How Employers/Carriers Can Prevent the "Double-Dip"

By Reinaldo Alvarez and Daniel Feight

When a workplace injury is partially caused by some entity other than the employer, the injured worker has both a workers' compensation claim against the employer and a potential third-party suit against the other entity. The following article explains how to avoid a result where the worker is "double-dipping" by receiving duplicative judgments.

One of the funnier moments in Seinfeld was the double-dip episode. George double-dips a chip into a dip and gets caught doing it. It all goes downhill from there for poor George. "You can't double-dip." It has become part of the American lexicon.

In the workers' compensation arena, a claimant may have a workplace injury that may have, at least partially, been caused by an entity other than the employer. In those instances, the injured worker may bring a workers' compensation claim against his employer and a suit against the other entity; the suit against the other entity is called a third-party suit.

When a claimant has both a workers' compensation case and a third-party case that stems from it, the claimant may receive judgments or settlements in both, thus creating a double-dip scenario. The Florida Workers' Compensation Law has checks and balances in place that, if followed, should not allow a claimant to double-dip.

When a claimant has a third-party settlement tied to a workers' compensation case, the employer/carrier gets to recover some of the monies it has expended in the workers' compensation case from the claimant's third-party settlement. While a workers' compensation carrier will never recover every penny it expends on a case, the Florida Supreme Court has given employer/carriers and claimants a basic mathematical formula to determine the percentage that an employer/carrier can recover.

In *Manfredo v. Employer's Casualty Insurance Co.*,[1] the Florida Supreme Court determined the mathematical formula upon which an employer/carrier can recover from amounts previously paid to the claimant and from any future payments should the workers' compensation case remain open after the third party case settles.

RIGHT OF ACTION

Before the employer/carrier can recover any monies expended, there first has to be a third-party case. The claimant, for some reason, may not want to pursue a third-party case. The Workers' Compensation Law gives the employer/carrier an opportunity to briefly step into the claimant's shoes and pursue a third-party action. The right to bring a third party suit belongs to the claimant for the first year that the cause of action has accrued.[2] If the claimant fails to file suit within a year of when the claim accrues the employer/carrier may file suit between the first and second year, but only after giving the claimant 30 days' notice. In turn, if the employer/carrier does not bring suit within two years, the right of action reverts to the claimant.[3]

To ensure that an employer/carrier is entitled to recovery of monies expended,

ABOUT THE AUTHORS...

REINALDO (REY) ALVAREZ is the Managing Attorney for the Workers' Compensation, Medicare Lien Negotiation and Medicare Set-Aside Department of Luks & Santaniello. He has over a decade of experience handling workers' compensation claims and preparing Medicare Cost Projections, Medicare Set-Asides and conditional payment lien negotiations with CMS. He has been rated AV Preeminent® by Martindale Hubbell™. Rey serves as the Workers' Compensation Committee Chair for the FDLA. He is a graduate of the University of Miami School of Law. He can be reached be RAlvarez@LS-Law.com.

DANIEL FEIGHT has experience in the practice areas of: general liability, personal injury protection and coverage, commercial litigation, business litigation, and complex commercial litigation. Daniel earned a Bachelor of Science degree in Finance from Indiana University and obtained a Juris Doctorate from the University of Miami School of Law. While attending law school, he completed a judicial internship with the Eleventh Judicial Circuit of Florida. He is admitted in the State of Florida and the United States District Court, Southern District of Florida. He can be reached be at DFeight@LS-Law.com

it is important to watch the calendar and bring suit within the statutorily allowed time frame. If the employer/carrier does not do so, and the claimant does not bring suit, then the employer/carrier forfeits its right to any recovery.

NOTICE REQUIREMENT

Once the third party action begins, the right to recovery does not attach automatically. Section 440.39, Florida Statutes, sets forth the steps in which employer/carriers can obtain a lien upon any judgment or settlement recovered from the third-party suit. The first step in securing the lien is the notice requirement. This is a step that is sometimes overlooked by the employer/carrier.

The notice requirement is designed to prevent settlement between an employee and tortfeasor without notice to the carrier. The decisions in *Circle K Corp./AIG Claims Services, Inc. v. Webster*[4] and *Zurich, U.S. v. Weeden*[5] serve as examples of the importance of the notice requirement.

In *Webster*, a Fifth District case, the employer/carrier was able to recover because it timely filed a notice of lien. The third-party litigants entered into and executed a settlement agreement, without providing notice of the settlement to the employer/carrier. The Fifth District found that, since the employer/carrier had timely filed its notice of lien, due process was implicated when the parties filed the joint stipulation for dismissal without notifying the employer/carrier.[6]

Weeden, a Fourth District case, was a legal malpractice case. The plaintiff, who was injured at work, also had a third-party case that stemmed from the injuries. The plaintiff brought a malpractice claim against her attorneys for allegedly mishandling her third-party case. The record appeared to be silent on whether notice of the suit being filed was ever served upon the workers' compensation carrier, Zurich, or the employer. However, Zurich's counsel was present on the first day of trial. Before and during the trial, Zurich's counsel did not file a notice of appearance or other notice advising of a lien upon any prospective judgment or settlement. After several days of testimony, the case settled.

