comp benefits.
 - For example, would the client be happier (1) settling his personal injury case for \$250,000 if he only received net settlement proceeds of \$50,000 and, after repayment of the work comp lien, faced having his work comp

benefits terminated and having to pay for his future medical treatment out of his own pocket, or (2) settling the personal injury case for \$175,000 with a partial or complete corresponding settlement of the work comp case that allowed him to reduce the amount of the work comp lien he had to repay and keep his future medical benefits open without application of a credit?

- Thus, maximizing recovery in combined cases requires consideration of how best to address the work comp lien and negotiate a recovery with the comp carrier that puts your client with the best possible net result.
 - This is where the twin goals of maximizing recovery and avoiding malpractice have the potential to diverge. If the attorney handling the personal injury case is singularly focused on obtaining the highest possible result in the personal injury case or obtaining the largest fee to the detriment or exclusion of the effect that result will have on the work comp claim then the issue becomes whether the attorney exercised the required level of proficiency.
- Subrogation lien: The Virginia Workers' Compensation Act, Va. Code § 65.2-100 *et seq.* ("The Act") permits a work comp client to have only one complete recovery. *Noblin v. Randolph Corp.*, 180 Va. 345, 358-59, 23 S.E.2d 209, 214 (1942). As a result, the employer/comp carrier have a subrogation lien against the proceeds of the personal injury case for all benefits paid to the claimant in the past and all benefits owed in the future.
 - Basis for the lien: Va. Code § 65.2-309.

KEY POINTS:

- The statute used to create an equitable subrogation "interest." After an unfavorable decision that denied a carrier repayment [*Yellow Freight Systems, Inc. v. Courtaulds Performance Films, Inc.*, 226 Va. 57, 580 S.E. 2d 812 (2003)], the statute was amended to specifically create a "lien" in 2004.
- Pursuant to the strict language of Va. Code § 65.2-309, the lien is created based upon the existence of "a claim against an employer ... for injury ... shall create a lien."
 - "making a 'claim' for workers' compensation benefits" triggers the employer and comp carrier's subrogation rights under Va. Code § 65.2-

309, and a specific compensation award from the Commission is not required. *Wood v. Caudle-Hyatt, Inc.*, 18 Va. App. 391, 444 S.E.2d 3 (1994).

- Does that require the claimant to file an actual claim with the Commission or does it also include the voluntary payment of benefits but a comp carrier after becoming aware of a claimed injury (a routine occurrence in comp claims)?
 - While some believe that a claim must be filed to trigger those rights, *Wood* was decided under the former “subrogation interest” language of Va. Code § 65.2-309 before a specific lien was created by the current language.
 - The safer bet is that the Commission and Court of Appeals would find that a subrogation lien is triggered by either an existing claim (or even the filing of a future claim), a claimant giving notice of a claim to his employer, the claimant’s receipt of benefits, or the payment of medical expenses by the carrier to a medical provider on behalf of the claimant. *See Wood v. Caudle-Hyatt, Inc.*, 18 Va. App. at 397 (the claimant “necessarily prejudices his employer's subrogation rights and, thus, is barred from obtaining or continuing to receive benefits under a workers' compensation award when an employee settles a third-party tort claim without notice, **or without making a claim for workers' compensation benefits**, or without obtaining the consent of the employer).
 - This language suggests a duty to give notice and to file a claim for work comp benefits prior to settling the comp claim.
- The comp carrier can enforce lien in its own name if claimant doesn’t pursue a claim.
 - If the comp carrier pursues the case and recovers more than the lien, the remainder, goes to claimant less a share of attorney fees and costs.
 - If the comp carrier pursues the claim in its own name, it cannot settle the case without the permission of the claimant and the Commission.
 - BUT SEE *Williams v. Capital Hospice*, 15 WC UNP VA00000535239 (2015)(case attached).

- In this Full Commission decision, currently being appealed to the Court of Appeals, the plaintiff attorney pursued a personal injury case but failed to put the work comp carrier on notice of the 3rd party case
- The work comp pursued its own claim against the tortfeasor's liability carrier and arbitrated for the exact amount of the lien. The work comp carrier won and was paid off for its lien amount.
- The comp carrier never got permission from the Commission or the plaintiff as required under 65.2-309(C).
- The plaintiff then settled the remainder of his personal injury case with the liability carrier and then sought to be reimbursed for a share of the attorney's fees and costs under § 65.22-311.
- The Full Commission held that 65.2-309(C) didn't apply and no permission was necessary because the work comp carrier limited its recovery to the exact subrogation lien amount.
- The Full Commission thus recognized (created?) two separate subrogation lien recovery actions available to the comp carrier: (1) one for a full personal injury recovery where permission from the Commission and plaintiff are required, and (2) one limited to the lien amount where no permission is required.
- The Full Commission also held that because the comp carrier pursued and recovered its own lien without input or effort by the plaintiff's personal injury lawyer, no reduction for attorney's fees and costs under § 65.22-311 was owed.
- The Full Commission also held that the plaintiff does not have a superior right to pursue the personal injury action.
 - Does this logic allow the comp carrier to hire a subrogation firm at 15% to race to the courthouse or file a claim first in every case and thus avoid thus cutting the lien by the standard 33.3% contingency rate charged by injury lawyers?

