Chapter 10

THIRD PARTY CLAIMS AND CARRIERS' LIENS

§ 10.01 Proper Handling of Concurrent Workers' Compensation and Third Party Cases.

When an employee's work-related injury is covered by the South Carolina Workers' Compensation Act, the employee and his heirs are barred from suing the employer at common law. Section 42-1-540. However, when the compensable injury or death is due to the tortious conduct of a third party, the employee is entitled to bring an action against the third party tort feasor. Section 42-1-560. If the employee fails to bring an action, the employer or carrier may do so in order to protect their subrogation rights. The fact that liability for an employee's injury might ultimately lie with a third party does not affect the employee's right to seek compensation under the Workers' Compensation Act. Section 42-1-560 gives the claimant

three remedies for job-related injuries:

1. He may proceed solely against the employer, thereby allowing the employer/carrier to seek reimbursement from the third party;

2. He may proceed solely against the third party tort feasor under section 42-1-550 by instituting and prosecuting an action at law; or,

3. He may proceed against both the employer/carrier and the third party tort feasor by complying with section 42-1-560. See Fisher v. South Carolina Department of Mental Retardation, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982). In order to prevent a double recovery by the claimant, the carrier is reimbursed from any damages recovered in a third party suit or settlement agreement. Section 42-1-560.

If the injury is significant, it is generally better to follow the third option and pursue both the workers' compensation and the third party claim. However, it is essential that the workers' compensation claim be completed before settling the third party claim. Settlement of the third party claim before the compensation claim may result in forfeiture of the workers' compensation claim. See Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 370 S.E.2d 104 (S.C. App. 1988).

When addressing a third party claim, causes of action in negligence (particularly of other sub-contractors), breach of warranty, intentional torts and products liability claims should not be overlooked. Although a work-related automobile accident is the most common third party action, liability may also arise from environmental pollutants, toxic injuries, defective products, and negligence.

A preliminary investigation should reveal who or what caused the accident or injury, what other investigations have been conducted, and the extent of available evidence. During the initial contact with the employer/carrier, contacts with persons needed for follow-up investigations should be established, witnesses should be identified, evidence should be located and secured, and requests should be made for discovery materials, such as drawings, specifications, procedure manuals and company regulations.

§ 10.02 Forms Required in Third Party Workers' Compensation Actions.

The regulations of the Workers' Compensation Commission require the filing of several forms. Form S-l, Notice of Third Party Action: Employer/Carrier, must be filed by the employer/carrier if it pursues the third party action. The employer/carrier must serve this form upon the South Carolina Workers' Compensation Commission, the injured employee or his surviving beneficiary, and any other person entitled to sue the third party. It must be served by personal service, registered or certified mail, within ninety days after statutory assignment of the right of action to the carrier or self-insured employer. It must be served with Form S-3: Entitlement to Right of Action.

If the employee pursues the third party claim he must serve Form S-2, Notice of Third Party Action: Employee, on the South Carolina Workers' Compensation Commission, and the workers' compensation carrier or self-insured employer. The form must be served by personal service, registered or certified mail within thirty days after the third party action has commenced. The third party action must be commenced within one year after the employer/carrier accepts liability for or pays compensation as provided in the workers' compensation law. But, see Section 10.03 below.

Form S-3: Entitlement to Right of Action must be attached to Form S-1: Notice of Third Party Action: Employer/Carrier. The form must be served upon the South Carolina Workers' Compensation Commission, the injured employee or his surviving workers' compensation beneficiary, and any other person entitled to sue the third party. It must be served by personal service, registered or certified mail, within ninety days after statutory assignment of the right of action to the carrier or self-insured employer.

Form S-4: Court Certificate must be filed with the South Carolina Workers' Compensation Commission and any other party or parties indicating that the third party action has been filed in the circuit court. This form should be served along with Form S-1 and/or Form S-2.

§ 10.03 One Year Rule.

The employee may institute a third party actior any time within one year from the acceptance of liability or payment of an award by the carrier or "within thirty (30) days prior to the expiration of the time in which such action may be brought..." Section 42-1-560. When an injured employee or his representative does not exercise this right to proceed against a third party tortfeasor within the statutorily prescribed time period, this failure may operate as an assignment of the injured employee's right of action to the carrier.

