

## **8. BASICS OF HANDLING A WORKERS' COMP CASE IN NEW YORK**

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**BASIC OUTLINE OF NYS WORKERS' COMPENSATION  
COVERAGE, BENEFITS, AND PROCEDURE**

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**A. WHAT IS COVERED**

1. **Accidents – WCL § 10**

- a. in the course of employment
  - i. outside workers
  - ii. special errands
  - iii. dual purpose
  - iv. gray area
- b. out of the employment
  - i. presumption
  - ii. assaults
  - iii. heart attacks and strokes
  - iv. unwitnessed accidents
- c. time limitations
  - i. notice – **30 days – WCL § 18**
  - ii. statute of limitations – **2 years – WCL §28**

2. **Occupational diseases – WCL § 37- §48**

- a. peculiar to and characteristic of the employment
- b. date of disablement

- i. notice – **2 years from date of disablement**
- ii. statute of limitations – **2 years from date of disablement**
- c. hearing loss – **WCL §49-aa – 49-hh**

B. **BENEFITS**

- 1. **Temporary Disability Benefits.**
  - a. 7 day waiting period – **WCL § 12**
    - i. no compensation for first week
    - ii. compensation for second week only if out 2 weeks
    - iii. waiting period waived if disability extends into 3<sup>rd</sup> week.
  - b. Average Weekly Wage – **WCL § 14**
    - i. based on earnings in the year before the accident.
  - c. Temporary Total Disability. - **WCL §15(2)**
    - i. maximum rate before 7/1/07 = \$400
    - ii. maximum rate 7/1/07 – 6/30/08 = \$500
    - iii. maximum rate 7/1/08 – 6/30/09 = \$550
    - iv. maximum rate 7/1/09– 6/30/10 = \$600
    - v. maximum rate after 7/1/010 = 2/3 of state AWW  
as of 7/1/10 = \$739.83;  
as of 7/1/11 = \$772.96;  
as of 7/1/12 = \$792.07  
as of 7/1/13 = \$803.21
  - d. Temporary Partial Disability. – **WCL §15(5)**
    - i Degrees of partial disability

e. Reimbursement to the Employer. **WCL §25(4)(a)**

f. Reduced Earnings. **WCL §15(5-a)**

2. **Permanent Disability Benefits – WCL § 15(3)**

a. Schedule Loss of Use.

i. applies to fingers, toes, hands, feet, arms, legs, vision loss, hearing loss, facial scar

b. Permanent Partial Disability.

i. no time limit for accidents before 3/13/07.

ii. time limit for accidents after 3/13/07 depends on “degree of disability”

Degree of Disability = Weeks of benefits

96% - 99%	= 525 weeks.
91-95%	= 500 weeks.
86-90%	= 475 weeks.
81-85%	= 450 weeks.
76-80%	= 425 weeks.
71-75%	= 400 weeks.
61-70%	= 375 weeks.
51-60%	= 350 weeks.
41-50%	= 300 weeks.
31-40%	= 275 weeks.
16-30%	= 250 weeks.
1-15%	= 225 weeks

iii. Disability over 80% is eligible for “safety net” provision which may lift the cap.

c. Permanent Total Disability – **WCL § 15(1)**

- no time limit on benefits.

3. **Death Benefits – WCL § 16**

4. **Medical Treatment – WCL §13 et. seq.**

- a. \$1,000 pre-authorization limit
- b. Use of carrier-designated diagnostic facilities
- c. Medical Treatment Guidelines
  - i. neck, back, knee, shoulder, carpal tunnel syndrome, chronic pain

5. **Section 32 Settlements – WCL § 32.**

C. **PROCEDURE.**

- 1. **Indexing.**
  - a. Assembly
  - b. Indexing
  - c. Carrier response (C-7 or C-669).
- 2. **Non-hearing resolutions.**
  - a. Administrative and Proposed Decisions.
- 3. **Hearings.**

## Recent Changes to Workers' Comp and 'Kelly' Negotiations

By: Robert E. Grey  
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When an employee is injured on the job, his or her sole remedy against the employer is a claim for workers compensation benefits.<sup>1</sup> The employee is, however, permitted to bring a personal injury action against any potentially liable third party to the employment relationship.<sup>2</sup> Such lawsuits are known as “third-party actions,” and may occur as a result of motor vehicle accidents, violations of the Labor Law, premises or product defects, and medical or legal malpractice claims, among other circumstances.<sup>3</sup>

