



Calculating Third-Party Liens: how to maximize your client's results



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In January 2011, my client, Randy, was a contract employee at an Oregon rock quarry working under a rock sorting machine. As the conveyor on the rock sorting machine was being turned, a hinge broke, and the side of the machine fell on Randy. He suffered severe injuries — a broken pelvis and sacrum. His lower back was also injured. Because of his injuries, Randy developed depression. He dealt with erectile dysfunction and bowel control issues.

Because Randy was working for a subcontractor at the quarry, he had an obvious third-party claim under Oregon's Workers' Compensation Law. The law allows an injured worker to obtain damages for the injuries sustained in a com-

pensable injury in addition to receiving workers' compensation benefits. The law allows an injured worker to obtain damages for pain and suffering and the full gamut of non-economic damages. I was brought into the case by Portland attorney Steve Piucci and Pendleton attorney Gene Hallman. They wanted me to pursue Randy's workers' compensation claim while they developed the third-party claim and, when the time came, help them resolve competing interests in the third-party claim recovery.

Before finishing Randy's story, a brief discussion of the law surrounding third-party workers compensation claims, the distribution of the proceeds and dealing with the subrogation interests of the workers compensation lienholder is appropriate.

The third-party claim

Oregon's Workers' Compensation Law allows an injured worker to bring a cause of action against a person or corporation who is not the employer of the injured worker and who is not a co-worker. When this factual situation present itself, ORS 656.154 states:

If the injury to a worker is due to the negligence or wrong of a third person not in the same employ, the injured worker, or if death results from the injury, the spouse, children or other dependents, as the

case may be, may elect to seek a remedy against such third person.

When a third-party claim has been identified, ORS 656.578 requires the injured worker to make an "election" in order to pursue the claim. The alternative to pursuing the claim as an individual is to assign the third-party claim to the paying agency, usually the workers' compensation insurance company responsible for paying the worker the benefits due under the Workers' Compensation Law. An election not to proceed against the third-party operates as an assignment of the cause-of-action to the paying agency. When the paying agency brings the claim, it may do so in the name of the injured worker or other beneficiaries.

Under ORS 656.583, the paying agency may require the injured worker to exercise the right of election by making a written demand for election. The law requires the injured worker to make an election within 60 days of receipt of the written demand from the paying agency. If the 60-day timeline is not met, the claim may be determined to have been assigned to the paying agency. Paying agencies in Oregon have developed forms for the purpose of demanding election by the injured worker.

Under ORS 656.580, the injured worker receives all the benefits provided by the workers' compensation law in the

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same manner and to the same extent as if no right of action existed against the third-party. ORS 656.580(2) establishes that the paying agency or insurance company had a lien against the injured worker's cause of action. Either one of those has preference to all claims "except the cost of recovering such damages."

It is important to remember that ORS 656.587 requires the written approval of the paying agency in order to settle a claim against a third-party. The statute states that any claim settled or compromised without the written approval of the paying agency is void.

When an injured worker elects to bring a cause of action against a third-party, notice must be provided to the paying agency by personal service or by registered or certified mail. The paying agency must also be provided notice of the name of the court in which the third-party claim has begun and a return show-

ing service of such notice shall be filed with the clerk of the court in which the action has been brought. This last series of notices are often overlooked by attorneys when pursuing third-party actions. SAIF Corporation has developed a form for the injured to use in order to satisfy these frequently overlooked notice requirements.

Distribution formula

ORS 656.593 states that the total proceeds of a third-party action shall be distributed in the following manner:

- Costs and attorney fees incurred shall be paid. The attorney fees shall not exceed the advisory schedule of fees established by the Workers' Compensation Board (WCB) for such actions.
- The worker or the beneficiaries of the worker shall receive at least 33.33 percent of the balance of such recovery.
- The paying agency shall be paid and retain the balance of the recovery, but

only to the extent that the agency is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim under this chapter.¹

- The balance of the recovery shall be paid to the worker or the beneficiaries of the worker. Any conflict as to the amount of the balance which may be retained by the paying agency shall be resolved by the WCB.

