HOW TO ADDRESS WORKERS' COMPENSATION ISSUES WHEN SETTLING A PERSONAL INJURY CASE

Whenever a person is involved in an accident while working, 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 benefits and the pitfalls of handling those claims are issues that every personal injury attorney needs to address.[1]

I. 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 forget that it 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 35%. ($50,000 fee and $2,500 expenses = 35% of $150,000) The result is 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 the 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, 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, meaning both medical and lost wages. This application will result in the stoppage of all workers' compensation benefits.

After this application is filed, the Virginia Workers' Compensation Commission will need to enter an order setting forth what the "recovery ratio" will be in order for Charlie's benefits to continue after the personal injury settlement.[3] The "recovery ratio" is the rate by which the claimant's future benefits are payable. In order to protect his future benefits, the injured worker will need to file a claim with the Virginia Workers' Compensation Commission to request that under Va. Code §65.2-313, the Virginia Workers' Compensation Commission enter an order setting forth the ratio at which the claimant's future compensation benefits are

paid. What this means in actuality is that not only is the workers' compensation carrier entitled to a portion of the proceeds from settlement, if there is any recovery by the plaintiff in excess of the workers' compensation lien, this gross recovery will also be credited against future compensation benefits.

i. What is the "Gross Recovery" in a Third Party Recovery Ratio?

The gross recovery, when referenced in the post third-party recovery ratio is the amount of the original workers' compensation lien, subtracted from the total personal injury recovery, which leaves the gross recovery. In our example, the total personal injury recovery is $150,000, the original outstanding workers' compensation lien was $75,000, and the gross recovery is the other $75,000.

In our example, the gross recovery in excess of the original workers' compensation lien was $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." [4] Typically, an order will be entered and it will state that Charlie's weekly check and medical benefits will be paid quarterly at a reduced ratio compared to what it was before.[5] 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% in its order, Charlie may be entitled to receive $210 per week. The full $600 per week will count as a credit against Charlie's gross recovery (even though he is only receiving $210 of that $600). This $600 credit will continue for each weekly payment against the $75,000. In addition the same will apply for medical benefits. If an MRI bill is $1,000, the carrier is responsible for paying only $350 (35% of that medical bill

but the full $1,000 will count as a credit against the gross recovery). This credit will continue for both lost wages and for medical benefits until such time as the $75,000 gross recovery has been exhausted.[6] 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 reinstituting benefits in full. What Larry needs to do before settlement of the personal injury case is to 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 Virginia Workers' Compensation Commission enters an Order setting forth the recovery ratio.

Even though the Virginia Workers' Compensation 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.[7] 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 complicated 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 will 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 value of the workers' compensation case to one-third of its original value.

ii. Issues and Strategies in Seeking Reduction of the Workers' Compensation Lien When You Are Settling Your Third Party Case

Many personal injury attorneys will call us on cases where we may be handling the workers' compensation claim or no one is handling the workers' compensation case, and they want advice or help in seeking a reduction of the workers' compensation lien against the third party case. Several basic strategies apply in this situation. First, if the workers' compensation lien is in excess of the amount of the personal injury settlement, then obviously if the compensation carrier is not willing to work with the plaintiff on a reduction of their lien, then there is going to be little chance of settling that case successfully.

For example, if the workers' compensation lien is currently $60,000 and the limits of liability of the defendant (and the only policy available) are $25,000, the compensation carrier is

going to have to agree to some reduction in order to facilitate the settlement. In these situations typically, we suggest a three-way split whereby the plaintiff's attorney gets 1/3 of the $25,000, the compensation carrier gets 1/3 of the $25,000 and the claimant gets 1/3 of the $25,000. Typically we suggest that is done after reimbursement of the plaintiff's attorney's expenses. Most reasonable carriers will understand that the plaintiff has no incentive to agree to settlement in this posture without some agreeable reduction by the workers' compensation carrier, and they should be agreeable to splitting it three-ways in this situation.

In those situations where the comp carrier agrees to a voluntary reduction of the lien, such as the three-way split discussed above, that reduces the lien figure as what is used as the basis for calculating the future credit, not the original total amount of the lien. In other words, the "gross recovery" that will effectively have to be burned off by this post third-party recovery ratio credit is the amount of the agreed upon lien, not the original amount of the lien as applies to most cases. *See* McKnight v. Work Environment Associates, 43 VA. App. 189 (2004).

