

Section 40 Lien Recoveries

In the case of Liberty Mutual Insurance Company v. Jose Rodriguez, the Superior Court, Appellate Division, was tasked with reviewing a dispute over the percentages that apply when reimbursing a carrier for a Section 40 lien asserted against a third-party recovery that results from a work accident

In this case, the employee, Rodriguez, was injured during the course of his employment in a motor vehicle accident and received both workers' compensation benefits and pursued a third-party action against the tortfeasor. The claimant retained the services of Gill & Chamas to represent him in the third-party action and workers compensation claim.

At the time of engaging the law firm, the applicable rule governing attorneys' fees in civil actions was found in Rule 1:21-7c which states that attorneys are entitled to 33.3% of the first \$500,000 recovered; 30% of the next \$500,000; 25% of the next \$500,000; 20% of the next \$500,000; and any amounts in excess of \$2,000,000 by application to the Court.

The third party case was ultimately settled for \$1.2 million. At the time of settlement, the workers' compensation lien total \$148,590.40. Accordingly, counsel in the third party action sent a check to Liberty for a total of \$98,310.26, representing 66.67% of the gross settlement less \$750.00 attributable to costs. Liberty disagreed with that calculation and claimed that the overall fee received by counsel in the third party case was calculated to be 30.56% and as such, the lien should be reimbursed at 69.44%, for a total of \$102,431.17.

In arriving at its calculations, Liberty averaged the overall fee received by Plaintiff's counsel and calculated same to be 30.56%. As such, Liberty argued that Section 40 lien should be reimbursed based on the actual fee received by counsel and not what is allowable in the rules. As such, they calculated the blended rate and asserted a deficiency by opposing counsel.

This issue was taken to trial and at that level, the trial judge determined that since the actual fee paid to counsel constituted 30.56% of the overall settlement, Liberty was correct in asserting a lien at 69.44%. This ruling was in compliance with the New Jersey Supreme Court ruling of Caputto v. Best Foods, Inc., 17 N.J. 259 (1955).

In his appeal, the Petitioner argued that the trial judge erred in ruling that a *pro rata* share of attorneys' fees should be determined using gross average, rather than the sliding scale as established in Rule 1:21-7.

At the Appellate level, the Appellate Judges noted the ruling in the Caputto case of the actual fee received and its overall percentage and concluded that the trial judge was correct in utilizing an averaging of the fee, to determine the applicable percentage of the Section 40 lien reimbursable to the carrier.

Comment: It is often mistakenly thought that the workers' compensation carrier is only entitled to two-thirds of their lienable amounts back based on a one-third counsel fee. However, when there is a settlement or judgment in a third party case that exceeds \$500,000, the proper calculation of the Section 40 lien is to determine the blended rate paid to the plaintiff's counsel, so as to determine the appropriate percentage for reimbursement of the Section 40 lien.

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