Costs and attorney fees

Under Oregon law, costs and attorney fees are first in line to come out of any third-party recovery and come off the gross or "the total proceeds" of the third-party action. The fees shall not exceed the advisory schedule of fees established by the WCB. The Board's administrative rules at OAR 438-015-0095 state that "[u]nless otherwise ordered by the Board after a finding of extraordinary circumstances, an attorney fee not to exceed 33.33 percent of the gross recovery obtained by the plaintiff in an action maintained under the provisions of ORS 656.576 through 656.596 is authorized." So, extraordinary circumstances will need to be established in order to exceed the 33.33 percent level established by OAR 438-015-0095.

The WCB's case law establishes that "extraordinary circumstances" can arise in a number of ways. The factors most commonly present to justify a fee greater than 33.33 are extensive and protracted litigation of the third-party case, a lengthy jury trial and no opposition from the paying agency to the extraordinary fee request.

The costs necessarily incurred in the prosecution of the action are also recoverable by the injured worker.

The paying agency's lien

Once provision has been made for the

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payment of costs, attorney fees and injured worker's one-third share of the net settlement, the interests of the paying agency are addressed. ORS 656.593 states that the paying agency can recover its lien, "but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim." The WCB has ruled that the costs incurred by the paying agency for insurance medical examinations (IME's) are not properly included in the lien of the paying agency. Similarly, costs incurred for medical bill auditing are not properly included in the lien of the paying agency.² Costs associated with medical arbiter examinations, however, can be included in a third-party lien, as the legislative history behind the medical arbiter process was not designed as part of the litigation process, but rather as a means to reduce litigation.³

Much of the litigation in the area of third-party liens concerns the paying agency's ability to recover "the present value of its reasonably to be expected future expenditures for compensation and other costs." The paying agency must establish, to a reasonable certainty, the amount of any claim for future claim expenses. In so doing, the individual circumstances of the injured worker are paramount; resorting to generalizations or statistical models will not suffice.

In *Curtis W. Phillips*, 57 Van Natta 1852 (2005), SAIF Corporation claimed future expenses based on its experience with hearing loss claims and its "Hearing Loss Educational Module," and that such costs were based on estimates of those in "typical hearing loss claims." Citing *Sherman v. W. Employer's Ins.*, 87 Or App 602 (1987) the Board held that SAIF's projected costs were based on statistical generalities, rather than on the claimant's particular circumstances, and were not persuasive in establishing SAIF's claim

for inclusion in the third-party lien.

Any money remaining after the paying agency's lien has been satisfactorily resolved is payable to the injured worker. Disputes over the distribution scheme set forth by ORS 656.593 are resolved on a case by case basis by the WCB. In such cases, the Board will issue a Third-party Distribution Order and follow the procedure set forth in the Board's rules at OAR 438 011 0045.

The exception

The so-called "million dollar exception" applies to cases where the injured worker is entitled to receive a settlement or judgment in excess of one million dollars. In that circumstance, the injured worker can release the paying agency of any future responsibility on the claim by reimbursing the paying agency for any benefits paid to date. Under this approach, the paying agency completely loses the right to include a claim for the present value of reasonably expected

future expenditures.

In order to utilize the million dollar exception the injured worker must be represented by an attorney. The release of the claim must be presented in writing and filed with the WCB, a copy served on the paying agency and on the Department of Consumer and Business Services. The claim release must specify that the worker understands the claim release means the worker will have "no further benefits of any nature whatsoever" from the paying agency.⁴ In the event of ongoing medical expenses, the paying agency may establish and maintain for 180 days a contingency fund in an amount reasonably sufficient to cover any outstanding medical benefits. Any amount remaining after the 180 day period shall be paid to the injured worker.⁵

The statutory formula discussed above makes it difficult to "negotiate" the size of the third-party lien. It is certainly good practice to keep the paying agent

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advised as the case progresses and to apprise the paying agent of any challenges with the case that make recovery in the third-party case difficult. Those challenges can include a case of difficult liability or a case where you are dealing with a difficult client. That way, when the settlement you put to together does come to fruition, and you need to make the money stretch, the needs of your client will not come as a surprise to the paying agent. However, with its basis in statute, the paying agent can always fall back on recovering its statutory share and choose not to negotiate.

It is also good practice to have an experienced workers' compensation lawyer assisting the injured worker with the workers' compensation aspects of the case in the event the attorney pursuing the third-party case is not well versed in the intricacies of the workers' compensation law. An experienced workers' compensa-

tion lawyer can get the injured worker through the system, maximize the worker's recovery under the workers' compensation law, and then be well-versed in the case when the time comes to analyze and negotiate the interest of the paying agent.