If they will not, then the plaintiff's attorney really has two choices: First, they can go ahead and settle the case for $25,000, take their 1/3 fee plus expenses, pay the remainder of the $25,000 to the compensation carrier and then in order to facilitate their client getting some recovery, possibly give the client a "gift" out of their fee. So, in such a scenario, the fee income is still taxable income to the plaintiff's attorney and you are simply giving the client a "gift" of some portion of your fee. You may want to check with the State Bar about how best to handle such a "gift". The "wrong method" we have seen plaintiff's attorneys apply is when they draft their settlement statement to reflect a 25% fee on their part (i.e. in a $25,000 settlement they will

pay the comp carrier $16,666.66 and they will take 25% fee of $6,250 and give the remainder to the client). Technically, this is not proper settlement of the workers' compensation lien under the statute. The carrier is entitled to the full lien in that scenario; their only reduction is for attorney's fees and costs. If you are reducing your fees then the workers' compensation carrier is entitled to the additional monies, not the client. The only way to get money to your client in this scenario is draft your settlement statement to reflect the full fee paid to you as taxable income and then give your client a gift. In addition, reducing your personal injury fee also reduces the post-third party recovery ratio. Remember to make sure your fee reduction does not reduce your client's future benefits to a smaller percentage (i.e. 25% of future lost wages instead of one-third).

If the plaintiff's attorney can't do that, then the second method is to point out to the workers' compensation carrier that if your client is not going to receive any money, they have no incentive to agree to the settlement and the carrier will not be able to settle that case on their own. In those situations, simply send the carrier a copy of the statute of Virginia Code section 65.2-309, part C, which provides that "no compromise settlement shall be made by the employer in the exercise of such right of subrogation without the approval of the Commission and the injured employee or the personal representative or dependents of the deceased employee being first obtained". If they don't help ensure your client gets a portion of the personal injury proceeds, then tell them you are closing your file, and they will never receive any lien reimbursement because they can't settle the case without your client's permission. Of course, if there is personal UIM proceeds available, the workers' compensation lien does not attach to these proceeds and you may still be willing to settle the case.

The other complication that plaintiff's attorneys need to understand is that reduction of that lien is directly affected by the recovery of the personal injury case. If you are settling a personal injury claim for a $1,000,000 and there is an outstanding $300,000 lien, it may be next to impossible to get a full lien reduction. You may be able to get some lien reduction but not a full lien waiver. The basic value of a workers' compensation case for settlement purposes is predicated on the future lost wage benefits they may receive and their future medical needs. By its very nature, when the personal injury case is settled in our example for $1,000,000, the post third party recovery ratio we had talked about will have to be established. This will effectively reduce the value of the claimant's future compensation case to 1/3 of its current value. If the claimant's future lost wages are worth $150,000 and his future medical needs are worth $75,000 prior to the personal injury case settling, after the third party personal injury case settles the carrier will essentially be paying only 1/3 of those benefits in the future and their wages are now only worth $50,000 and the medical is only worth $25,000. The carrier's total future exposure is only $75,000 for settlement purposes. Given the uncertainties of what may happen in the future, settlement value may be only $50,000. If there is already an outstanding lien of $300,000 we may not be able to do much to reduce that lien.

In contrast, if the third-party personal injury case is only going to settle for $25,000 the "gross recovery" is going to be very low, or may be so small that there is no gross recovery at all. In that situation the future value of the workers' compensation claim is not affected by the sum of the personal injury case and the comp claim can be settled for full value. In that situation we are more likely to see that whatever the outstanding lien is, the comp carrier may agree to a full

waiver of that lien and settle the workers' compensation case simply because the settlement value of the workers' compensation case is not being reduced because there is no significant recovery in the third-party personal injury case.

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 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.

III.
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 has even 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," Va. Code §65.2-310.

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.[8] 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 stoppage of any and all benefits (lost wage, medical, permanent partial disability benefits, etc.)[9] In addition, although there are no cases on point, an agreement to arbitrate the personal injury case or an agreement to a high/low may also jeopardize the workers' compensation claim and should only be finalized after getting the workers' compensation carrier's prior approval.

In addition, failure to seek the carrier's approval of the third-party personal injury case not only will effectively cut off any future workers' compensation benefits the claimant has by prejudicing the employer's right of subrogation, the plaintiff loses their chance to reduce the subrogation lien by a pro rata share of attorney's fees and costs. *See* Skelly v. Hertz Equipment Rental Corporation, 35 VA. App. 689 (2001) affirming the Opinion of the Worker's

Compensation Commission that the carrier was not responsible for "payment of attorney's fees and costs related to the settlement of the third-party tort claim" where the plaintiff settled the third-party tort claim without the carrier's permission or knowledge.

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 statute. Va. Code §65.2-309. 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.

