

Worker Compensation Carrier's Lien Subject to Reduction for Employer's Comparative Fault

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An individual is injured on the job and accepts workers' compensation benefits. After accepting the benefits, the worker cannot sue the employer, but may sue others responsible for the injuries. In the lawsuit involving the third parties, fault is apportioned to the employer. Since Arizona law grants the employer's insurance carrier a lien against any recovery by the worker, can the worker obtain a judicial determination of whether the carrier's lien should be reduced to account for the employer's comparative fault?

The Arizona Court of Appeals recently tackled this issue of whether a request for trial to determine the equitable apportion of an employer's insurance carrier lien is proper after the settlement of an employee's claim against third-parties. *Twin City Fire Ins., Co., v. Leija*, No. 1 CA-CV 16-0174 (August 31, 2017). Victor Leija was involved in a fatal work accident. His employer's workers' compensation carrier, Twin City

Fire Insurance Company ("Twin City"), accepted the claim made by Mr. Leija's dependents and paid monthly benefits.

The Leija family sued several third parties, including the City of Glendale. The third parties identified Mr. Leija's employer as a nonparty at fault. They identified citations the state Division of Occupational Safety and Health issued the employer for failing to repair a defect in the scaffold from which Mr. Leija fell, failing to properly secure the scaffold to the building, and failing to make sure Mr. Leija wore a safety harness. Mr. Leija's family eventually settled with all the defendants. All of the defendants except the City of Glendale paid their insurance limits. Twin City did not object to any of the settlements, but asserted a right to fully enforce its lien against the settlement proceeds it had already paid and credit against future payments. The Leija family rejected Twin City's demand, and argued the lien should be reduced due to the employer's comparative fault.

Twin City filed a complaint to enforce the lien. The Leija family counterclaimed alleging Twin City breached its duty of good faith and fair dealing, breached a promise to reevaluate the lien after the settlements were finalized, and in the alternative requested the superior court to set a trial to establish the amount of the lien. Both parties filed summary judgment motions, and

the trial court ruled in favor of Twin City on all issues.

On appeal, the Leija family argued a hearing to determine equitable apportionment of a workers' compensation lien is appropriate because there is no indication A.R.S. § 23-1023 was intended to force the employee to endure the combined effect of first having his or her reward reduced by a reason of the employer's fault, and thereafter having to satisfy a lien against this diminished recovery in favor of the employer and its carrier to the full extent of compensation benefits provided. The Court agreed and held when a worker settles a claim against a third party for less than the limits of the third party's insurance, the worker may obtain a judicial determination of whether the carrier's lien should be reduced to account for the employer's comparative fault. In this case, the Leija family settled with the City of Glendale for less than the limits of its insurance.

The Court first looked at A.R.S. § 23-1023, which gives an injured worker or the worker's dependents the right to sue a third party whose negligence or wrong contributed to the worker's injury or death. After filing the lawsuit, the worker or the dependents must notify the workers' compensation insurance carrier of the suit, and the carrier may intervene to protect its interests. The statute grants the insurance carrier a lien on the

amount actually collectible from the named defendant to the extent such compensation and benefits have been paid. Lastly, the carrier must approve any proposed settlement in an amount less than the benefits the insurance carrier has paid.

The Court analyzed multiple Arizona cases, but focused on *Aitken v. Indus. Comm'n*, in which the Arizona Supreme Court held A.R.S. § 23-1023 was not created to be a windfall for the employee, employer, or insurance carrier. 183 Ariz. 387, 392 (1995). It should be interpreted in a manner that achieves the legislative objectives of distributing responsibility according to fault and avoiding double recovery while ensuring full and fair payment. *Id.* The Supreme Court concluded the workers' compensation carrier's lien and any future credit should apply only to the extent the compensation benefits paid exceed the negligent employer's proportionate share of the total damages awarded in the third party action. *Id.*

Applying the case law and statute, the Court dismissed Twin City's argument the trial requested by the Leija family would be a sham because in the first lawsuit the Leija family attempted to minimize the employer's fault, but would now take the opposite position. The Court pointed out Twin City would be afforded the opportunity to introduce new evidence and evidence used by the Leija family in the original matter to dispute the comparative fault claim. Hence, as long as the parties are accorded a fair

adversarial proceeding conducted in accordance with due process, the concerns of a sham proceeding are avoided.

The Court also addressed the trial court's ruling in favor of Twin City on the Leija family's claim for breach of the covenant of good faith and fair dealing and breach of contract. The Leija family's primary contention was Twin City failed to comply with its good faith obligation to negotiate a compromise of its lien against the settlement proceeds. The Court held absent a fair adjudication of damages and employer comparative fault, a workers' compensation carrier owed an injured worker no duty to compromise or reduce the lien A.R.S. § 23-1023 grants the carrier. Also, Twin City did not breach the contract as the evidence revealed it consistently warned the Leija family of its unwillingness to reduce its lien based on the employer's comparative fault.

Takeaway:

Despite the employee or the employee's family not being able to file suit against the employer after accepting the workers' compensation benefits, it is still prudent to investigate and prepare for any possible comparative fault argument that may be used in an attempt to reduce the lien.

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