- Lesson: Put the work comp carrier on notice immediately that you are pursuing the third party case.
 - This case is presently on appeal to the Virginia Court of Appeals, and an *amicus curiae* is being filed in support by VTLA.
- Similarly, if claimant pursues a personal injury case, permission must be obtained from the comp carrier to settle the case.
- If the claimant fails to repay the work comp subrogation lien, the comp carrier can sue the claimant in a civil action to recover the amount owed on the lien and avoid paying its pro rata share of attorney’s fees and costs. Va. Code § 65.2-311(B).
- Obtain Permission to Settle: The most singularly important step for avoiding malpractice in a Combined Case is to **ALWAYS SEEK PERMISSION** from the comp carrier to settle the personal injury case. The granting of permission by the comp carrier should be unambiguous and should be documented.
 - “[T]he employee may not pursue his common law remedy in such a manner or settle his claim to the prejudice of the employer's subrogation right and thereafter continue to receive workers' compensation benefits.” *Wood v. Caudle-Hyatt, Inc.*, 18 Va. App. 391, 397, 444 S.E.2d 3, 7 (1994) (emphasis added).
 - “The employee necessarily prejudices his employer's subrogation rights and, thus, is barred from obtaining or continuing to receive benefits under a workers' compensation award when an employee settles a third-party tort claim . . . without obtaining the consent of the employer.” *Id.* (emphasis added).
 - If you think permission isn’t required in your case or there is some exception that excuses the need for obtaining permission to settle the personal injury case, you are probably wrong, and thus not taking the necessary steps to avoid a malpractice claim. These are examples where personal injury attorneys sometimes believe permission is not required:
 - Permission is not required because the personal injury settlement is larger (or even MUCH larger) than the subrogation lien: Still get permission.
 - *Skelly v. Hertz Equipment Rental Corporation*, 35 Va. App. 689, 547 S.E.2d 551 (2001)

- The comp carrier was sent a check for the full amount of their subrogation lien minus a reduction for fees and costs and then cashed that check. Still get permission.
 - *Alexandria Kitchen & Bath Studio v. Hare*, 97 Vap UNP 2259963 (1997)

- The comp carrier's attorney or adjuster advised that it shouldn't be a problem to get permission and it can be worked out: Still get permission.
 - *Skelly v. Hertz Equipment Rental Corporation*, 35 Va. App. 689, 547 S.E.2d 551 (2001)

- The liability carrier offered the policy limits and there were no other sources of coverage in the personal injury case: Still get permission.
 - The fact that “the full amount of insurance was allotted in the settlement is immaterial. . . . and the right of subrogation is not limited by the limit of a tortfeasor's insurance policy.” *Burrell v. Atlantic Coast Express*, 78 OIC 120, 78 Va. WC 120, 124 (1999)
 - *Cortes v. Star Valley Painting Contractors, Inc.*, 14 WC UNP VA 02000012553 (2014), *aff'd sub nom Cruz-Gonzalez v. Star Valley Painting Contractors, Inc.*, 15 Vap. UNP 00161152 (2015) (attached).

- The defendant had no assets and was judgment proof.
 - The “argument that employer was not prejudiced because [the tortfeasor] did not have any assets other than the liability insurance policy is without merit.” *Alexandria Kitchen & Bath Studio v. Hare*, 97 Vap UNP 2259963 (1997)

- The client had a different work comp attorney who it was assumed would handle those details: Still get permission.

- The work comp case was already settled before the personal injury case: Still get permission.

- The work comp case was already settled before the personal injury case, with settlement terms that permitted the personal injury attorney to settle the case at his discretion and included specific subrogation lien repayment terms: MAYBE! You should be able to escape an argument that you prejudiced the work comp claim if raised by the comp carrier, but why not still get permission to be sure?
- The defendant was uninsured and all of the personal injury proceeds came from the claimant's own UM/UIM coverage: To be safe, still get permission.
 - Two cases hold that the work comp carrier is not prejudiced and thus permission is not required where the settlement is with a UM/UIM carrier against whom the work comp carrier has no subrogation rights under § 65.2-309.1 and where the settlement does not release the defendant individually.
 - *Horne v. Superior Life Insurance Company*, 203 Va. 282 (1962); *Palovick v. Hague Towers Apartments*, 00 WC UNP 1885130 (2000).
 - Because the purpose of UM/UIM is to provide the insured with additional coverage and not to insure the tortfeasor against liability and because a work comp carrier has no subrogation interests against the UM/UIM proceeds, a settlement with the UM/UIM carrier does not constitute a settlement with 'an other party' as referenced in § 65.2-309.
 - *Horne* also held that the work comp carrier is not prejudiced because the settlement with the UM/UIM carrier creates a competing subrogation right for the UM/UIM carrier because "the employer's right of subrogation against the negligent third party is superior to that of the insurer under the uninsured motorist law." *Horne*, 203 Va. at 287.
 - BUYER BEWARE: Is *Horne* still good law? At the time both cases decided § 65.2-309 only created a subrogation "interest" (or "right of subrogation") whereas the statute was subsequently amended to create an actual lien.