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.

iii. Attempts to Avoid Lien Payback

Over the years various attempts have been made by plaintiff's attorneys to avoid payback of the workers' compensation lien. The most successful one in recent memory was Yellow Freight Systems, Inc. v. Courtaulds Performance Films, Inc., et al., 226 Va. 57, 580 S.E. 2d 812 (2003), which 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 down side was a loss of future compensation benefits and a potential civil claim against the claimant based on an equitable lien. This potential loop-hole 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.

An attempt was made previously by a creative plaintiff's attorney in court to avoid paying back all of the workers' compensation lien in a wrongful death case. *See* Liberty Mutual

Insurance Co v. Fisher, 263 VA 78, 557, S.E. 2d 209 (2002) holding that the carrier's right to subrogation is not restricted to reimbursement of benefits paid to an individual beneficiary of the wrongful death case. Essentially the Court held that even in a wrongful death case there is no statutory language that places a limitation on the employee's right of recovery of their statutory lien, meaning their lien is valid against all wrongful death proceeds, just like a regular personal injury case.

C. PROCEDURAL ISSUES AND WORKERS' COMPENSATION SETTLEMENTS

i. PETITIONS & 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% or less of the lump sum settlement. 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 reduced or offset by the amount of workers' compensation benefits. 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.

ii. 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. (CMS July 23, 2001 Memo)[10] The discussion below pertains only to Medicare and workers' compensation settlements. The below Medicare set-aside guideline and suggestions do not apply to a settlement of a personal injury case with no workers' compensation component.

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 is normally 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 they have 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.[11] In that case, it is 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.

With regard to the above mentioned categories, CMS will review and approve a Medicare set-aside amount if requested by the parties. Such review is not required but it is highly advisable because it gives the parties a definite number that Medicare feels needs to be set-aside. The important point to remember is these are **workload thresholds**, meaning these are the levels in which CMS will review a proposed Medicare set-aside arrangement. That does not mean these are thresholds for whether a Medicare set-aside arrangement needs to be considered by the parties.

Most settlements in workers' compensation cases fall below these thresholds. Many workers' compensation clients are not currently Medicare eligible but have a reasonable expectation of becoming Medicare eligible within the next thirty months. Typically those are people who have applied for Social Security Disability, have been turned down and are in the process of appealing. In addition it also applies to people who are 62 ½ years of age whether they have applied for social security disability or not, or anyone over the age of 65 who is already Medicare eligible. For these persons who are settling their case for less than $250,000 but have "reasonable expectation of qualifying for Medicare" in the next thirty months, they still may need to do a MSA but it cannot be reviewed and approved by CMS.

All of these Medicare/MSA issues become relevant to your personal injury case when as a condition of reducing or waiving their lien against the third party personal injury case, the

carrier requires that the workers' compensation case be closed. In such a situation, a Petition and Order will need to be submitted to the Workers' Compensation Commission as discussed above and a Medicare set-aside arrangement may need to be considered in order for that case to settle. Even though no money may be received by your client as a result of the workers' compensation case settling, that settlement still has to be approved by the Workers' Compensation Commission. The Commission has specifically stated that their settlement department, who is responsible for reviewing and approving all workers ' compensation settlements in Virginia, will require that some discussion of a Medicare set-aside account be discussed in every settlement. This is a new policy as of January 1, 2011. Up to this point it does not appear that the Commission is requiring that a Medicare set-aside account be set up in every settlement. If no Medicare set-aside is created, the reasons and rationale for not setting one up must be addressed in the settlement letter that is submitted to the Commission for approval of a settlement. In any event, if you are settling a personal injury case and as a part of that settlement, a workers' compensation case is going to be settled and your client meets these basic work thresholds of the Center of Medicare Services, a Medicare set-aside account will be insisted upon by the carrier. In addition, if you meet the work thresholds for CMS, the workers' compensation insurance company is typically going forward to have that MSA approved by CMS prior to the workers' compensation case settling (i.e. being approved by the Workers' Compensation Commission).

What does that mean for the personal injury attorney? That means several things. One, it means you are going to be holding money in escrow for a long time while the CMS approval process is completed. CMS currently indicates that they can approve a settlement within four to five months of submission by the parties. Our experience is that it rarely, if ever, happens that

quickly. Once they approve the proposed MSA amount, then the settlement will need to be forwarded to the Workers' Compensation Commission which can take another four to eight weeks to approve your settlement. Only once all of that has completed then can the workers' compensation carrier's lien be paid out and the claimant's file closed for good.

In every case where a Medicare set-aside is going to need to be prepared and approved by CMS, the Virginia Workers' Compensation Commission will have to approve the settlement as well. 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.

