

Third Party Actions Provide Needed Compensation for Injured Workers

By Mark McGrath

Given the limitations of the workers' compensation remedy and the precarious status of *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), third-party claims offer workers their brightest prospect for obtaining full compensation for workplace injuries.

Third-party claims are a creature of statute. G.S. Sect. 97-10.2(a) provides that "[t]he right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefore."

The pool of potential third-party tortfeasors is virtually limitless. The following example, however, should provide some insight regarding the identification of potential defendants:

The employee of a subcontractor is injured while working in a newly constructed office building. On the date of the incident, the worker stepped into a temporary elevator that had not been cabled properly. As he pressed the button to lower the elevator, it plunged three stories to the ground. Evidence reveals a design defect in the elevator arrestor system. The evidence also reveals that the general contractor installed the cable and elevator and that the architect, who was under a contractual duty to inspect and approve all elevator installations, had inspected and approved the installation.

In this scenario, and assuming that the claims had merit, the injured employee could pursue third-party claims against the manufacturer of the elevator, the general contractor and the architect.

In practice, other scenarios would include employee v. employer's parent or sister corporation, employee v. franchisor of franchisee-employer, employee of contractor v. owner of facility, and employee v. third party negligent driver.

TIMING AND LIMITATIONS

The statute provides that the injured employee has the exclusive right to proceed against potentially responsible third parties during the 12 months following the date of injury or death, whichever occurs later. If the employee files suit within this 12-month period, she possesses the exclusive right to settle with the third party, including the right to enter into a full and final release of the third party's liability.¹

If an injured worker does not file suit or resolve her claim against the third party during the initial 12-month window, and if the employer has filed a Form 60 admission of liability within that time frame, either the employer or the employee may file suit and resolve any and all claims against the third party at any time within the applicable statute of limitations. If, however, 60 days prior to expiration of the statute of limitations (typically three years) neither party has filed suit or settled with the third party, the sole right to prosecute and settle the third-party claim reverts to the employee.²

THE EMPLOYER'S RIGHT OF SUBROGATION

The payment of workers' compensation benefits by the employer's insurer or self-insured employer creates a lien against any funds collected by the employee from the third party by way of settlement or judgment. G.S. Sect. 97-10.2(h) provides that "[i]n any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as

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consideration for covenant not to sue or otherwise and such lien may be enforced against any person receiving such funds."

The statute specifically provides that the lien may be enforced against "any person" who is, or was at one time, in possession of the settlement or judgment proceeds. Accordingly, the lien attaches to the proceeds, regardless of whether they are in the possession of someone other than the employee, including the employee's attorney. When attorneys distribute third-party settlement proceeds, they must be mindful of the fact that they can be held personally responsible for funds that are distributed in contravention of G.S. Sect. 97-10.2.3

The North Carolina courts have not addressed whether the lien attaches to payments made to a person other than the employee. For example, should the lien apply to settlement proceeds that are directed to an employee's spouse for her loss-of-consortium claim or payments made to a child or other relative for negligent infliction of emotional distress? Because such claims are legally distinct from the employee's individual claim, payments in consideration of bona fide loss of consortium and NIED claims should not be subject to the lien.⁴ However, because the statute provides that the lien applies to any compensation paid "by reason" of the employee's injury, regardless of to whom it is made, there is an argument to be made that even these kinds of claims are subject to the employer's lien.

SEEKING REDUCTION OF THE SUBROGATION AMOUNT

G.S. Sect. 97-10.2(j) allows the employee to petition the Superior Court to determine the amount of the workers' compensation lien. Two events can trigger the jurisdiction of the Superior Court: settlement of the third-party claim or judgment following trial. Under earlier versions of the statute, the jurisdiction of the Superior Court was not triggered unless the judgment was insufficient to satisfy the lien.⁵ Under the current statute, judgment in any amount will permit a judge to determine the amount to be recovered by the carrier.

Subsection (j) provides that "in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party the judge shall determine, in his discretion, the amount, if any, of the employer's lien." In exercising its discretion the court is required to "make a reasoned choice, a judicial value judgment, which is factually supported [b]y findings of fact and conclusions of law sufficient to provide for meaningful appellate review."