- The comp carrier has a subrogation lien against any UM/UIM at issue that is “carried by or at the expense of the employer.” § 65.2-309.1, such that settlement with that carrier would prejudice the rights of the comp carrier.
 - A settlement with a UM/UIM carrier that included a waiver of subrogation rights against the tortfeasor would likewise prejudice the rights of the comp carrier.
- An agreement reached at a mediation, a high-low agreement for trial or an agreement to arbitrate. Still get permission.
 - For mediations, give the comp carrier notice of the mediation, invite them to attend or be on standby to give permission to settle.
 - Otherwise make any agreements subject to the consent of the comp carrier.
 - A high-low agreement, even one capped at all available coverage prejudices the comp carrier’s lien recovery rights and should thus be subject to the consent of the comp carrier.
 - Arguably an agreement to arbitrate a case also prejudices the comp carrier’s rights
- A plaintiff suffers an injury that aggravates or worsens an injury that is subject to an existing or ongoing work comp claim for a prior injury. Still get permission.
 - WHY? Because the comp carrier is responsible for medical treatment and wage loss related to subsequent accidents that necessitate medical treatment or cause disability from work even if only caused in small part due to the underlying compensable work comp injury.
 - Thus, settling the subsequent personal injury case when the comp carrier is still paying wage loss benefits or medical treatment for the prior injuries prejudices their right of recovery. *Green v.*

Warwick Plumbing & Heating, 5 Va. App. 409, 364 S.E.2d 4 (1988).

- Two exceptions exist which limit the impact on the client's future work comp claim when consent to settle is not obtained from the comp carrier:
 - If the injuries caused in the second accident were minor in nature resulting in fleeting symptoms that did not materially alter the symptoms attributable to the work comp accident. *City of Newport News v. Blankenship*, 10 Va. App. 704, 396 S.E.2d 145 (1990).
 - If the second accident only resulted in aggravation to some of the injuries from the work comp claim, the prejudice to the comp carrier – and thus the bar against future compensation and medical expenses – is limited only to the overlapping injuries affected in the subsequent accident. *United Airlines v. Hayes, Inc.*, 58 Va. App. 220, 708 S.E.2d 418 (2011).
 - For example: work comp claim covered injuries to head, arm and back and subsequent accident settled without permission only resulted to injuries to back and arm, then prejudice limited to those body parts and comp claim for head injury survives.
- Various comp claim hassles: (1) the comp claim has been denied and/or is being litigated; (2) the comp carrier knows about or is aware of the proposed personal injury settlement and doesn't object; (3) the personal injury attorney can't figure out the identity of the comp carrier; (4) the employer won't cooperate with the personal injury case; or (5) the registered comp carrier denies it owes coverage to the employer. Still get permission.
- Even though counsel for the comp carrier advised plaintiff's counsel that the proposed settlement offer was so much more than the potential subrogation lien that he did not see what reservations the comp carrier could have, he did not provide specific permission to settle the claim. The Commission and Court of Appeals held that

exchange did not constitute actual or implied permission. *Skelly v. Hertz Equipment Rental Corporation*, 35 Va. App. 689, 547 S.E.2d 551 (2001).

- The comp carrier’s “silence, however, does not amount to acceptance” after being informed of the terms of a potential or proposed settlement. *Cortes v. Star Valley Painting Contractors, Inc.*, 14 WC UNP VA 02000012553 (2014), *aff’d sub nom Cruz-Gonzalez v. Star Valley Painting Contractors, Inc.*, 15 Vap. UNP 00161152 (2015)(citing *Skelly, supra.*)
- Irrelevant that two comp carrier may be fighting as to who owes coverage on a claim or that the personal injury attorney can’t identify the comp carrier. *Cortes, supra.*
- Form of Permission: Although nothing specifically prohibits relying on verbal consent from the carrier to settle, it is recommended that permission be obtained in writing or, at a minimum, that the attorney confirm verbal consent to settle in a letter to the comp carrier.
- Penalty for Failing to Obtain Permission: Because the comp carrier has a subrogation lien for past payments and because the amount of the personal injury settlement affects future work comp payments, settling the personal injury case without the comp carrier’s permission prejudices the rights of the comp carrier.
 - The first penalty for failing to obtain permission from the comp carrier to settle the personal injury case is that the claimant/plaintiff forfeits the right to all future work comp benefits, including both indemnity benefits paid directly to the claimant and medical benefits paid to medical providers for treatment related to the injuries. *Wood v. Caudle-Hyatt, Inc., supra. Also Safety Clean Corp. v. Van Hoy*, 225 Va. 64, 300 S.E.2d 750 (1983).
 - The impact of this penalty on the claimant can vary depending on whether he is entitled to any additional weekly work comp payments, is still receiving medical treatment, or has any treatment projected in the future.
 - The second penalty resulting from a failure to obtain permission to settle the personal injury case, is that the claimant forfeits the right to reimbursement of a pro rata share of attorney’s fees and costs under Va. Code § 65.2-311. *Skelly v. Hertz Equipment Rental Corporation*, 35 Va. App. 689, 547 S.E.2d 551 (2001).

