

# Third Party Involvement in Compensable Workers' Compensation Claims

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## A South Carolina Scenario

An employee is injured by another's breach of duty or warranty. The claim is compensable. The best practice is for the carrier and/or the claimant to confirm the third party identity, the type of third party liability, the action's expiration date and anticipated defenses, if any. This initial investigation can be time consuming and there are additional considerations affecting an efficient recovery.

## Who Has the Right of Action? First Come First Serve under 42-1-560(b) & (c)

The injured worker may be eager to file the third party suit in addition to the workers' compensation claim because he may be entitled to recover more under another theory of liability than he can under a disability theory of loss of earning capacity (i.e. pecuniary loss and loss of earning capacity, disfigurement, pain and suffering, etc.). The claimant must commence the third party action no later than one year after the carrier accepts liability for payment. The claimant should file the Form S-2 with the Commission within 30 days of the commencement of the third party action. The carrier will have a lien over the total amount recovered.

On the other hand, the carrier may want to assert the claim against the third party. If so, the carrier must provide notice to the claimant that failure to commence the third party action will operate as an assignment of the cause of action to the carrier. The right of action will be assigned to the carrier twenty days after the carrier notifies the employee, if the employee does not address the action. The carrier has ninety days after the assignment to notify the injured employee and the commission that the action has or will commence against the third party by filing the SCWCC Form S-1. The right of action will be reassigned to the injured worker if the carrier does not commence the action 30 days prior to claim expiration.

## Carrier-filed Third Party Claims: The Cost of Control under 42-1-560(c)

The carrier may want the right of action to be assigned to them for a few reasons:

- to protect the reimbursement right from an uninterested claimant,
- to preserve control over the third party claim, or
- to avoid costs of recovery by bringing an action to enforce its lien.

A carrier has more control in a carrier-led claim because it can select the attorney(s), stay informed about claim progression, and give input on discovery activity to maximize third party recovery.

More importantly, a carrier can avoid the "cram-down provision" in a carrier-led third party action because it is being reimbursed directly by the third party

On the other hand, while the carrier may avoid lien litigation by filing the suit, the carrier may pay more attorneys' fees to effectuate third party recovery. If the attorney's fees to effectuate recovery will exceed one-third of the total value paid to the injured worker in the underlying claim by the time of settlement, the carrier may pay more for the recovery than in an injured-worker led claim. (S.C. Code Ann. § 42-1-560(b)) This could offset savings associated with the avoidance of lien litigation.

### **Workers' Compensation Carrier's Lien over Third Party Proceeds: The Myth of Dollar for Dollar Reimbursement**

If the injured worker brings the claim, the carrier has a lien over the injured worker's third party recovery. The carrier's lien is automatically reduced by reasonable attorney's fees up to 1/3 of the value paid on the underlying claim at the time of settlement or judgment by 42-1-560(b). In addition, S.C. Code Ann. § 42-1-560(f), also known as the "cram-down provision" provides that the Commission may modify the amount of the carrier's lien over third party proceeds where the injured workers' total legally recoverable damages from the third party claim are greater than the settlement or judgment in the third party claim. The greater the third party's defenses, the more likely the lien will be equitably reduced as a general matter. If lien reduction is proper, the lien will be reduced by a formula derived by the proportion that the settlement/judgment bears to the commission's determination of total damages.

The workers' compensation carrier will not be bound by a settlement for less than total amount of its lien unless it provides written consent to such settlement. The written consent requirement gives the carrier the opportunity to review the strength of the third party's defenses and the total cognizable damages in a settlement. If the carrier does not approve a settlement, the injured worker can petition the commission for an order that the settlement is reasonable and fair.

### **The Take-Away**

Investigate and determine the third party identity, type of action, deadlines, and third party defenses as early as possible. Hopefully, this will keep the issues clear as you negotiate your lien.

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