Statutory factors to be considered by the court include: (1) the anticipated amount of prospective compensation the employer is likely to pay to the employee in the future; (2) the net recovery to the plaintiff; (3) the likelihood of the plaintiff prevailing at trial or on appeal; (4) the need for finality in the litigation; (5) and any other factors the court deems just and reasonable. Taken together, when presented with a motion for allocation under G.S. Sect. 97-10.2(j), the trial court is required to balance the equities in determining whether it should reduce or eliminate the subrogation lien of the employer.⁷

As the language of the statute suggests, the court has jurisdiction to reduce the lien or eliminate it altogether.⁸ Case law (and experience) reveals that trial courts exercise their discretion under the statute quite freely and have routinely stricken workers' compensation liens in their entirety.⁹ Because the standard for reviewing Subsection (j) rulings is abuse of discretion, the North Carolina appellate courts have repeatedly affirmed such decisions.¹⁰ Going further yet, the courts have recognized that liens can be stricken even when the net effect is a double recovery to the employee.

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Trial courts have traditionally given considerable weight to employer negligence in determining whether the employer should be permitted to recover its lien at the employee's expense. Paying deference to the trial courts, the appellate courts have consistently affirmed rulings in which the culpability of the employer was considered by the trial court in determining the amount of the employer's subrogation lien. Indeed, the appellate courts have repeatedly held that the enforcement of workers' compensation liens is only available to non-negligent employers.

SETTLEMENT WITH THIRD PARTY VOID WITHOUT CONSENT OF EMPLOYER

As a general rule, a settlement agreement executed between the employee and third party without the consent of the employer or its insurance carrier is regarded as a nullity. G.S. Sect. 97-10.2(h) provides that "[n]either the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both the employer and employee or his personal representative join therein." An employee can settle without her employer's consent, but only if she reimburses the employer for all benefits received under the Act, less attorney fees.

Obviously, this presents a potential problem for the employee's lawyer. For example, assume the employee settles with the third-party tortfeasor at mediation. Settlement documents are exchanged, and the settlement check is forwarded to the employee's attorney to be held in trust pending finalization of the documents. If there is a workers' compensation lien, the employer is not likely to consent to the settlement unless the employee agrees to satisfy the lien in full. The employee, on the other hand, is rightly indignant at the prospect of repaying an insurance company that has assessed the employer's risk through a sophisticated underwriting process and collected premiums from the employer in exchange for providing it with workers' compensation coverage.

Anticipating this scenario, the General Assembly provided in Subsection (h) that employer consent is not required when the employee "follows the provisions of subsection (j)." Subsection (j) sets forth the procedure for petitioning the Superior Court for reduction or elimination of the workers' compensation lien. Accordingly, the employee can overcome the hurdle of employer intransigence by petitioning the Superior Court to determine the amount of the lien. Upon order of the court, the settlement will be given effect, notwithstanding the employer's refusal to consent to its terms.

EMPLOYER NEGLIGENCE

As we have seen, a finding of employer negligence can work in favor of an injured employee in that it provides a basis for reducing or eliminating the employer's subrogation lien. Unfortunately for claimants, it can also provide a basis for reducing an award of damages by a jury.

If the third party proves that the negligence of the employer joined and concurred in causing the worker's injury, the statute allows the third party to deduct from any judgment entered against it the full amount of workers' compensation benefits paid to the worker under the Act.

More specifically, the statute provides that:

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"If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death."

Upon receipt of such notice, the employer may appear and be represented by counsel, introduce evidence, cross-examine adverse witnesses and argue to the jury as if the employer were a party to the action. When a "claim" of employer negligence is made under this section and the matter proceeds to trial, the issue of employer negligence is the last issue to be presented to the jury.¹⁵

If a jury finds that the employer's negligence concurred and joined with the negligence of the third party, the court is required to reduce the damages awarded to the worker in an amount equal to that which the employer (or its carrier) would otherwise be entitled to recover by way of subrogation. In essence, the finding of employer negligence yields a credit to the third party to the extent of the employer's lien.