- Although disputed, the facts as accepted by the Court of Appeals in *Skelly* were that a wrongful death case for a decedent who died while at work was settled not only without obtaining the permission of the comp carrier but after a letter from the comp carrier’s attorney stating that the plaintiff’s attorney was “not authorized to negotiate or settle the claim against third parties.” *Id.*
 - As a result, the comp carrier was deprived “of the opportunity to protect or assert its subrogation rights against the third-party tort-feasor.” *Id.*
 - Even though the settlement was for more than the comp carrier’s maximum liability in the comp claim, the comp carrier retained an interest in the third party case because the amount of the settlement affected the carrier’s *pro rata* share of attorney fees and costs. *Id.* Thus, settling the case without the consent of the comp carrier “foreclosed the possibility that [the comp carrier] could lessen its obligation by negotiating a higher settlement.” *Id.*
 - The result was that the claimant’s right to compensation in the form of reimbursement of attorney’s fees and costs was barred. *Id.*
- Comp Carrier’s Refusal to Consent: For decades, there was no specific remedy in instances where, because of strategic reasons or spite, the comp carrier refused to engage with the plaintiff’s attorney or provide consent to settle the personal injury case.
 - This changed with the passage of Va. Code § 8.01-424.1, which allows the plaintiff to petition the Circuit Court for approval of a settlement offer that is fair and just to the parties where the comp carrier fails to consent to a settlement offer that is acceptable to the claimant.
 - Plaintiff’s counsel must follow the steps laid out therein including giving notice to the comp carrier.
 - Of note, the statute specifically prohibits the Circuit Court from reducing or compromising the subrogation lien.
- Calculating the Lien Repayment: Pursuant to Va. Code § 65.2-310, the comp carrier has a subrogation lien for compensation, medical expenses and funeral expenses paid to or on behalf of the claimant. Under Va. Code § 65.2-311 requires that reasonable attorney’s

fees and costs “shall” be apportioned pro rata between the comp carrier and the plaintiff. So what does that mean? See Appendix: Sample Calculation Of Work Comp Lien And Credit.

- Step 1: confirm the amount of the claimed subrogation lien is correct. Many times, the personal injury attorney will receive a letter from the comp carrier or a third party subrogation entity hired by the comp carrier giving a total of the lien or else breaking it down between “medical” and “indemnity” benefits paid to the claimant. Many times the comp carrier will include items in these liens that cannot properly be recovered under to Va. Code §§ 65.2-309 & 310. Suggestions for clarifying the lien amount:
 - Request an itemized lien: This can serve dual purposes. One, it allows you to insure that everything included by the comp carrier in the lien can be recovered, and two, it allows you to make sure you aren’t missing any bills in the special damages you are claiming in the personal injury case.
 - Because subrogation liens are, as cited above, limited to compensation paid to the claimant, medical expenses, and funeral expenses, the following items – all of which comp carriers have attempted to include in subrogation liens in prior instances -- cannot be included in a subrogation lien and can thus be removed from the gross lien amount: nurse case manager charges, case management services, IME expenses, vocational rehabilitation charges, attorney’s fees, cost containment, record reviews, copying charges, and private investigators. See *Washington v. Miller & Rhoads*, 68 O.I.C. 250 (1989); *Lockwood v. Automatic Control of Tidewater*, 63 O.I.C. 219 (1984).
- The next step is to calculate the pro rata share of attorney’s fees and costs (or “offset ratio” or “recovery ratio”) to determine the percentage the comp lien can be reduced. The easiest method of performing this calculation is to add the amount of the attorney’s fee and the costs and divide that total by the amount of the gross third party settlement to produce the percentage by which the gross work comp subrogation lien can be reduced. To perform that calculation, multiply the gross subrogation lien by the percentage and subtract that amount from the gross subrogation lien.
 - Example: \$150,000 settlement, \$50,000 fee, \$2,500 costs, \$75,000 gross comp lien: $[\$50,000 + \$2,500] \div \$150,000 = .35$ (or 35%). Then, \$75,000

comp lien x 35% = \$26,250 reduction. \$75,000 gross comp lien - \$26,250 reduction = \$48,750 net comp lien repayment amount.