However, in order for such an assignment to become valid, the carrier must give the employee at least twenty days notice that the assignment will take place unless the employee brings suit. The employer is also required to give the employee notice when the assignment takes place and when a third party action has begun. The carrier's failure to comply with the requirements of sections 42-1-560(b) and (c) will operate as a reassignment of the right of action back to the injured employee.

§ 10.04 Workers' Compensation Liens.

South Carolina Code Ann. § 41-1-560(b) provides that the employer/carrier "shall have a lien on the proceeds of any recovery from the third party whether by judgment, settlement, or otherwise, to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid, by such carrier less the reasonable and necessary expenses, including attorney fees, incurred in effecting the recovery...." The section goes on to say that attorney fees of the carrier are set by the commission, not to exceed one-third (1/3) of the lien. Note: These are the fees of the carrier, payable to the claimant's attorney for representing the carrier's interests. By implication, the claimant's attorney fee for representing the claimant's interests in the third party claim is <u>not</u> subject to commission approval.

Subsection (f) essentially provides that settlement of the third party claim without the carrier's consent may give it a direct action against the third party. It is therefore <u>essential</u> that the carrier's lien be dealt with <u>before</u> finalizing any third party settlement.

§ 10.05 Approval of Settlements.

Most third party settlements should be approved by the commission, even if the claimant does not seriously pursue the workers' compensation portion of the claim. (Regulation 67-805 provides that settlements below $ 2,500.00 are deemed automatically approved and do not need to be submitted to the commission.) The third party liability carrier will generally insist on this to insure that the workers' compensation carrier does not come back against them. See section 42-1-560(r). Subsection (f) also provides that a compensation carrier may not "unreasonably refuse" to approve a third party settlement. The claimant can petition the commission to approve a settlement whether the carrier agrees or not. Usually these petitions are filed in conjunction with a petition to reduce the carrier's lien.

§ 10.06 Reduction of Liens By The Commission.

Carriers occasionally refuse to reduce their liens at all. This position is easily refuted. Section 42-1-560(b) provides that the carrier has a lien to the extent of all payments it has made "less the reasonable and necessary expenses, including attorneys fees, incurred in effecting the recovery, and to the extent the recovery shall be deemed to be for the benefit of the carrier." In other words, the workers' compensation carrier has to pay its pro rata share of the recovery costs. If the claimant's attorney were not "protecting" the carrier's lien, the carrier would have to hire someone else to do so.

When an employee or his representative enters into a settlement with or obtains judgment upon trial from a third party in an amount less than the amount of the employee's estimated total damages, the commission may reduce the amount of the carrier's lien on the proceeds of the settlement in the proportion that the settlement or judgment bears to the commission's evaluation of the employee's total cognizable damages at law. Section 42-1-560(f). The amount received by the carrier may also be reduced by attorney's fees and other expenses pursuant to section 42-1-560(f)(b). A hypothetical example is as follows:

EXAMPLE

Compensation paid by WC carrier	100,000
Settlement in third-party action	300,000
Commission's estimate of total cognizable damages at law	1,000,000
Attorney's fees--1/3 contingency	100,000
Costs	5,000

1. The settlement amount divided by the estimated total cognizable damages = percentage.

$300,000 ÷ $1,000,000 = 30%.

2. The amount of compensation paid by the carrier multiplied by the percentage = carrier's lien against the recovery.

$100,000 x 30% = $ 30,000.

3. The carrier's recovery is reduced by its pro-rata share of the attorney's fees.

$30,000.00 x 1/3 = $ 10,000.

4. The carrier's recovery is also reduced by its pro rata share of the costs. This pro rata share is determined by dividing the carrier's recovery by the settlement amount.

$30,000.00 ÷ $300,000.00 = 10%;

$5,000 x 10% = $500

5. The claimant's share of the third party settlement is determined by first subtracting the carrier's total recovery including its pro-rata share of attorney's fees and costs from the third party settlement.

$300,000.00 - $30,000 = $270,000

6. The claimant's recovery is reduced by his pro rata share of the attorneys' fees.

$270,000 x 1/3 = $ 90,000

7. The claimant's recovery is also reduced by his pro rata share of the costs.

$5,000 x 90% = $4,500

The resulting distribution would be as follows:

Carrier's net recovery	$ 19,500
Claimant's net recovery	$ 175,500
Attorney's fees	$ 100,000
Costs recovered	$ 5,000
Total	$ 300,000

See Appendix 10 for a more complicated calculation involving future medical expenses.