Approximately one month after the case settled, Zurich filed its notice of lien, and later petitioned for equitable distribution of the settlement proceeds. The trial court denied the petition, in part because it was untimely. In its opinion, the Fourth District found the untimely notice to be dispositive: "[A]lthough section 440.39(3)(a), Florida Statutes, places no time limit on the filing of the notice of lien, a reasonable interpretation of the statute as a whole is that such notice must be filed before any settlement or judgment is recovered, not after."[7] The court found that Zurich had missed its opportunity to provide notice of the lien based upon a reading of the plain and ordinary meaning of section 440.39(a)(3), which the court interpreted as requiring the notice to be filed prior to any settlement or judgment.

Webster and *Weeden* demonstrate the importance of the notice requirement. The ruling in *Weeden* shows that a failure to timely file the notice can constitute waiver of the employer/carrier's right to a lien. As a result, it is important for employers/carriers to diligently abide by the notice provision of the statute.

MANFREDO FORMULA

Once the notice requirements are met, the employer/carrier will need to wait until entry of the third-party judgment or settlement. Once that occurs, the parties can determine what the employer/carrier will recover. The amount of the recovery is determined by using the *Manfredo* formula. The *Manfredo* case reached the Florida Supreme Court because competing mathematical formulas were being used in Florida to determine the employer/carrier's lien. The primary issue in *Manfredo* was to determine which mathematical formula was to be used in computing equitable distribution under section 440.39.[8]

After analyzing the different formulas, the Florida Supreme ruled that the ratio of settlement to full value was consistent with the legislative intent in both the 1981 and 1983 versions of the workers' compensation statute.[9]

The court found that the correct mathematical formula to use was the Ratio to Net Settlement formula. This formula takes the plaintiff's net recovery (after deducting fees and costs) and divides it by the full value of the claim to come up with a percentage that the employer/carrier is entitled to recover from the monies they have expended (net recovery after fees and costs/full value of case).

The *Manfredo* decision indicates that the monies that the employer/carrier can recover will fluctuate depending on the level of comparative negligence, if any. For example, in that case, the full value of the case was $1,500,000. The attorney's fees were $600,000 and the costs were $49,500. Assuming no comparative negligence, the net recovery would be $850,000, thus entitling the employer/carrier to 56.7% of the monies it paid ($850,000/$1,500,000).

However, when there is comparative negligence, the amount the employer/carrier can recover is greatly reduced. As an example, the court provided the following example where the plaintiff was 80% negligent:

$1,500,000 (full value of case)
x 20%(percentage third party was responsible)
= $300,000 recovery
-$120,000 fees and -$49,500 costs
= $130,500 net recovery / $1,500,000 full value=8.7%.

In the above example, the employer/carrier's recovery was greatly diminished due to the

plaintiff's comparative negligence, leading to the employer/carrier recovering only 8.7% of the monies it paid.

In the *Manfredo* case, the claimant was 40% liable, which entitled the employer/carrier to recover 32.7% of the amounts previously paid and allowed the employer/carrier to deduct 32.7% of future payments.[10]

$1,500,000 (full value of case)
x 60%(percentage third party was responsible)
= $900,000 recovery
-$360,000 fees and -$49,500 costs
= $490,500 net recovery / $1,500,000 full value=32.7%.

The concern with the *Manfredo* formula is determining the full value of the case. It is an artificial number. In *Manfredo*, the full value of the case ($1,500,000) had been judicially determined. However, without an exact way of determining the full value of a case, third-party litigants may try to inflate the "full value," causing a lower recovery amount; at the same time, employer/carriers will try to deflate the "full value" of a case to recover more monies. For example, if a plaintiff nets $100,000 after fees and costs, the full value of the case would determine the amount the employer/carrier would be able to recover. If the third party litigants inflate the "full value" of the case to $1,000,000, the employer/carrier would only recover 10% on its lien. On the other hand, should the employer/carrier deflate the "full value" of the case to $500,000, the employer carrier would recover 20% on its lien.

Most liens are resolved through negotiations with the third party attorneys and the employer/carriers. The *Manfredo* formula should be the starting point for the resolution of the lien. In the past, employers/carriers sometimes waived their lien rights in order to settle the workers' compensation claim. However, it appears that the trend lately for employer/carriers is not to waive liens. Understanding the *Manfredo* formula and being able to calculate the recovery percentage will lead to greater recovery for the employer/carrier.

1 560 So. 2d 162 (Fla. 1990).
2 § 440.39, Fla. Stat.
3 *Id.*
4 747 So. 2d 1010, 1011 (Fla. 5th DCA 1999).
5 805 So. 2d 945, 946 (Fla. 4th DCA 2001).
6 747 So. 2d at 1011.
7 805 So. 2d at 946.
8 Section 440.39 states, in part:
Upon suit being filed, the employer or the insurance carrier, as the case may be, may file in the suit a notice of payment of compensation and medical benefits to the employee or his or her dependents, which notice shall constitute a lien upon any judgment or settlement recovered to the extent that the court may determine to be their pro rata share for compensation and medical benefits paid or to be paid under the provisions of this law, less their pro rata share of all court costs expended by the plaintiff in the prosecution of the suit including reasonable attorney's fees for the plaintiff's attorney. In determining the employer's or carrier's pro rata share of those costs and attorney's fees, the employer or carrier shall have deducted from its recovery a percentage amount equal to the percentage of the judgment or settlement which is for costs and attorney's fees. Subject to this deduction, the employer or carrier shall recover from the judgment or settlement, after costs and attorney's fees incurred by the employee or dependent in that suit have been deducted, 100 percent of what it has paid and future benefits to be paid, except, if the employee or dependent can demonstrate to the court that he or she did not recover the full value of damages sustained.
9 560 So. 2d at 1165.
10 *Id.*