- The subrogation lien attaches to payments received in the personal injury case from all defendants, liability policies or UM/UIM policies on vehicles owned or insured by the client's employer. Any payments made pursuant to settlements or verdicts that are made from UM/UIM policies paid for wholly by the client or by any other family members are exempt from the subrogation lien. Va. Code § 38.2-2206(I), § 65.2-309.1.
 - In cases where payments are received from a combination of liability policies, UM/UIM on the employer's vehicle and UM/UIM on the client's personal vehicle it is recommended that the attorney prepare two separate Disbursement Statements, one for those funds that are subject to the subrogation lien and one for those funds that are not subject to the lien.
- BE AWARE if the UM/UIM is from a self-insured employer: any workers compensation benefits received by the plaintiff is set off against the UM/UIM owed by the self-insured employer pursuant to any judgment for damages for the personal injuries. Va. Code § 38.2-2206(I)
 - Thus, the employer gets to deduct any workers compensation benefits paid to the plaintiff from the amount it owes under the UM/UIM provisions. *Dale v. City of Newport News*, 243 Va. 48, 51-52 (1992).
 - This provision only applies when the employer is self-insured for UM/UIM. *William v. City of Newport News*, 240 Va. 245 (1990) (“[t]he term ‘self-insured employer in § 38.2-2206(I) references only employers who self-insure their motor vehicle liability insurance, not their workers’ compensation insurance.”)
- There are no additional legal rights or remedies that allow the plaintiff to avoid, void or reduce the comp carrier's subrogation lien.
 - This can result in a hardship in cases where there are minimum coverage limits and the comp subrogation lien exceeds either the gross personal injury recovery or the net recovery after attorney's fees and costs. In these situations there is no legal authority to require the comp carrier to reduce its lien even where the client will receive nothing or minimal proceeds from the personal injury case.

amount of the credit and the offset ratio. *See Benson v. Abbit Management, Inc.*, VWC File No. 192-08-58 (Aug. 2, 2006) (holding that the comp carrier is entitled a breakdown of the disbursements from the personal injury settlement to calculate its responsibility for payments under the offset ratio),

- Upon discovering the amount of the attorney's fee, the comp carrier could file a claim for fraud under Va. Code § 65.2-712 or a claim seeking reimbursement for the entire pro rata share of attorney's fees and costs under of Va. Code § 65.2-311(B) which states that the comp carrier is not required to pay a pro rata share of attorney's fees and costs if required to institute an action against "any party to recover some or all of its lien . . ."
- A Gift?: On the other hand, no known legal authority prevents a caring and compassionate attorney who believes his client was poorly served by the workers comp and civil justice system from making a financial gift to a client in an amount of the attorney's choosing.
 - The personal injury attorney would bear the tax consequences for a gift unlike a reduced attorney's fee where taxes are only owed on the amount actually paid into the attorney's operating account as a fee.
 - While not legally tested, it is recommended that any attorney pursuing this course pay the full attorney's fee used as the basis for calculating the net subrogation lien Va. Code § 65.2-311 from the attorney's escrow account into the operating account, that any Disbursement Statement make clear that the full attorney's fee was collected, and that any transmittal documentation to the client clearly state that the payment represents a gift unrelated to the proceeds or attorney's fee associated with the personal injury claim.
- Impact Of Settlement On Future Work Comp Benefits: Under the terms of Va. Code § 65.2-313, any time the gross settlement amount in a personal injury claim exceeds the total past work comp subrogation lien, the comp carrier is entitled to a credit – or offset – for the amount of that difference.
 - Calculation of Credit: Gross personal injury settlement minus total work comp lien = comp carrier's credit.

- Of note: the credit is difference is between the past work comp subrogation lien and the gross personal injury settlement not the client's net recovery.
 - Prior Example: \$150,000 settlement, \$50,000 fee, \$2,500 costs, \$75,000 gross comp lien: \$150,000 settlement - \$75,000 comp lien = \$75,000 credit or offset.
 - If you successfully negotiate a reduction in the past work comp lien, the credit then becomes based on the reduced amount accepted by the comp carrier rather than the amount of the original gross work comp subrogation lien. Thus, when the comp carrier voluntarily reduced their lien, the effect is to increase the credit they are due against future work comp benefits. *McKnight v. Work Environment Associates*, 43 Va. App. 189, 596 S.E.2d 573 (2004); *Toney v. Hertless Brothers Roofing, Inc.*, 09 WC UNP 2286010 (2009).
- Offset Ratio: Because the comp carrier also remains liable for a pro rata share of attorney's fees and costs for the amount of the future work comp benefits that are being offset, the comp carrier must reimburse or pay to the client "a percentage of each further entitlement as it is submitted equal to the ratio the total attorney's fees and costs bear to the total third party recovery until such time as the accrued post-recovery entitlement equals the sum which is the difference between the gross recovery and the employer's compensation lien." Va. Code § 65.2-313.
 - In English, please!:
 - The comp carrier gets to terminate all weekly work comp payments to the claimant and payment for all accident related medical expenses until those payments equal the difference between the gross personal injury recovery and the total subrogation lien.
 - That same percentage used to reduce the past subrogation lien now becomes the "offset ratio." (35% in our example).
 - The full amount of every weekly work comp check owed to the claimant and every accident related medical expense count against the credit (or offset) on a dollar for dollar basis. *Lee v. Allstate Insurance Co.*, JCN 2333734 (Oct. 24, 2012).