Consider the following example: At trial, a jury finds that the third party negligently caused the employee's injuries and awards the employee \$1 million in damages. The jury also finds that the negligence of the employer joined and concurred with the negligence of the third party in causing these injuries. Finally, assume that the employer has paid \$300,000 to the employee in medical and indemnity payments and has a lien on the award to that extent. In this scenario the net award to the plaintiff would be \$700,000.

A finding of employer negligence also has the effect of voiding the employer's lien. Such a finding also extinguishes any right of contribution or indemnity that the third party might have against the employer, except that the third party may still pursue a claim for contractual indemnity against the employer. If there is an express contract of indemnity in favor of the third party, the court has discretion to exclude the employer from the trial of the third-party claim and submit the issue of employer negligence to the jury in a separate hearing.

DISTRIBUTION OF PROCEEDS

Under G.S. Sect. 97-10.2, the proceeds of a third-party settlement can be distributed either by the Industrial Commission or by the Superior Court. Recall that the Superior Court possesses jurisdiction to determine the lien amount and that its jurisdiction is triggered by either settlement with the third party or final judgment. Under the original version of Subsection (j), courts had held that the jurisdiction of the Superior Court could not be invoked unless the employee reached a settlement with the third party and the employer consented to the settlement in accordance with Subsection (h).¹⁷ In essence, this meant that an employee could never seek reduction of the lien amount unless the employer consented to the settlement.

The General Assembly amended Subsection (j) in 1991 to clarify that Subsection (j) applied "[n]otwithstanding any other subsection in this section," thus making clear that Subsection (j) was intended to operate independently of Subsection (h). Accordingly, under the current version of Subsection (j), a settlement between the employee and third party, regardless of whether the employer consents to the settlement, will invest the Superior Court with jurisdiction to determine the lien amount. As a result, the Superior Court is now almost always a legitimate forum for distribution of the settlement proceeds.

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Unlike the grant of jurisdiction to the Industrial Commission contained in Subsection (f)(1), Subsection (j) does not expressly authorize the Superior Court to distribute settlement proceeds. Rather, this section states that the court may "determine the subrogation amount" and allocate the cost of the third-party litigation between the employee and employer. Interpreting this language, the North Carolina courts have made clear that once the Superior Court exercises jurisdiction over a matter pursuant to Subsection (j), it possesses jurisdiction to disburse the entire corpus of the settlement proceeds. The court's authority to disburse proceeds is not confined to the amount of the subrogation lien.¹⁹ Because the Superior Court has jurisdiction to allocate the entirety of the settlement proceeds, including the disbursement of fees to the employee's attorney, no further action by the Industrial Commission is required or authorized. Of course, the commission retains exclusive jurisdiction for the approval of any clincher agreement entered into between the employer and employee, even when the court has already disbursed the proceeds of the employee's third-party settlement under Subsection (j).

Unless a motion is made under Subsection (j), action by the Industrial Commission is required to disburse third-party settlement proceeds. Pursuant to G.S. Sect. 97-10.2(f)(1), either the filing of a Form 60 admission of liability by an employer or the entry of a final award by the commission requires the commission to distribute the proceeds of the third-party settlement according to a statutorily prescribed schedule. Under this section, payment must be made according to the following order of priority: (1) first to reimburse the employee for court costs or expenses incurred in prosecuting the third-party case; (2) then to attorney fees not to exceed one-third of the third-party settlement; (3) then to the employer in an amount sufficient to satisfy its lien (less attorney fees); and (4) then to the employee. Significantly, the Superior Courts are not bound by this schedule when disbursing funds under Subsection (j). Rather, when allocating and disbursing the proceeds of a third-party settlement, a Superior Court is bound only by the confines of its discretion.

CONCLUSION

Given the current state of the law, third-party claims provide attorneys with their best opportunity to obtain full compensation for workplace injuries. While the issues in such cases are typically complex and require a considerable degree of patience and legal creativity, the rewards for attorney and client can be well worth the effort.