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How Workers' Compensation Laws Can Affect Settlement Negotiations

Oregon's workers' compensation laws, ORS 656.001 *et seq.*, allow for two classes of potential plaintiffs – either the injured worker or the entity paying the workers' compensation benefits (generally the injured worker's employer or its insurer). The workers' compensation statutes structure the disbursement of proceeds recovered from a liable third party such that, depending on which kind of plaintiff pursues the third party claim, the plaintiffs' incentives and threshold to settle may vary greatly. A defense attorney engaged in settlement negotiations in a case involving workers' compensation should keep in mind the different pressures and requirements placed on the two classes of plaintiffs. This will help a defense attorney understand and advise her clients on a plaintiff's willingness to settle the suit at all, how much pressure the plaintiff may be under to arrive at a certain settlement figure, and the calculation of an appropriate settlement figure.

I. How the Statutes Create Two Classes of Potential Plaintiffs

Either the injured worker or the entity paying the workers' compensation benefits may become a plaintiff in a claim for damages beyond the statutorily prescribed compensation for the injury. The entity paying the workers' compensation benefits is usually either the employer's insurance carrier or a self-insured employer. This entity is referred to as the "paying agency." ORS 656.576.

Generally, the workers' compensation scheme provides an exclusive remedy for injured workers with regard to their employers. With certain exceptions, if an employer complies with its duties under the workers' compensation statutes, the employer is exempt from liability claims brought by the injured worker for amounts beyond the statutorily prescribed compensation for the injury. ORS 656.018. If an employer does not comply with its duties, the employer is still liable for injury compensation, but the employer loses the protection of the statute's exclusive remedy provision and the injured worker may seek to recover damages from the employer. ORS 656.020; ORS 656.054; ORS 656.578.

If a third party causes the compensable injury, the injured worker may also seek to recover damages from that third party. ORS 656.154; ORS 656.578. The injured worker's election to seek damages from a non-complying employer or from a third party does not affect the worker's right to receive workers' compensation benefits from the employer under the statutory scheme for compensable injuries. ORS 656.580. Thus, injured workers may be plaintiffs in cases against both third parties and against non-complying employers.

The statute also provides for the paying agency to seek recovery from a third party when the injured worker does not pursue the claim. The paying agency may force the injured worker to decide whether to pursue a claim against a potentially liable third party by issuing a written demand to the injured worker. ORS 656.583(1). If the worker does not elect to pursue the claim within 60 days of the demand, then the claim is deemed assigned to the paying agency. ORS 656.583(2). If the worker elects to pursue the claim, but fails to initiate the claim within 90 days of electing to pursue the claim, the claim is again deemed assigned to the paying agency. ORS 656.583(2).

II. When the Paying Agency Pursues the Third Party

If the claim is assigned to the paying agency, the paying agency may bring the claim in the name of the injured worker. ORS 656.591(1). If the paying agency recovers from the third party, it may reimburse itself for three categories of expenses: (1) Expenses incurred in obtaining the recovery;

(2) The amount expended for workers' compensation benefits, first aid or other medical, surgical or hospital service; and (3) The present value of the future monthly payments of compensation to which the injured worker is entitled. ORS 656.591(2).

Any recovery amount in excess of these amounts must be paid to the injured worker. Thus, if the paying agency pursues the third party claim, its only incentive is to recoup its own past and future expenses and it is not obligated to ensure that any recovery goes to the injured worker.

III. When the Worker Pursues a Third Party

An injured worker, on the other hand, who elects to pursue the third party claim has more considerations that bear on how they approach settlement negotiations. First, the paying agency will automatically have a lien against any recovery by the injured worker. ORS 656.580(2). Second, the statute's disbursement rules create a personal incentive for the worker to hold out for the highest possible settlement. Third, the paying agency controls whether the plaintiff may settle the claim. Finally, the ability of an injured worker to extinguish the paying agency's lien on the recovery proceeds, if the recovery is high enough, adds further incentive for the plaintiff to hold out for a high settlement figure or take his chances at trial.

A. Disbursement of Damages

The workers' compensation scheme details how any funds must be disbursed when an injured worker recovers from a third party. The plaintiff's attorney receives up to one-third of the total recovery for costs and fees, and the worker receives one-third of the remaining balance of the recovery before the paying agency is reimbursed at all. ORS 656.593(1) (a)-(d). If the balance of the remaining recovery is insufficient to cover the paying agency's expenses, the paying agency is simply out of luck. If the paying agency's share exceeds the amount necessary to reimburse the agency for costs paid and for future costs, the agency must turn over the remaining funds to the worker. The paying agency must retain the estimated amount to cover future expenses and payments to the injured worker. If it merely reimburses itself for past costs and then turns over the remaining balance to the injured worker, the paying agency loses its right to seek recovery of those amounts needed for future medical costs.