- However, the comp carrier must pay the claimant the “offset ratio” for each weekly work comp check and every incurred medical expense that was owed “but for” the credit.
- Prior example: Comp carrier’s credit is \$75,000, offset ratio of attorney’s fees and costs is 35%. If claimant owed weekly compensation checks of \$600 prior to the settlement, each week the credit is reduced by \$600, and each week the comp carrier owes the claimant \$210 ($\$600 \times 35\%$). If the claimant requires a medical test or MRI costing \$1,000, he must pay it out of pocket and then be reimbursed \$350 ($\$1,000 \times 35\%$) although the full \$1,000 is then counted against the credit.
- After the personal injury settlement, the comp carrier will terminate payment of weekly work comp checks and medical expenses. Either the claimant or the comp carrier will then file a claim with the Commission for entry of a Third Party Order. *See Appendix*
- The Commission will thereafter enter a Third Party Order suspending the pending award and memorializing the amount of the personal injury recovery, the amount of the attorney’s fees and costs, the resulting pro rata percentage used to reduce the past comp subrogation lien, the gross comp lien, the net payment owed on the work comp lien after application of the pro rata percentage, and the amount of the resulting offset due to the comp carrier. *See Appendix.*
- The payments owed the client under the offset ratio are due on a quarterly basis. Thus, every 12 weeks the comp carrier will owe the claimant a payment equal to the offset ratio multiplied by all work comp benefits the claimant would otherwise be entitled to receive and all out of pocket medical expenses paid by the claimant.
 - The comp carrier can voluntarily agree to continue to make the payments on a weekly or bi-weekly basis and at least one unappealed deputy commissioner level opinion ordered the payments to be made on a weekly basis.
- Late or Unpaid Medical Bills: Sometimes when a client is continuing to receive medical treatment up through the date of the settlement some

medical bills may “slip through the cracks” or otherwise not get paid before the personal injury case is settled.

- Those bills are generally not included in the comp carrier’s subrogation lien because they weren’t paid before the personal injury settlement.
- Such unpaid medical expenses are treated as future medical expenses (or “further entitlement” under Va. Code § 65.2-313) whereby the total amount of the bills count against the comp carrier’s credit, the client must pay the bills himself (or from the personal injury proceeds) and then will receive a payment from the comp carrier representing the offset ratio based on the bill amounts. *Emberton v. White Supply & Glass Co.*, 43 Va. App. 452, 598 S.E.2d 772 (2004)
- No Pain and Suffering: It has been argued – unsuccessfully – that by entitling the comp carrier to a dollar-for-dollar credit for the full amount of the difference between the gross personal injury recovery and the past gross subrogation lien, the client is thereby deprived of realizing any settlement proceeds for pain and suffering (or inconvenience, permanency, humiliation, etc.).
 - While logical, this argument has been specifically rejected by the Commission. *Knott v. Virginia Dept. of Transportation*, VWC File No. 235-26-07 (Jan. 13, 2010).
- Client Reaction: It is easy to see why client will get angry and resentful if the impact on their future work comp benefits is not fully explained to them when the attorney seeks authority to settle the personal injury case. \$50,000 in net proceeds from the personal injury case when the client believes his weekly work comp checks will continue sounds much differently when he discovers those payments are terminated and he will only receive the offset ratio paid on a quarterly basis.
- Negotiating Reductions in Work Comp Liens: The first step is recognizing that there is no “silver bullet” or panacea for negotiating lien reductions. Likewise, there is not a “one size fits all” approach.

- Strategies to employ can depend on an number of variables including: (1) your client's need for future medical care, (2) the amount of coverage or recovery in the personal injury case, (3) the amount of the comp carrier's credit, (4) the size of the offset ratio, (5) your client's risk tolerance for waiving his entitlement to future wage and medical benefits and (6) the willingness of the carrier to negotiate.
 - The final variable is probably the most important because, remember, by statute the comp carrier does not have to compromise the lien beyond reducing it for a pro rata share of attorney's fees and costs pursuant to Va. Code § 65.2-313.
 - However, most comp carriers want to close out claims to eliminate uncertainties and liabilities. That said, you don't have the luxury of threatening the comp carrier with a home run jury verdict when negotiating a lien. Rather, you will have to use more carrot and less stick to get something worked out.

