By DANIEL VINCENT DILORETTO

When Good Intentions Backfire

A Helping Hand Can Sometimes Cause Headaches

Our profession requires that we zealously represent the interest of our clients with competence, due diligence and an abiding loyalty to their wishes.

Sometimes, though, what seems like good lawyering can come back to haunt you. Take subrogation – it is often hard to explain, much less convince, your client that their employer has a right of subrogation against workers' compensation benefits received for a work injury. It's even tougher to explain that the size of the lien may leave them with little, if any, money from their civil suit. When faced with that situation, you may often feel you're working for the employer's carrier rather than your client, and that's a bitter pill to swallow. Nevertheless, employers have an absolute right of subrogation, and without compromise, the end result for clients can be disappointing. Assuring fair results for clients can be a challenge; particularly, when the costs and liens leave a meager result. Some lawyers, for reasons ranging from empathy for their clients to public service, reduce their fees to assure what they view is a fair result. If you decide to make this sacrifice, be sure it doesn't backfire as it did for a lawyer in a recent 6-1 decision from the Commonwealth Court in *Good Tire Service v. WCAB (Wolfe)*, decided on July 15, 2009.

In *Good Tire Service*, the claimant suffered a work injury from an automobile accident. The employer's carrier paid wage loss and medical benefits. The claimant later filed a third-party action, which settled for $75,000. At settlement, the workers' compensation lien was $48,259.32.

The claimant's attorney prepared a settlement agreement and determined that the costs of recovery left the employer with a net lien of $28,478.67. The costs were based upon a 40 percent contingency fee, which was deducted and deposited in the firm's operating account before distribution. After making the standard calculations, the claimant's net settlement was $15,794.08. The claimant's attorney was troubled by his client's net settlement. Consequently, he waived a portion of his fee in the amount of $9,205.82 to bring his client's compensable damages to $25,000, which he believed was fair result when taking into account pain and suffering, which is not compensable under the Act, and the severity of injuries sustained in the auto accident.

Unfortunately, the employer's carrier didn't feel the lawyer could remit a portion of his fee without adjusting the net lien. Consequently, the carrier refused to accept the $28,478.67 and filed a review petition. The Workers' Compensation judge granted the petition concluding that the refunded attorney fee was not an incurred cost of recovery and, therefore, ordered the claimant to reimburse the employer's carrier in the amount of $34,485.67.

The Appeal Board reversed the decision reasoning that the fee waiver was a "gratuity" from the attorney and, therefore, not subject to subrogation. The Appeal Board also opined that the "gratuity" fostered the humanitarian purposes of the Workers' Compensation Act. Commonwealth Court disagreed and reinstated the judge's decision.

The court held that the employer's subrogation lien could not be altered by equitable principles *(Thompson v. WCAB (USF&G Co.)*, 566 Pa. 420, 781 A.2d 1146 (2001)). The court rejected the claimant's argument that a remitted fee following distribution was a waiver made solely at the discretion of his attorney. The court reasoned that such an arrangement lacked statutory support and would "[o]pen the door to sham fee arrangements specifically calculated to avoid the law regarding employers' subrogation rights." Accordingly, whether the reduced fee was a refund, waiver, or gratuity, the court saw the reduction as a circumvention of the employer's subrogation rights.

In a dissenting opinion, Judge Doris A. Smith-Ribner wrote that what an attorney

does with his fee confers no right upon the claimant or his employer. Consequently, because the fee belonged to counsel at settlement, he was free to do whatever he pleased with his money, including making a refund to his client. Judge Smith-Ribner, therefore, concluded that the employer had no right against the fee waiver under the Act.

The claimant filed an allocatur petition with the Pennsylvania Supreme Court. The final word on this issue, therefore, remains to be seen. Nevertheless, this case illustrates how a lawyer's well-intentioned motives can have unintended results.

While the Commonwealth Court praised the claimant's attorney for his professionalism and public service, his good intentions failed to outweigh the potential for abuse under the Act. Consequently, the lawyer's sacrifice to assure a fair result for his client is, for the moment, in vain. ■

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