

By Bruce M. Bender

The Interplay between Workers' Compensation and Social Security Disability Cases
And Workers' Compensation and Third Party Cases

A. Interaction Between Workers' Compensation Case And Social Security Disability Cases Upon Settlement

The savvy workers' compensation practitioner needs to know some critical information regarding the interplay between Social Security Disability cases and Workers' Compensation claims when litigating a case at the Commission or considering a settlement of the case.

First, from a practical standpoint, even though your client may be on Social Security Disability, this does not guarantee that a Commissioner will find your claimant to be permanently and totally disabled. I have found from my years of experience that the Commissioners take the fact that one is on Social Security Disability into account when considering permanency but this is no guarantee of a permanent total award.

Regarding settlement agreements, there are a number of critical issues that must be addressed in settlement agreements when someone is on Social Security Disability. First, in order to protect your client in a settlement agreement, the settlement proceeds could potentially create an off-set against the claimant's Social Security Disability benefits. Therefore, in order to try to prevent the off-set, a standard paragraph can be utilized in all settlement agreements to amortize the settlement proceeds over the claimant's life expectancy on paper, even though the claimant will be receiving the workers' compensation settlement in a lump sum. The Social Security Administration will honor this paragraph pursuant to Social Security Regulations which allow it, and hopefully this will avoid the off-set. A copy of this paragraph is attached to this article as appendix 1. If you amortize the settlement proceeds for the claimant in the settlement agreement, this could potentially save the claimant hundreds of thousands of dollars up through age 66 and three-quarters when the Social Security Disability benefits end and the claimant is then entitled to regular Social Security. Thus, adding this paragraph to a settlement agreement is a critical aspect of settlement negotiations because it is also a selling point to the claimant that they will save a great deal of money over time if they are able to settle their case rather than getting an award from the Commission.

In addition to attempting to avoid the off-set through this language in a settlement

agreement, Maryland Workers' Compensation Commission requires that if one is on Social Security Disability and Medicare or there is a reasonable expectation a claimant will be on Medicare within 30 months from the time of any settlement, either the medicals must remain open or a Medical Set Aside Trust Account must be set up to take into account Medicare's interest in future medical care. Normally, the carrier will do an analysis of the cost of future medical care and submit said analysis to CMS for approval. CMS will review the last two years of medical records usually and can either approve the MSA as submitted, or increase or decrease the MSA proposal. Thus, most carriers will settle a case with open medicals pending a submission to CMS which gives them the option to either fund the MSA after CMS approval or the option to keep medicals open. This will all have to be outlined in any settlement agreement to the Commission and set forth on the Guide form with the Commission.

B. Interplay Between Workers' Compensation Claims and Third Party Actions

1. Actions Against the Employer

In almost all cases, if a person is injured because of the negligence of the employer, the sole remedy is workers' compensation LE Art §9-509(f). An exception would be if there is no workers' compensation insurance 9-509(c) or if the employer deliberately injures the claimant 9-509(d). However in both these exceptions an election has to be made, whether to proceed under workers' compensation law or to file a third-party claim or lawsuit. Once a workers' compensation claim is made, even if it is found not compensable, it is considered that an election is made and one cannot file a third-party claim against the Employer.

2. Third Party Actions

If an employee has a compensable accident but it is caused by the negligence of a third party, an employee may file a third party claim in Maryland. A third party includes a co-employee but does not include a statutory employer. See LE §9-508.

If, for example, there is an owner of property who hires a general contractor and an employer of the general contractor negligently injures an employee of the subcontractor, the injured employee cannot sue the general contractor for negligence.

This is true even though the general contractor does not pay any of the workers' compensation award because the subcontractor has workers' compensation insurance. The rationale is that the employee has the right to file a worker's compensation claim against the general contractor. (i.e. the statutory employer)

If there is, however, a third party that is negligent, or causes an injury to the claimant, then the third party may be sued. LE Art. 9-901. An Action can be brought against the third party and at the same time a workers' compensation claim can be filed.

For the first two months after the commission makes an award, the employer/insurer has the exclusive right to bring an action for damages against the third party. This is rarely done. After the first two months, then the employee and the employer/insurer have a concurrent right to bring such an action 9-902 (c).

However, if the claimant brings a third party action, the employer/insurer in the workers' compensation claim has a statutory lien. (See Labor & Employment Article §9-902(e). Under Maryland law, the lien must be reduced by a proportionate share of the attorney's fees and expenses. (See Collins v. United Pacific Ins. Co., 315 Md. 141, 552 A.2d 707 (1989)

C. Practical Tips Regarding Workers' Compensation And Third Party Actions

I generally pursue the workers' compensation claim until it is completed so that the lien can be established prior to pursuing a third party action. This will allow for a negotiation of the lien in any settlement discussions regarding the workers' compensation claim.

Often there is a resolution between the third party case and the workers' compensation case. The comp case is often settled in consideration of the workers' compensation lien being eliminated or reduced.

However, if this is not possible because of the timing of the three year statute of limitations, then one may have to pursue the third party claim and complete said claim prior to the workers' compensation claim being finalized. If the third party claim is

completed and the claimant receives net settlement proceeds, the employer/insurer in the workers' compensation claim is entitled to a credit for all net settlement proceeds the claimant received in the third party claim. This may create a long period of time where the claimant will not be receiving workers' compensation benefits so if one settles a third party claim, as part of the negotiations to reduce the lien, a savvy workers' compensation practitioner should also get the employer/insurer to agree to not take any credit until the permanency portion of the claim is resolved. This could be a critical factor in keeping your client's benefits coming in even though they have already received their third party settlement or verdict.

Finally, a trap to be aware of is that you cannot settle a third-party case and then file a workers' compensation claim. Your claim will be denied. Central GMC, Inc vs. Lagana, 120 Md. App. 195, 706 A2d 639 (1998). There is no requirement that you get the approval of the employer/insurer before settling the third-party claim, unless there is proof that the settlement prejudiced the employer/insurer. Generally, if there is enough in the settlement to reimburse the employer/insurer, then prejudice would be difficult to show, and most cases can settle without the necessity of seeking approval. In most cases, however, one should consult with the workers' compensation carrier, particularly if the lien is substantial. This is especially so if you are attempting to reduce the lien.

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