Attorneys who represent injured workers in third-party actions must be familiar with Workers’ Compensation Law Section 29, which covers the rights and obligations of the attorney and the workers’ compensation carrier. As a threshold matter, the attorney may not settle or discontinue the third-party action without the written consent of the carrier.<sup>4</sup> The carrier has an interest in the third-party action as a matter of law, and thus its rights may not be impaired without its written consent.<sup>5</sup>

The carrier’s interests are its right to a lien for payments made prior to the date of settlement or judgment in the third-party action<sup>6</sup> and its right to take credit for the worker’s net third-party recovery against future workers’ compensation payments.<sup>7</sup> These rights are not, however, unlimited.

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<sup>1</sup> WCL §11. An exception is where the injury was the result of an intentional tort. See, e.g., Oben v. Charmer Ind., 37 A.D.3d 791; 2007 N.Y. App. Div. LEXIS 2320 (2<sup>nd</sup> Dept. 2007)

<sup>2</sup> WCL §29(1)

<sup>3</sup> See, e.g., Buck v. Graphic Arts Mutual Ins. Co., 19 A.D.3d 966; 799 N.Y.S.2d 289 (3<sup>rd</sup> Dept. 2005) (motor vehicle); Reinitz v. Arc Elec. Constr. Co., Inc., 104 A.D.2d 247; 483 N.Y.S.2d 821 (3<sup>rd</sup> Dept. 1984) (Labor Law); Place v. Ryder, 2 A.D.3d 961; 767 N.Y.S.2d 689 (3<sup>rd</sup> Dept. 2003) (premises liability); General Aniline & Film Corp. v. A. Schrader & Son, Inc., 13 A.D.2d 359; 215 N.Y.S.2d 861 (3<sup>rd</sup> Dept. 1961) (products liability); Prentice v. Levy, 27 A.D.3d 970; 813 N.Y.S.2d 234 (3<sup>rd</sup> Dept. 2006) (medical malpractice); McDowell v. LaVoy, 63 A.D.2d 358; 408 N.Y.S.2d 148 (3<sup>rd</sup> Dept. 1968) (legal malpractice).

<sup>4</sup> WCL §29(5)

<sup>5</sup> See, e.g., Durham v. Barker Chem. Corp., 151 A.D.2d 887, 543 N.Y.S.2d 182 (3<sup>rd</sup> Dept. 1989)

<sup>6</sup> WCL §29(1)

<sup>7</sup> WCL §29(4)

If the circumstances of the accident would have implicated No-Fault insurance coverage (such as the use and operation of a motor vehicle, or a collision involving two covered persons), then the workers' compensation carrier has neither a lien nor a credit to the extent that its payments are equivalent to basic economic loss under the Insurance Law.<sup>8</sup> Basic economic loss includes wage loss payments less than \$2,000 per month within three years of the accident date or a combination of wage loss and medical payments totaling less than \$50,000.<sup>9</sup> It should be noted, however, that the compensation carrier retains the right to consent even in the absence of a present lien or credit.<sup>10</sup> Failure to obtain consent in these circumstances may result in the forfeiture of future workers' compensation benefits and an action against the erring attorney.<sup>11</sup>

In addition, the compensation carrier's right to recover its lien is offset by its obligation to contribute its equitable share of the litigation expense incurred in obtaining the third-party recovery.<sup>12</sup> The Court of Appeals decision in Matter of Kelly v. State Insurance Fund established that where the compensation carrier is relieved from future liability as a result of a third-party settlement, that must be considered a benefit to the carrier when determining its equitable share of the litigation expense.<sup>13</sup> In order to apply the Kelly principle, the compensation carrier's lien must be added to the present value of its future liability. The combination of the two is considered the "total benefit" to the carrier from the third-party settlement. That total benefit can then be compared to the third-party settlement amount and a ratio obtained. The compensation carrier's lien is then reduced by that ratio multiplied by the litigation expense.

