

## WORKERS' COMPENSATION INSURER'S SUBROGATION LIEN ON SETTLEMENT PROCEEDS CAN BE REDUCED BY EMPLOYER'S PERCENTAGE OF FAULT

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Written By: [Eileen GilBride](#)

An injured worker who accepts workers' compensation cannot sue his employer. If the worker obtains settlement funds from a third party, the workers' compensation carrier may obtain a lien on that recovery to the extent of the benefits paid to the worker. The Court of Appeals held today that if the worker's settlement with the third party is for an amount less than that third party's insurance limits, the worker may obtain a judicial determination of whether the carrier's lien should be reduced to account for the employer's comparative fault. The carrier's lien on a settlement may be apportioned in this way as long as the worker's damages and the employer's comparative fault are determined in a fair proceeding between the employee and employer/carrier.

Leija was a window washer who fell to his death when the scaffold he was attempting to erect atop a three-story building collapsed and fell to the ground. His employer's workers' compensation carrier, Twin City, accepted the claim and pays monthly benefits to Leija's widow and children. Leija's family sued third parties, including the building's property and maintenance company, the scaffolding company, the company that fabricated the scaffolding, and the City that owns the building. Defendants named Leija's employer as a non-party at fault. The Leijas settled with all defendants. All but the City paid the limits of their insurance coverage. Twin City sought reimbursement from the settlement proceeds of the benefits it paid and will pay in the future. The Leijas argued that Twin City's lien should be reduced by the employer's percentage of fault, and claimed Twin City breached its contract and acted in bad faith by refusing to reduce its lien.

The Court of Appeals held that because the City settled for much less than its insurance limits, the workers' compensation lien on the Leijas' settlement proceeds should be reduced by the amount equal to the employer's percentage of fault. That fault is to be determined in a trial between the employee and the employer/carrier, though the court did not address the specifics of such a proceeding – including whether the worker's damages and the employer's comparative fault should be determined by the court or by a jury. Under prior case law, a reduction of the lien was required only when the worker's claim against at least one third party was actually adjudicated at a trial where fault was apportioned. In that circumstance, it would not be fair for the employee to have his or her award reduced by the employer's percentage of fault, and then have to satisfy the full workers' compensation lien on top of that. This decision expands that rule to situations where all parties settle and there has been no adjudication or apportionment of employer fault in the worker's case against the third party.

The court affirmed summary judgment for Twin Cities on the Leijas' breach of contract and bad faith claims, however. At the time the parties were discussing the lien, a workers' compensation carrier owed no duty to an injured worker to compromise or reduce the lien that § 23-1023 grants the carrier, absent a fair adjudication of damages and employer comparative fault. In light of this published case, however, workers' compensation carriers are now on notice that the carrier's lien can be equitably apportioned and is an issue that should be considered regardless of whether the worker's claim against one or more third parties is settled or tried.

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