B. Settlement Requirements

If the injured worker pursues the third party claim, the worker may not settle the claim without the paying agency's written approval or, in the event of a dispute between the worker and the paying

agency, without an order from the Workers' Compensation Board. ORS 656.587.

If the paying agency approves the settlement, the injured worker must receive the amounts to which he would have been entitled under the previous sections. ORS 656.596(1) and (2), ORS 656.593(3). The paying agency may accept whatever amount is "just and proper." "Just and proper" means an amount equal to or less than what the paying agency would have received from a judgment in a third party action.

Thus, where the worker pursues the third party claim, the worker has an incentive to recover as much as possible because he stands to receive a large portion of the recovery. Additionally, the worker may be under pressure from the paying agency to settle for an amount that would allow for full reimbursement of the paying agency after the plaintiff and his or her attorney receive their portions of the settlement.

IV. Cancellation of the Paying Agency's Lien

If the injured worker recovers an amount from which the worker's portion would total more than one million dollars, the worker may elect to partially cancel the paying agency's lien on the recovery proceeds. In this situation, if the worker agrees to release the paying agency from all future liability regarding the workers' compensation claim, the worker extinguishes the paying agency's lien on the amount of the recovery that represents the value of the paying agency's future expenditures. ORS 656.593(6)-(7). Any settlement agreement encompassing this situation must still provide for the reimbursement of costs incurred by the paying agency in paying benefits, first aid or other medical, surgical or hospital service. ORS 656.593(6)(b)-(d). Thus, in addition to the worker's personal share of the recovery, the worker may also have the opportunity to receive up front the value of all his future benefits. Therefore, where the injury warrants such a high recovery, the worker has an incentive to push for an amount that would break the one-million-dollar threshold and allow the worker to increase his total recovery beyond this amount.

V. Conclusion

In many cases, it will be easier to achieve a reasonable settlement where the paying agency has brought the claim on behalf of the injured worker because the paying agency has only the incentive to recover its own costs. Conversely, where the injured worker pursues the claim, settlement may be difficult to achieve because the worker has personal incentives to recover as much as possible. Additionally, in an action brought by the worker, the paying agency has

control of whether the plaintiff can settle the case. Because the paying agency is third in line to receive funds from any settlement, it has incentive to withhold its assent and force the plaintiff to hold out for a settlement large enough to provide for attorney fees, the worker's personal share, and also for full reimbursement of the paying agency's costs.

Medicare Reporting Deadline Extended for Liability Settlements

The deadline to report liability settlements to Medicare has been extended one year. On November 9, 2010, the Centers for Medicare and Medicaid Services issued an Alert extending the deadline so that liability settlements, without ongoing responsibility for medicals, must now be reported by the first calendar quarter of 2012, instead of 2011. The extension does not apply to claims involving ongoing responsibility for medicals, such as workers' compensation claims, no fault insurance claims, and some liability settlements. Responsible reporting entities will be required to report settlements that occur on and after October 1, 2011.

Additionally, the schedule for minimum reporting thresholds has been extended one year. A claim where the total payment to a claimant is \$5,000 or less does not need to be reported before January 2013. In 2013, all payments totaling at least \$2,000 must be reported, and that limit drops to \$600 in 2014. In 2015, all total payments to a claimant must be reported.

Ninth Circuit Expands Definition of "Religious Organization" for Purposes of Permissible Religious Discrimination under Title VII

A corporation interviews an applicant for an accounting position. The corporation, although not associated with any particular church, is faith-based. The employer asks the applicant if she follows the same religious ideology as the corporation. When the applicant says no, the employer informs the applicant that she is no longer a contender for the position. Angered, the applicant files a complaint in the Ninth Circuit federal court for religious discrimination under Title VII. Does she have a valid claim?

Before *Spencer v. World Vision, Inc.*, (9th Cir August 23, 2010) the answer probably would have been yes. Now, the answer is not so clear.

Title VII of the Civil Rights Act, 42 USC §2000e-2(a), bars religious discrimination in employment. The bar does not apply to a "religious corporation, association . . . or society with

respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

Historically, the Ninth Circuit Court of Appeals applied a narrow interpretation of the statute. In *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F2d 610 (9th Cir 1988), the Court determined that a for-profit manufacturer of mining equipment did not qualify for the Title VII exemption, even though the company, founded as a "Christian, faith-operated business," enclosed Gospel tracts in outgoing mail, printed Bible verses on invoices, and conducted weekly prayer meetings for employees.