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<sup>8</sup> WCL §29(1-a). See also Dietrick v. Kemper Ins. Co., 76 N.Y.2d 248, 556 N.E.2d 1108, 557 N.Y.S.2d 301 (1990)

<sup>9</sup> Dietrick, supra, Johnson v. Buffalo & Erie County Private Ind. Council, 84 N.Y.2d 13; 636 N.E.2d 1394; 613 N.Y.S.2d 861(1994)

<sup>10</sup> Parmelee v. Int'l Paper Co., 157 A.D.2d 878, 550 N.Y.S.2d 150 (3<sup>rd</sup> Dept. 1990); Durham v. Barker Chem. Corp., 151 A.D.2d 887, 543 N.Y.S.2d 182 (3<sup>rd</sup> Dept. 1989); Burton v. ITT Cont. Baking Co., 93 A.D.2d 921, 462 N.Y.S.2d 335 (3<sup>rd</sup> Dept. 1983).

<sup>11</sup> Id.

<sup>12</sup> WCL §29(1); Matter of Kelly v. Commissioners of the State Insurance Fund, 60 N.Y.2d 791, 456 N.E.2d 131, 468 N.Y.S.2d 850 (1983).

<sup>13</sup> Kelly, supra.

By way of example, assume a third-party action settlement of \$350,000. The third-party attorney's disbursements are \$5,000 and the legal fee is \$115,000, for a total litigation expense of \$120,000. The compensation carrier's lien is \$120,000 and the plaintiff is a 50 year old man receiving permanent partial disability benefits at a rate of \$300 per week. Using the tables found in the appendix to the Pattern Jury Instructions, the plaintiff's life expectancy is about 26 years and (using a discount rate of 4%) the annual benefit amount of \$15,600 has a present value about \$245,000.<sup>14</sup> Thus, the lien (\$120,000) plus the present value of the future liability (\$245,000) exceeds the \$350,000 third-party settlement. As the "total benefit" to the compensation carrier exceeds 100%, its equitable share of the litigation expense is 100%. Reducing the lien of \$120,000 by the full litigation expense of \$120,000, the lien is entirely extinguished. The plaintiff's net recovery is \$230,000, against which the compensation carrier will take a credit, resuming payments (known as "deficiency compensation") if and when the credit is exhausted.

The recent amendments to the Workers' Compensation Law will have a significant impact on negotiations under Kelly. For the past 15 years, the maximum weekly workers' compensation benefit has been \$400. For accidents on or after July 1, 2007 that figure will rise to \$500, with additional increases to \$550 for accidents on or after July 1, 2008 and \$600 for accidents on or after July 1, 2009. As of July 1, 2010, the maximum weekly benefit rate will be tied to the New York State average weekly wage, which is anticipated to result in a maximum benefit rate of at least \$650, which will then rise annually thereafter.<sup>15</sup>

One result of the increase in the maximum benefit will be to create workers' compensation liens in motor vehicle cases that did not previously exist. The current \$400 maximum benefit is \$1,733.33 per month, which is less than the basic economic loss

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<sup>14</sup> The recent decision of the Appellate Division, Third Department in Burns v. Varriale, 34 A.D.3d 59; 820 N.Y.S.2d 655 (3<sup>rd</sup> Dept. 2006) casts some doubt on whether a Kelly calculation is appropriate in a case of permanent partial disability. However, the Court of Appeals has granted leave to appeal this decision. 2007 N.Y. LEXIS 136 (2/15/2007)

<sup>15</sup> WCL §15(6), as amended 3/13/07.

amount of \$2,000 per month. When the weekly benefit rises to \$500, however, the figure is \$2,166.66 per month - \$166.66 per month more than basic economic loss. At \$550 per week the excess is \$383.33 per month, and at \$600 per week it is \$600 per month. To the extent that workers' compensation payments exceed \$2,000 per month, the excess is not equivalent to basic economic loss, and thus becomes a lien on third-party settlements. Practitioners who have become accustomed to the absence of workers' compensation liens in vehicular accidents must beware this new pitfall.

Another result of the increase in the maximum benefit will be to increase workers' compensation lien amounts, particularly for high-wage workers.<sup>16</sup> However, the recent amendments also impose time limits on awards for permanent partial disability. Workers injured after March 13, 2007 who are permanently partially disabled are no longer entitled to lifetime payments. Instead, the law now includes a scale of time limits ranging from four to ten years, depending on the level of permanent disability.<sup>17</sup>

Just as the increase in the maximum benefit will increase workers' compensation liens, the time limits on permanent partial disability awards will reduce the present value of future liability. The combination of the two may seriously impair a third-party attorney's ability to negotiate workers' compensation liens under Kelly.

