

Section 40: A Way to Prevent Double Dipping

The issue in the matter of *Cabrera v. Cousins Supermarket* was the employee's appeal from the Court's order which permitted Cousins Supermarket (Cousins) to assert a lien under Section 40 of the statute. The Appellate Division, in an unreported decision on February 23, found Cousins had a right to assert a lien in the matter.

Cabrera involved an admitted injury to an employee's right hand in March 2008 while the employee was operating a meat perforating machine. Two years later, the matter ultimately settled under an Order Approving Settlement. In addition to his workers' compensation claim, Cabrera filed a civil action against the employer and manufacturer of the machine. This civil action proceeded to arbitration where the arbitrator found no liability as to the defendants. However, Cabrera still recovered \$25,000 pursuant to a "high/low agreement." The employee received none of the recovery as it all went to litigation costs and attorney's fees.

Before the arbitration, Cabrera served a subpoena on Amerihealth Casualty, his insurance carrier, requesting the amount of any bills it paid on his behalf and if a lien was being asserted. Three months later, and several days before arbitration, Cabrera contacted Cousins' counsel requesting counsel contact Amerihealth to obtain the lien amount as there was no response to the subpoena. Cabrera did not mention the impending arbitration and the following day advised Cousins since the lien amount was not provided, it would not be acknowledged. Cabrera asserted Cousins waived its lien rights by failing to provide the lien amount.

Cousins filed a motion with the Workers' Compensation Judge (WCJ) to enforce the lien pursuant to Section 40. The Court found Cousins was entitled to a Section 40 lien and there was no waiver of the right to the lien as Cabrera was always aware the lien existed.

The Appellate Court affirmed the WCJ decision that Cousins had the right to attach a lien to the recovery from the "high/low agreement." When a third party is involved and is directly responsible for the injury a petitioner sustains and for which the employee receives workers' compensation benefits, Section 40 attaches. The purpose of Section 40 is to prevent "double dipping" in terms of monies recovered by employees when a third party causes their injury.

Cabrera argued because the money he received from the "high/low agreement" did not exceed the cost of litigation, the third party claim and as such Section 40 did not attach. The Appellate Division disagreed with Cabrera. It found that when he accepted the "low" of the agreement, \$25,000, this triggered Section 40 as it represented settlement of the third party claim.

Comment: The key information to take away from this decision is that a Section 40 lien will attach to recovery from a third party claim no matter what. Settlement of the claim triggers Section 40. Section 40 attaches to the recovery even if the employee does not receive any money due to the award being consumed by fees and costs of litigation.

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