In many cases the carrier will agree to accept one-third of the settlement in satisfaction of its lien. This results in the claimant, attorney, and carrier all receiving roughly the same thing. Depending on the size of the settlement, or lack thereof, the carrier will frequently agree to further reduction or total waiver of its lien. It never hurts to ask. If the amount of the lien is agreed upon, it should be placed in the motion for approval of the settlement and proposed order.

Occasionally there is no recourse but to file a motion for reduction of the carrier's lien. Some attorneys will call another attorney to testify about what the "cognizable damages at law" are. However, this is generally done by affidavit. Others simply rely on the commission to determine damages in much the same way as a jury would. Expert testimony is probably the better method. Garrett v. Limehouse and Sons, 293 S.C. 539, 360 S.E. 2d 519 (S.C. App. 1987) holds that cognizable damages mean all provable damages, without consideration of the liability situation. Hardee v. Bruce Johnson Trucking, 293 S.C. 349, 360 S.E. 2d 522 (S.C. App. 1987) demonstrates how many issues can arise in a lien reduction case. Note: One way to avoid dealing with the carrier's lien is to negotiate it away when settling the compensation

case. Sometimes the best workers' compensation settlement a claimant can get is a full waiver of the carrier's lien on the third party claim.

§ 10.07 Approval of Settlement and Reduction of Lien in Circuit Court.

Section 42-1-560(e) provides that the claimant may "in the event of a settlement made during actual trial of the action against the third party, approved by the presiding judge at the trial, provide for distribution of the proceeds of any recovery in the action different from that prescribed by subsection (b) and (c) of this section." This section clearly gives circuit court judges the authority to approve settlements. It is also generally interpreted to give the circuit court the same authority as the commission to reduce a carrier's lien.

If the case is settled during actual trial, the parties can ask the circuit judge to address approval of the settlement and reduction of the lien. However, in order to proceed with a hearing to address these matters, all parties to the lien, including the employer and carrier, the second injury fund, etc., should be notified of the proceeding. As a practical matter, these parties should be given advance notice of the trial and the fact that if a settlement is reached the court will be asked to approve the settlement and reduce the carrier's lien. If a settlement is indeed reached they should again be notified that the court will conduct a hearing regarding approval of the settlement and reduction of the lien.

What if the case is tentatively settled shortly before it is called to trial? A motion could be filed with the commission asking it to approve the settlement and reduce the lien. However, this procedure could delay matters for several months. It is possible that you could leave the case on the court docket, wait for it to be called to trial, and then proceed with a "cram down" hearing. But again, all parties should be given notice of the hearing.

§ 10.08 Trial.

An action against a third party may be instituted by either the injured employee, or in the case of death, by his personal representative or other person so entitled to proceed or, in certain circumstances, by the carrier responsible for the payment of the compensation benefits. Section 42-1-560. This civil action to recover damages in addition to any workers'

compensation benefits paid is similar to other civil proceedings brought in the Court of Common Pleas and governed by the South Carolina Rules of Civil Procedure. The defense of contributory negligence of the employer is unavailable to a third party in an action brought by the employer or his carrier.

Ideally, the employee and the carrier should cooperate with each other when pursuing a third party action. Failure to work closely together in securing witnesses and managing investigations may reduce the potential damages recoverable by both the employee and the employer.

Section 42-1-570 states that the amount of workers' compensation benefits which have been paid to an employee or his dependents or to which he is entitled, shall not be admissible as evidence in any action brought to recover damages.

§ 10.09 Potential Defendants.

A. The Classic Cases.

The third party provisions of the workers' compensation act are designed to ensure that the employee obtains the fullest possible recovery for his job related injury and that the costs of that recovery are ultimately borne by the responsible party. The classic third party cases are automobile accidents, products liability cases, and medical malpractice cases. The less common cases are listed below.

B. Subcontractor Negligence.

The exclusive remedy limitation expressed in section 42-1-540 does not apply to injuries resulting from acts of a subcontractor of the employer or his employees. The limitation does not bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by the same person. Whether the Workers' Compensation Act provides the exclusive remedy for an injured employee of a subcontractor depends upon whether the work performed by the subcontractor at the time of the injury is a part of the owner's trade, business, or occupation. Henderson v. Guild, Inc., 288 S.C. 261, 341 S.E.2d 806 (S.C. App. 1986).