To return to the example above, the increase in the maximum benefit could well result in a compensation lien of \$150,000 instead of \$120,000. If the worker was found to be 50% disabled, then he would only be entitled to 300 weeks of permanent partial disability benefits – 20 years less than his life expectancy. The present value of the future liability is now only about \$83,000, making the total benefit to the carrier \$233,000 (compared to the former \$365,000), which is 66% of the value of the third-party settlement. The compensation carrier is thus responsible for 66% of the litigation expense of \$120,000, or \$80,000, reducing the lien from \$150,000 to \$70,000. The

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<sup>16</sup> An injured worker's maximum benefit rate is two-thirds of his or her average weekly wage. Therefore, those who earn \$600 per week or less do not benefit from the increased maximum benefit.

<sup>17</sup> WCL §15(3)(w), as amended 3/13/07.

plaintiff's net third party recovery is now \$160,000, against which the carrier will take credit as discussed above. This is, of course, a substantially lower net recovery to the plaintiff.

There are other ways that the changes in the Workers' Compensation Law will impact third-party settlements. It is anticipated that the new time limitations on permanent partial disability awards, combined with other statutory amendments, will result in a significant increase in the final settlement of workers' compensation claims. Should this occur, workers' compensation liens will increase dramatically due to the up-front payment of the settlement amount, and the compensation carrier's future liability will simultaneously be eliminated in its entirety. This is the "perfect storm" from the perspective of the third-party attorney, because the combination of dramatically increased lien amounts and the removal of Kelly leverage may render many third-party cases incapable of settlement.

It is likely to be several years before the effects of the recent amendments to the Workers' Compensation Law are seen either at the Workers' Compensation Board or in third-party actions. However, in evaluating a potential third-party case today, it would be wise to consider the extent and negotiability of the lien that will exist tomorrow.

## Kelly's Application for Permanent Partial Disability Ends

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On October 11, 2007, the Court of Appeals limited its 1983 decision in Matter of Kelly v. State Insurance Fund<sup>18</sup> to cases of permanent total disability and death, ending its application in cases involving permanent partial disability. This decision, Matter of Burns v. Varriale,<sup>19</sup> will have a significant impact on attorneys, injured workers, and workers' compensation carriers involved in personal injury litigation.

Where an injured worker pursues a workers' compensation claim against the employer and also sues a third party as permitted by Workers' Compensation Law §29(1), the compensation carrier has a lien for benefits paid prior to the date of the third-party settlement (or judgment) and is also entitled to take credit for the injured worker's net third-party recovery against future workers' compensation benefits.<sup>20</sup> The compensation carrier thus reaps two benefits from the third-party recovery, and is obligated to pay its proportionate share of the litigation expense associated with obtaining that recovery. The rule in Kelly called for this to be accomplished by adding the compensation carrier's lien to the present value of its future liability, comparing the total to the third-party recovery, and charging the compensation carrier with a like percentage of the third-party litigation expense. The compensation carrier's lien was then reduced by the resulting figure.

In Burns, the Court of Appeals upheld a determination by the Third Department<sup>21</sup> that the present value of future workers' compensation benefits payable for permanent partial disability is speculative, and that therefore the compensation carrier's lien should not be reduced by the present value of its future liability. The Court observed that a permanently partially disabled worker may return to work, or may be found to have "voluntarily withdrawn from the labor market," and that these eventualities may result in the reduction or suspension of workers' compensation benefits.

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<sup>18</sup> 60 N.Y.2d 791, 456 N.E. 2d 131, 468 N.Y.S.2d 850 (1983)

<sup>19</sup> Court of Appeals, 10/11/07.

<sup>20</sup> WCL Section 29(4)

<sup>21</sup> Burns v. Varriale, 34 A.D.3d 59, 820 N.Y.S.2d 655 (3<sup>rd</sup> Dept. 2006)

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The result of this holding is that in cases of permanent partial disability, the compensation carrier's lien can no longer be reduced by reference to the present value of the compensation carrier's future liability. In short, it is the end of Kelly in such cases.

