



# Compensating for something

## Pointers and pitfalls when a client is entitled to workers' comp benefits



Cooper

BY MILES B. COOPER

The client described the incident to the lawyer. "I was a sprinkler fitter working for a subcontractor. The general contractor was supposed to build access platforms for us. They hadn't built them yet but told us we needed to start work. I was trying to get to the work area without the access platform when I fell." The lawyer took note. Workers' compensation overlap. An opportunity, and a time for caution.

### Workers' compensation basics

Workers' compensation is a no-fault system dating back to the early 20th century. Mechanized industry produced the joys of pollution, conspicuous consumption, and wooden shoe-wielding Luddites, as well as catastrophic injuries. The Progressive Era's reaction to the Industrial Revolution saw no-fault systems develop to help injured workers. Rather than force injured workers to use the lengthy tort system where a worker would go broke during the case, the worker received immediate compensation for on-the-job injuries. Compensation included medical expenses and a portion of lost wages but no non-economic damages. Get some – no requirement that liability be established and immediate payment; give some – no pain and suffering damages.

A potential client who was injured on the job and also has a possible third-party case therefore has certain benefits. The person will receive temporary disability payments and health care through workers' compensation. This helps the person survive economically during the third-party case. The disability payments tend to be a fraction of earnings, however. The slow healthcare approval process also tends to delay physical recovery.

### He should have armed himself

There's no fair fight with any insurance company. An injured worker will get better treatment with a workers' compensation lawyer, or applicant's attorney. The third-party case also benefits. If the client does not already have an applicant's attorney, make a referral. The relationship is mutually beneficial. But as the two lawyers do the dance, they need to make sure they step lightly. It helps to commit to honor the applicant attorney's fee if the case resolves in a way where the workers' comp fee gets wiped out. Applicant attorneys work hard, their relatively low fees are

capped, and the least one can do is make sure they get paid for their work. In return, the applicant's lawyer can use the compensation case to obtain records (a costs savings) and guide the worker away from employer-leaning medical providers. It will be no surprise that the provider's employers tend to find nothing wrong with the employee, or that the employee can return to work right away.

### Employer fault, future benefits, and collectability

Early on, the lawyers need to evaluate whether the case lends itself to any arguable employer fault. There are situations where, with no employer fault, a catastrophically injured worker may be better off without a third-party case. To understand this, one needs to know that workers' comp has a lien or subrogation right on third-party cases as well as a credit against future disability and medical payments.

Imagine the following situation: A worker is crossing the street with no arguable employer fault, gets hit by a vehicle, and has catastrophic injuries. The vehicle has \$250,000 in insurance, and the driver has no collectible assets. The workers' comp carrier refuses to negotiate a deal with the third-party lawyer. If the worker receives driver insurance money, the comp carrier will get a credit and benefits will stop until the worker demonstrates that the money has been spent on medical coverage. As difficult as it may sound, it is probably best to let that third-party case go.

A little employer fault, typically about 10% depending on the past and future medical expenses, is very helpful to wipe out the workers' compensation lien and any credit rights. To succeed, one needs to make sure to send out a Notice of Third Party Action to the employer and the employer's insurer with the Complaint and all the defendants' Answers at the beginning of the case. This puts the employer on notice that their fault may be in play. It will frequently result in the employer filing a Complaint-in-Intervention with a subrogation lawyer. Work with them to beat up the defense, and recognize the friendship ends during settlement.

If necessary, help the applicants' attorney fight any post-civil-settlement workers' compensation Petition for Credit. This is where the employer claims it does not have to make any further compensation payments because the employee received civil settlement money. Asking the defense, as part of the civil settlement, to allow one to acquire their liability experts helps. Those liability experts have usually been dumping on the employer and thus help increase the employer fault at the credit hearing.



APRIL 2021

## Outro

Back to our lawyer. The lawyer finished speaking with the potential client and then dialed a new number, a highly competent applicants' attorney. "Chris," the lawyer said, "I have a new case I'd like to work with you on."

*Miles B. Cooper is a partner at Emison Cooper & Cooper LLP. He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the*

*American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).*