C. Intentional Torts.

As a general rule, section 42-1-540 bars civil actions against employers. Stewart v. McClellan's Stores Co., 194 S.C. 50, 9 S.E.2d 35 (1940) held that the exclusivity rule does not apply in the case of intentional torts, in that case, an assault. The case also held that suit was proper against the corporate defendant/employer because the manager who committed the assault was the company's alter ego. A foreman is not an alter ego. Thompson v. J.A. Jones Coast. Co., 199 S.C. 304, 19 S.E. 2d 225 (1942). Note: If the tortfeasor is the alter ego of the company, the employee may pursue his remedies under comp or file a civil suit. He may not do both. Boulware v. Mills, 294 S.C. 24, 362 S.E.2d 184 (S.C. App. 1987).

Nash v. AT & T Nassau Metals, I and II, 294 S.C. 248, 363 S.E. 2d 695 (S.C. App. 1987); 298, S.C. 428, 381 S.E. 2d 206 (S.C. App. 1987) hinted that the tort of outrage might also fall outside of the exclusive remedy statute. McSwain v. Shei and Go Sport, Inc.,, 304 S.C. 25, 402 S.E.2d 890 (1991), held that intentional infliction of emotional distress (outrage) was indeed exempt from the exclusive remedy statute. It has also been held that a cause of action for slander is not barred. Dockins v. Ingles Markets, Inc., 306 S.C. 287, 411 S.E.2d 437 (1991).

D. Single Catastrophe Hazard.

Section 42-5-250 provides that the Workers' Compensation Act, and presumably its exclusive remedy provisions, does not apply in cases where there are "policies of insurance against loss from explosion of boiler or flywheels or other single catastrophe hazards." The section goes on to provide that this exception does not exempt employers from the payment of workers' compensation benefits. Several cases have been filed against employers under the single catastrophic event theory. One case survived a motion to dismiss in state circuit court. However, in an unpublished opinion, another such case was dismissed by the Fourth Circuit Court of Appeals. See Appendix 10.

E. Other cases.

Claimants may sometimes be able to get around the exclusive remedy doctrine and sue the employer pursuant to the "dual capacity" doctrine. Tatum v. Medical University of South Carolina, 335 S.C. 499, 517 S.E.2d 706 (S.C. App. 1999) (suit allowed against employer for medical malpractice); But see, Johnson v. Rental Uniform Service. of Greenville, 316 S.C. 70, 447 S.E.2d 184 (1994) (suit not allowed against employer for negligence in construction of its own plant). An action was allowed against a carrier for a negligent safety inspection because the carrier's actions in performing the inspection were not covered by the workers' compensation act. Ancrum v. U.S.F. & G., 301 S.C. 32, 389 S.E.2d 645 (1989).

F. Rejected Theories.

Our supreme court has rejected a cause of action against a carrier for bad faith failure to pay workers' compensation benefits. Cook v. Mack's Transfer & Storage, 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986), cert. denied, 292 S.C. 230, 355 S.E.2d 861 (1987). The court has also rejected an argument that reckless acts should be treated the same as intentional acts. Peay v. U.S. Silica Company, 313 S.C. 91, 437 S.E.2d 64 (1993).

§ 10.10 Uninsured Motorist and Underinsured Motorist Coverages.

The employer/carrier's lien does not apply to uninsured motorist coverage. 1976-1977 Op. Atty. Gen. No. 77-393, p. 320. The reasoning is that subrogation in workers' compensation cases is only allowed from proceeds realized through tort action. Actions based on uninsured motorist policies are contractual in nature. Logically the same reasoning would also hold true with underinsured coverage. Note: Carriers have a stronger argument that the lien should apply to uninsured motorist protection purchased by the employer on a company vehicle because the employee is not being deprived of the benefit of a privately purchased insurance contract. A. Larson, Workmen's Compensation Law, § 71-23(i) (1983).

§ 10.11 Health Insurance Liens.

In the context of property and casualty coverage, an insurer's right to subrogation is not generally based, though it may be, in contract or statute. The doctrine of legal or equitable

subrogation is "founded not upon any fixed law, but upon principles of natural justice; its purpose is to require the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it; and it is to be applied according to the dictates of equity and good conscience in light of the actions and relationship of the parties." Calvert Fire Ins. Co. v. James, 236 S.C. 431, 114 S.E.2d 832, 834 (1960)

A right of subrogation is not traditionally implied, however, in the area of personal insurance (e.g. health insurance). Shumpert v. Time Ins. Co, 329 S.C. 605, 496 S.E.2d 653, 657. The reason for the distinction between personal insurance and property or casualty insurance regarding the availability of subrogation is that in the area of property and casualty insurance, the insured's loss is clear and liquidated and the tort recovery is generally more or less equal to the coverage amount. "[T]he actual loss and the amount of any excess compensation from the combination of insurance proceeds and the tort recovery can be determined with certainty." Shumpert, at 657.