The Court characterized its inquiry as an effort to determine whether the general picture of an institution is primarily religious or secular, and concluded that the company was primarily secular because it was for-profit, unaffiliated with any church, did not include a religious purpose in its articles of incorporation, and produced a secular product. The Court reasoned that Congress intended only to exempt churches and entities similar to churches.

The Court came to a similar conclusion in *EEOC v. Kamehameha Schools*, 990 F2d 458 (9th Cir 1993), which involved a group of schools founded pursuant to a bequest that required all teachers be Protestants. The Court considered the fact that the schools were unaffiliated with any particular church and determined that the schools were secular institutions with a historically religious tradition, and were ineligible for the exemption.

Townley and *Kamehameha* suggest that the hypothetical plaintiff has a valid claim because the exemption, narrowly construed, would not apply to a corporation that is not a church, similar to a church, or affiliated with any particular church or similar entity. *Spencer*, however, suggests that the Ninth Circuit is expanding the types of qualifying organizations.

In *Spencer*, World Vision Inc. terminated three employees ("plaintiffs") after it discovered that plaintiffs disavowed a central doctrine of World Vision's Statement of Faith. World Vision describes itself as a "Christian humanitarian organization dedicated to working with children, families and their communities worldwide ... by tackling the causes of poverty and injustice."

Plaintiffs filed suit, alleging discrimination in violation of Title VII. The district court held that World Vision was exempt under Title VII and granted summary judgment in its favor. The Ninth

Circuit Court of Appeals upheld the decision of the district court on different grounds. While the majority of the Court agreed on certain factors to determine whether a religious organization falls under the exemption, they disagreed on the ultimate test.

The Court agreed upon the following factors:

The organization need not be a church or house of worship. The Court examined the language of Title VII and determined that if Congress intended to restrict the exemption to “[c]hurches, and entities similar to churches,” it would have said so.

The organization need not always discriminate on a religious basis. The Court determined that a religious organization did not need to follow a strict policy of religious discrimination to be entitled to the exemption.

The Court refused to place weight on certain historically applied factors, such as where an organization receives its funding, and whether an organization’s activity, product or service is primarily religious or secular.

Judges O’Scannlain and Kleinfeld, however, disagreed on the ultimate test to determine whether a religious organization qualifies for the exemption. Judge O’Scannlain placed significant weight on an organization’s non-profit status and held: A nonprofit entity qualifies for the Title VII exemption if it establishes that it (1) is organized for a self-identified religious purpose (as evidenced in its articles of incorporation or similar foundational documents), (2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and (3) holds itself out to the public as religious.

Judge Kleinfeld disagreed. Claiming Judge O’Scannlain’s test would also allow people “to advance discriminatory objectives outside the context of religious exercise by means of more corporate paperwork,” Judge Kleinfeld focused on how the corporation charges for its services or products. He stated that looking at how an institution charges sorts out the institutions focused on profit, as opposed to those who provide products or services for little or no money serve a religious purpose.

Judge Kleinfeld reformulated the test as follows: To determine whether an entity falls within the exemption, look at whether the entity: (1) is organized for a religious purpose, (2) is primarily engaged in carrying out that religious purpose, (3) holds itself out as an entity for carrying out that religious purpose, and (4) does not engage

primarily or substantially in the exchange of goods or services for money.

Both judges agreed that World Vision, under either test, qualified for the Title VII religious organization exemption. Yet what does the holding of *Spencer* mean for our hypothetical plaintiff?

Although the Court did not formulate any clear test, the two tests can be combined to determine what organizational requirements must be met. First, the hypothetical corporation must be organized for a religious purpose, and the purpose must be set forth in the articles of incorporation. Second, the actions of the corporation must be consistent with the religious purpose. Third, the corporation must hold itself out to the public to be a religious organization. Fourth, the corporation must be a non-profit. Fifth, the corporation must offer products or services for free, or for a nominal amount.

If the hypothetical corporation does not meet all of the requirements, plaintiff may have a valid claim under Title VII for religious discrimination. It remains to be seen how the Court will rule on an organization that meets the elements of one test but not the other. In the meantime, counsel for employers should advise any entity that wishes to qualify for the exemption to meet the requirements of both tests.

Bodyfelt Mount is pleased to welcome Angela W. Bennett to the firm. Angela graduated *magna cum laude* from Willamette University College of Law in 2009. She earned her undergraduate degree from Gonzaga University. Angela joins the firm as an associate attorney.

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