In the last several years these settlements have been handled two ways: One, the parties get an MSA prepared and then they agree to go ahead and send the settlement to the Workers' Compensation Commission for approval with the carrier agreeing in the Order that if CMS requires any additional sums to be placed in a set-aside amount that the carrier will fund that additional money. Because of the inclusion of prescriptions in the Medicare set-aside account, carriers have been reluctant to undergo this procedure. They now prefer the method of sending it in to CMS first to have CMS confirm the amount of the set-aside and then the client deciding, depending on what the CMS set-aside amount is, whether they wish to go forward with the settlement or not. If they do, then it is submitted to the Commission and it takes four to eight weeks for approval.

Obviously the amount of the set-aside account can have implications for the client in terms of whether the settlement makes sense or not. If they are getting a lien waiver of $30,000 in exchange for closing the comp case, that's an additional $30,000 they will receive from the personal injury proceeds. But if the Medicare set-aside account, as determined by CMS, comes back at $40,000 they now have to take $40,000 out of their personal injury proceeds in exchange for closing their comp case. That may not make any sense in that situation. If you have already settled the personal injury case and the client has the understanding that there is going to be additional money coming to them as a result of the workers' compensation lien waiver, that may not hold true depending on what the MSA number determined by CMS ends up being. Even if the case does not meet the CMS work thresholds, the parties will still need to consider Medicare's interest. This will mean a Medicare set-aside number will need to be agreed upon and the funding for that Medicare set-aside will typically come out of the personal injury proceeds.

As you can see, in any case where there's a workers' compensation lien reduction or waiver being involved, particularly if there's a Medicare set-aside amount that needs to be considered, it is going to delay the settlement for a number of months and could significantly jeopardize and complicate the settlement of both the personal injury case and the workers' compensation claim.

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CONCLUSION

As you can see from the above discussion, 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 a combined workers' compensation / personal injury case 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, VTLA The Journal, Spring 2004, authored by Andy J. Reinhardt and Stephen T. Harper.

[2] (Va. Code §65.2-311)

[3] (Va. Code §65.2-313)

[4] (Va. Code §65.2-317)

[5] Lance v. School for Contemporary Education 74 O.W.C. 106 (1995); (Many times the order can provide that the reduced checks continue on a weekly basis so the claimant does not have to wait to be paid quarterly.)

[6] Eshbal v. Boston Coach, Corp., 75 O.W.C. 147 (1996)

[7] Kern v. Logistic Express, Inc. 74 V.W.C. 106 (1995)

[8] See Overhead Door Company of Norfolk v. Lewis, 29 Va. App. 52, 509 S.E. 2d 535 (1999).

[9] Barnes v. Wise Fashions 16 Va. App. 108 (1993)

[10] For further information see CMS website at www.cms.hhs.gov/WorkersCompAgencyServices/

[11] 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.

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

A. SETTLEMENT TERMS:

Settlement	$150,000	
Lien before reduction	$ 75,000	
Atty 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 = $\frac{\text{Total Attorney Fee + Cost}}{\text{Gross Recovery}}$

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 $1,000.00 and seeks reimbursement of share of attorney fees/cost

Reimbursement Amount = % of Fees x Additional Medical or Compensation

$350. = 35% x 1,000

Biography of Stephen T. Harper

Stephen T. Harper is a partner in the law firm of Reinhardt & Harper, P.L.C. in Richmond, Virginia. 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 representation of claimants before the Workers' Compensation Commission and personal injury litigation. He is an active member of the Virginia Trial Lawyers Association, Richmond Bar Association, Workers Injury Law & Advocacy Group (WILG) and is on the WILG Board of Directors. He is currently the Chair of Virginia Trial Lawyers Association's Workers' Compensation Section.

Biography of Craig B. Davis

Craig B. Davis has been a member of Emroch & Kilduff, LLP since January 2002 when he established the firm's workers compensation section. He is currently a Governor at Large on the Virginia Trial Lawyers Association's Board of Governors and is a former chair of VTLA's Workers' Compensation Section and Young Trial Lawyer Section. Craig frequently lectures on topics related to workers' compensation and personal injury throughout the Commonwealth of Virginia and has previously been published on the subject of workers' compensation. Craig also helped establish and has served as moderator of the Workers' Compensation Section's Advanced Practice CLE Retreat for the last three years. Craig graduated *cum laude* from Washington and Lee University in 1990 and obtained his J.D. from the T.C. Williams School of Law in 1994. Craig has been admitted to practice in Virginia and West Virginia. Craig handles cases involving workers compensation, medical malpractice, products liability and personal injury. He volunteers his time at Central Virginia Legal Aid and the Richmond SPCA.