In the area of personal insurance, however, the insured's actual loss is difficult to determine. This is especially true when the basis for recovery includes "loss of wages, loss of earning capacity, pain and suffering, permanent or temporary physical impairment, medical expenses, property damages and intangible losses which are not susceptible to exact measurement." Shumpert, at 657.

Although courts will not imply an equitable right of subrogation in the health insurance context, South Carolina Code Ann. § 38-71-190 permits the inclusion of subrogation clauses in contracts for health insurance. See Shumpert, at 658. As a result, health insurers that include subrogation language in their contracts may be subrogated to the rights of the insured to the extent that "the sum received by the [insured] from the wrongdoer, together with the insurance, exceeds the loss, and the expense incurred by the insured in realizing on the claim against the wrongdoer..." Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638, 643 (1950).

The insurer, however, need not prove that the reimbursement sought exceeds the total amount of actual loss to the insured. The insurer may establish a prima facie case by merely showing

that (1) there was an insurance contract between the insurer and insured, (2) that the insured suffered a covered loss, (3) that the insurer paid for the loss, (4) that the insured sued the third party tort feasor for the loss, and that (5) the insured settled with the third party for some sum. See Frank B. Hall & Co. v. Bailey Lincoln-Mercury, Inc., 298 S.C. 282, 379 S.E.2d 892, 893 (1989). The insured then has the burden of showing that the insurer has no right to recover because the recovery sought does not exceed the insured's actual loss. Id., at 894.

Therefore, the health insurer may recover, out of the insured's settlement, amounts paid to the insured unless the insured can show that those amounts together with the settlement do not exceed the insured's loss.

The next issue is determining the amount of the health insurance carrier's subrogation right. Section 38-71-190 states that "the director [i.e., the Director of the Department of Insurance] or his designee, upon being petitioned by the insured, determines that the exercise of subrogation is inequitable and commits an injustice to the insured..." This determination by the director or his designee may be appealed to the Administrative Law Judge Division as provided by law in accordance with section 38-3-210.

If the insured does not petition the Department of Insurance and the health insurer brings suit for enforcement of its right to subrogation in state court, can the court exercise its equity jurisdiction? If the health policy is an employment benefit, removal to federal court under ERISA is appropriate.

Assuming that the health insurer's lien is brought before some tribunal, whether the insurance commission, a state court judge, or a federal judge, a decision must be made as to what portion, if any, of the workers' compensation settlement is attributable to health care. The insurance recovery is limited "to the amount by which the sum received by the [insured] from the wrongdoer, together with the insurance, exceeds the loss, and the expense incurred by the insured in realizing on the claim against the wrongdoer." Powers v. Calvert Fire Ins. Co., 216 S.C. 309, 57 S.E.2d 638, 643 (1950). In other words, the court must determine the total loss the claimant sustained as a result of his injury. This comes very close to the concept of "cognizable damages at law" set out in section 42-1-56(f) when evaluating the third party lien

the employer has against any third party recovery the claimant receives. Obviously, the term "expenses incurred by the insured in realizing on the claim against the wrongdoer," is addressing itself to attorney's fees and costs, and section 38-17-90 specifically states: "Attorneys fees and costs must be paid by the insurer from the amounts received."

By definition, workers' compensation benefits are not designed to make the insured worker "whole" because the claimant is only compensated for two-thirds of his average weekly wage, because there is a limit of five hundred (500) weeks of compensation benefits, because there is no payment for pain and suffering, no payment for loss of consortium, and because disfigurement is only compensated to a limited degree. The tribunal must determine from the onset that the claimant's loss was, to some degree, greater than the amount of his recovery as a matter of law.

Also, if the claim is settled on a doubtful and disputed basis and the apportionment of that settlement is set out in the Workers' Compensation Commission order, then that issue is settled as a matter of law. For example, if the order specifically states that the medical bills are the responsibility of the claimant and that no portion of the settlement is attributable to the payment of any past or future medical expenses incurred by the claimant it can be argued that the health insurer cannot contest the finding of the commission. See also Section 6.08.