The Court recognized, however, that there are likely to be cases in which the injured worker would have remained entitled to workers' compensation benefits but for the third-party recovery, and that in such circumstances the compensation carrier must still be charged with its proportionate share of the third-party litigation expense. The Court suggests that the "the trial court, in the exercise of its discretion, can fashion a means of apportioning litigation costs as they accrue." In the decision below, however, the Third Department had suggested that this be left to the Workers' Compensation Board, and this may be the more effective procedure.

An example may be instructive in differentiating the difference between the Kelly mechanism and a likely Burns mechanism.

Assume that the injured worker is a 45 year old man and that he has been found to be permanently partially disabled with a weekly benefit rate of \$300. Assume further that the third-party action has been settled (with the compensation carrier's consent) for \$150,000 and that the third-party litigation expense (legal fee and disbursements) is \$53,333.33. Lastly, assume a workers' compensation lien of \$75,000.

Under Kelly, the present value of the compensation carrier's future liability would exceed \$75,000, and thus the lien plus the present value of the future liability would exceed the third-party settlement.<sup>22</sup> The compensation carrier would therefore be responsible for the entire litigation expense of \$53,333.33, and its lien would be reduced from \$75,000 to \$21,666.67. As a result, the plaintiff's net third-party recovery after deduction of the litigation expense and the compensation lien would be \$75,000 and the compensation carrier would make no further payments for 250 weeks (250 weeks x \$300 = \$75,000). In week 251, workers' compensation payments would resume at \$300 per week.<sup>23</sup>

Under Burns, however, the compensation carrier's lien is only reduced by the percentage that the third-party litigation expense bears to the third-party recovery,

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<sup>22</sup> This would render the case a so-called "deficiency" case.

<sup>23</sup> Assuming that the worker remained entitled to benefits during the entire period.

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without regard to the present value of future liability. In our example, the third-party litigation expense is 35.56% of the recovery (\$53,333.33/\$150,000). Therefore, the compensation carrier's lien is reduced by \$26,670 (\$75,000 x .3556) to \$48,330. As a result, the plaintiff's net recovery is now \$48,446.67 instead of \$75,000.

As before, the compensation carrier is entitled to take credit for the net third-party recovery, but it is now obligated to reimburse the claimant its share of the remaining third-party litigation expense as workers' compensation payments become due. In our example, the carrier has only paid \$26,670 (the amount of the lien reduction) towards the third-party litigation expense of \$53,333.33. This leaves the carrier with a potential outstanding obligation of \$26,663.33. The extent to which the carrier must meet this obligation depends on how long the claimant remains entitled to compensation.

If the claimant's entitlement to compensation benefits continues, then under the Third Department's mechanism the carrier would initially have to pay the claimant \$106.68 for each week that the \$300 rate is in effect. This figure results from the fact that \$106.68 is 35.56% of \$300, which is the ratio the third-party litigation expense bears to the third-party recovery.

If there is no change in the claimant's entitlement to compensation benefits, the carrier would continue to pay \$106.68 per week for 250 weeks before its payments (\$26,633.33) plus the amount of its lien reduction (\$26,670) reach the third-party litigation expense of \$53,333.33. During this period the unpaid portion of the weekly compensation award would be \$193.32 per week (\$300 minus \$106.68 = \$193.32), which after 250 weeks would total \$48,330, nearly exhausting the claimant's net third party recovery. Thus, just as in the Kelly scenario, under Burns compensation payments would resume at the full \$300 weekly rate 251 weeks after the 3<sup>rd</sup> party settlement.

It will therefore be seen that the principal effect of the Court of Appeals decision in Burns will be to reduce the net third-party recoveries of permanently partially disabled workers, possibly impacting the ability of personal injury practitioners to settle cases. In addition, the decision is likely to require post-settlement proceedings before the Workers' Compensation Board to adjust the compensation carrier's obligation to pay the third-party litigation expense.

Taken together with recent amendments to the Workers' Compensation Law,<sup>24</sup> it appears that we have reached the end of Kelly and the beginning of the next chapter of workers' compensation lien litigation.

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<sup>24</sup> See Recent Changes to Workers' Comp and 'Kelly' Negotiations, NYLJ 5/23/07

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