- Minimal Coverage Cases: In cases where the coverage in the personal injury case is less than the past subrogation lien, the client would receive nothing from the personal injury case absent a negotiated compromise with the comp carrier. In those cases, one starting point is to propose the comp carrier agree to the "Principle of Thirdsies" whereby whatever personal injury recovery is divided in thirds: 1/3 to the attorney for fees and costs (thereby agreeing to reduce the attorney's fee so that the fees and costs together equal 1/3), 1/3 to the comp carrier, and 1/3 to the client.
 - That equation could also be altered in favor of demanding "50% - 50% on the net," whereby the carrier and the client split the net proceeds after the attorney takes a full fee and costs.
 - In exchange for this deal the comp carrier will want something in return, which usually involves requiring the client to waive some portion or all of their future work comp benefits so the comp carrier can close out the file.
 - If the client has little to no future expectation for medical treatment or work comp entitlement, this can be a reasonable compromise.
 - If the client remains disabled from work and is still receiving benefits or has significant future medical needs this could well be a

poor result, as it could require the client to give up a lot more than is being received.

- The Nuclear Option: Threatening to Drop the Case: In some cases stubborn or intransigent comp carriers or their subrogation vendors refuse to make any deals even if it means the client gets nothing from the proceeds of the personal injury case.
 - In such circumstances the only real options are to (1) go forward with the case with the knowledge that you are working for your own fee and to reimburse the comp carrier (almost universally unacceptable to clients) (2) propose that the carrier allow you to split your fee with the client without having it affect the pro rata share of attorney's fees and costs and the resulting offset ratio; or (3) "go nuclear" and threaten to drop the personal injury case so that no one gets paid.
 - The argument is that if the comp carrier is going to be so uncompromising then you are not going to work for the comp carrier alone if your client cannot realize any proceeds from the personal injury case.
 - This option requires a willingness to walk away from a potentially lucrative attorney's fee. The comp carrier could very well call your bluff because in the comp carrier's mind, all trial lawyers are greedy bastards and would never walk away from a potential attorney's fee.
 - If pursuing this option, put your position in writing to the comp carrier, indicate that the plaintiff withdraws permission to pursue the case in his/her name and explain your previous efforts to compromise. Copy the letter or communicate the facts of the stalemate to the comp adjuster's claims manager.
 - The comp carrier will likely respond to the threat that under Va. Code § 65.2-309 they will simply hire their own attorney and pursue the case in their own name.
 - Trump Card: Va. Code § 65.2-309(C) prohibits a comp carrier pursuing a subrogation claim from settling the case without the approval of "the Commission and the injured employee . . . first being obtained."

- Thus, I make clear to the comp carrier that if we drop the case and they pursue it, it will have to be in their own name and the case will have to be tried because we will never give approval or permission to settle no matter how much the settlement offer.
 - Remind the comp carrier also, that Va. Code § 8.01-424.1 only allows the Circuit Court to give permission when the comp carrier refuses to agree to the proposed settlement and does not work when the claimant won't consent.
 - BUT SEE: *Williams v. Capital Hospice*, 15 WC UNP VA00000535239 (2015), *supra*, where the Full Commission ruled that a comp carrier could pursue and settle a claim limited to the amount of its lien without permission from the Commission or the claimant. This case is on appeal to the Court of Appeals.
- Settling Portions or All of the Comp Claim: In practice, the nuclear option doesn't happen that often. More often, the comp carrier is willing to reduce the comp subrogation in exchange for the client waiving all or portions of his work comp claim.
- In catastrophic or substantial injury cases where the client will require ongoing and future medical treatment, having to pay for all of that treatment out of pocket and then submit the records and bills on a quarterly basis to obtain the offset ratio reimbursement can range from a headache to an insurmountable challenge. In those cases, then, securing additional reduction of the lien can be less important than insuring continuity and ease of future medical treatment.
 - In those cases, a standard proposal is that (1) the client will agree to repay the comp subrogation lien with only a modest reduction beyond the statutory pro rata reduction (e.g. 50%), (2) the client will waive all entitlement to future work comp payments for work disability or permanency rating, and in exchange, (3) the comp carrier will agree to keep the client's future medical benefits open without application of the credit or offset ratio under Va. Code § 65.2-313.
 - Some comp carriers are incentivized to agree to this deal because it eliminates future indemnity payments, allows them to show a

substantial subrogation recovery on their books and eliminates the administrative problems of processing reimbursements for offset ratio payments on a quarterly basis.