Finally, having an experienced work-

Personal relationships with the opposing counsel and the adjuster went a long way to maximizing the worker's recovery.

ers' compensation attorney involved in the case will allow the injured worker to enter into two types of workers' compensation settlements which could, taken in conjunction, greatly reduce or eliminate the lien interest of the paying agent.

The injured worker could enter into a Claim Disposition Agreement (CDA). Under ORS 656.236 an injured worker

can relinquish future rights to workers' compensation benefits for future temporary disability or time loss, future permanent disability compensation and future vocational assistance benefits as consideration for releasing these rights. The worker can negotiate a partial or total elimination of the paying agency's third-party lien, thereby increasing the amount the injured worker recovers under the third-party settlement. The WCB has approved this use of settlements, using CDAs.⁶

Additionally, if there are conditions present in the case that are claimed but not yet accepted as part of the claim, or if the parties want to negotiate an end to a claim entirely and the basis for a such a resolution is present, the parties can negotiate a Disputed Claim Settlement (DCS) to eliminate a portion of the third-party lien. A DCS, combined with a CDA, under the right circumstances, can eliminate a third-party lien, allow the injured worker to disengage from the workers' compensation system and keep a larger portion of the third-party settlement.

Resolution

Randy's case eventually went to multi-party mediation with the parties involved in the third-party case and the workers' compensation carrier. Piucci and Hallman were negotiating with the liability carrier in one room while I negotiated with the workers' compensation carrier in another. The liability carrier brought experienced trial counsel, two of the principals of the employer and an experienced claims adjuster.

With the help of experienced mediator Sid Brockley, Piucci and Hallman were able to negotiate a settlement of \$450,000. The third-party lien at that point was \$183,000. Under the traditional distribution scheme under ORS 656.593, Piucci and Hallman would have been entitled to their fees plus costs, and the paying agent would have recovered its entire lien, \$183,000. Through



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negotiations with the workers' compensation defense lawyer and the workers' compensation adjuster, a complete waiver of the paying agent's third-party lien, \$183,000, was accomplished.

I was able to establish that the workers' compensation carrier would have substantial future exposure to the injured worker for permanent partial disability, temporary disability compensation, vocational assistance and medical care. Medical expenses were not an issue in Randy's case as he was medically stationary and had health insurance available through other means.

Through a combination of a disputed claim settlement and a claim disposition agreement, we obtained a waiver of the third-party lien in exchange for the worker relinquishing his future rights to compensation. With the third-party lien eliminated, the monetary distribution from the proceeds of the third-party case placed \$297,000 in the worker's pocket. The case likely would not have settled

without a waiver of the third-party lien.

This case shows the type of results that can be obtained when a workers' compensation attorney assists with a third-party case. It also shows the necessity of getting along with the other parties in a case. Everyone involved in the case treated the other parties with respect. Personal relationships with the opposing counsel and the adjuster went a long way to maximizing the worker's recovery.

Conclusion

A third-party case can be valuable and important to an injured worker in seeking just compensation for a work injury. Having an experienced workers' compensation attorney involved in the case can allow an injured worker to maximize the benefits available and reduce the interest of the paying agent so the injured worker can keep as much of the third-party settlement as possible.

Martin Alvey practices workers' compensation, personal injury and Social Security law. His law firm, Alvey Law Group, has offices in Portland and Astoria. He contributes to the OTLA Guardians of Civil Justice at the Guardians Club Plus level, is an OTLA Annual Sponsor at the Gold level and is serving as OTLA President. His Portland office is located at 8555 SW Apple Way Ste 310, Portland OR 97225. He can be reached at martin@alveylawgroup.com or 503-229-0895.

¹ Such other costs include expenditures of the Department of Consumer and Business Services from the Consumer and Business Services Fund, the Self-Insured Employer Adjustment Reserve and the Workers' Benefit Fund (WBF) in reimbursement of the costs of the paying agency. Such other costs also include assessments for the WBF and include any compensation which may become payable under ORS 656.273 or 656.278.

² Jack S. Vogel, 47 Van Natta 406 (1995).

³ Bruce A. Gosner, 54 Van Natta 678 (2002).

⁴ ORS 656.593(6)(c).

⁵ ORS 656.593(6)(e)(C).

⁶ See e.g. Anthony G. Allen, 49 Van Natta 460 (1997).



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