- Just as important, it can actually save the comp carrier money. Under Va. Code § 65.2-605, the comp carrier is responsible for paying medical expenses based on the “prevailing community rate” when the treatment is paid for by the injured person, which are, naturally, substantially higher than the negotiated provider agreements that comp carrier’s enter into with most medical providers and networks. Thus, it may be cheaper for the comp carrier to pay for all of the claimant’s medical treatment at its negotiated rate than to pay the offset ratio percentage of the non-negotiated billed to the client when he gets the treatment himself.
 - If the client pays more than the prevailing community rate, however, the comp carrier could seek to limit offset ratio payments to a lower amount of incurred medical expenses.
- In many cases the comp carrier will still be willing to reduce the subrogation lien repayment (or waive it completely or waive it and pay a lump sum on top of the waiver depending on value of the claim) in exchange for a full and final settlement completely resolving the work comp claim.
- Determining whether the proposed compromise is beneficial to the client requires the attorney to analyze the value of the future work comp benefits and medical expenses.
 - Remember, however, that the value of the work comp claim is impacted by the credit such that the comp carrier’s future comp liability is limited to the offset ratio until the credit is exhausted.
 - In other words, if you calculate that the client’s future comp payments are worth \$150,000 and the future medical benefits have a value of \$75,000 but the comp carrier has a \$300,000 credit and an offset ration of 33.3%, then the value of the carrier’s future exposure is \$75,000, not \$225,000 ($\$225,000 \times 33.3\% \text{ offset ratio} = \$75,000$).

- Thus, for example, the comp carrier's offer to waive a \$25,000 subrogation lien repayment is a reasonable result for the client if the comp carrier's liability for future comp benefits paid out over time according to the offset ratio is \$35,000 but an unfavorable result if the comp carrier's future liability is \$100,000.
- Mediations: If a mediation is proposed in the personal injury case, give the comp carrier plenty of advance notice and ask a representative to attend in order to resolve all of these issues at once. The mediator or defense attorney can even insist the comp carrier attend as a condition for mediating the personal injury case.
 - Experience has shown mediators can be just as effective obtaining concessions from the comp carrier at the mediation as from the parties to the personal injury case.
 - In some instance the defendant and plaintiff even align together to exert additional pressure on the comp carrier in an effort to extract concessions or a compromise.
 - If the comp carrier does not attend the mediation, make sure that any settlement or agreement reached is made SUBJECT TO obtaining permission from the comp carrier for the terms of the personal injury settlement. A proposed settlement at mediation could also be made subject not only to obtaining permission to settle from the comp carrier but agreement to satisfactory terms resolving the subrogation lien or the work comp case.
- Settling the Comp Claim Before the Personal injury Case: A debate exists regarding whether there is any advantage to settling the work comp claim earlier in the process prior to settlement negotiations in the personal injury cases.
 - Certainly exigent circumstances could develop where settling the work comp case earlier is necessary, such as an unexpectedly vigorous defense to the work comp claim or threats of one or more IME's that could damage the personal injury case.
 - In most circumstances however it is suggested that the client can obtain more value via subrogation lien reduction, lump sum payment, or both by

pursuing a global simultaneous settlement of the personal injury case and the work comp claim.

- Settling the work comp claim prior to the personal injury case without negotiating favorable settlement terms for the repayment of the subrogation lien removes most incentive for the comp carrier to later compromise its subrogation lien even where refusal to do so could prevent acceptance of an otherwise favorable settlement offer.
 - To limit the damage to subsequent personal injury negotiations include “sliding scale” repayment language in the work comp settlement such as “the claimant will repay the carrier 50% of the gross subrogation lien not to exceed 33.3% of the gross personal injury recovery.”
 - Such language locks in the maximum and minimum repayment amounts on the subrogation lien so that the comp carrier can recover up to 50% of its lien assuming a favorable recovery in the personal injury case but limits the comp carrier to no more than one-third of the gross personal injury recovery if difficulties with liability or damages compel acceptance of a lower settlement, thus insuring the client receives a reasonable share of the personal injury proceeds.
- Commission Approval: Any agreement to compromise the underlying subrogation lien that limits or impairs some or all of the client’s work comp benefits must be specifically approved by the Commission via submission of a Petition and Order.
 - Attorney’s Fees: The Commission must approve all fees taken for any work relative to the work comp claim.
 - The Commission will generally approve a fee equal to 20% of any lump sum paid to the claimant and up to 20% of any reduction in the past subrogation lien beyond that mandated by Va. Code § 65.2-311.
 - A specific fee request signed by the client must be submitted with the Petition and Order, and the Order must contain a blank for the Commission to enter the fee to be awarded.
 - Medicare Issues: Are beyond the scope of this presentation other than to say the personal injury attorney must be aware of Medicare’s requirements and guidelines which are more exacting than in work comp cases including a requirement that

any settlement with a value over \$25,000 that impairs the Medicare client's medical benefits in the work comp claim ought to be specifically reviewed and approved by the Center for Medicare and Medicaid Services

APPENDIX

1. Sample calculations for determining work comp lien and credit
2. Motion to suspend work comp award and determine recovery ratio
3. Commission's Third Party Order

Cases:

4. *Skelly v. Hertz Equipment Rental Corporation*, 35 Va. App. 689, 547 S.E.2d 551 (2001).
5. *Williams v. Capital Hospice*, 15 WC UNP VA00000535239 (2015).
6. *Cortes v. Star Valley Painting Contractors, Inc.*, 14 WC UNP VA 02000012553 (2014),
aff'd sub nom Cruz-Gonzalez v. Star Valley Painting Contractors, Inc., 15 Vap. UNP
00161152 (2015).