

Workers' Comp Settlement Nets Victim More Than \$1M

Double Damages Were Argued In Mediation

SETTLEMENT Spotlight

An employee who sustained massive injuries resulting in amputation of an arm was recently granted one of the state's largest reported workers' compensation awards after arguing entitlement to double damages in mediation.

The settlement provided that the 29-year-old employee, who was electrocuted after holding a metal pole that hit a power line while performing his job, would be awarded a guaranteed settlement of approximately \$1.1 million structured over 25 years. If he reaches his life expectancy, that award will increase to approximately \$2.25 million.

In obtaining the successful settlement, the injured employee's attorney, Steven P. Sabra of Somerset, was able to use the threat of G.L.c. 152, §28 damages, which allow double damages when the employee can prove that the injury was caused by serious and willful misconduct on the part of the employer to his advantage.

While workers' compensation awards have decreased since the law changed in 1991 limiting the amount an employee could get to only 60 percent of his weekly wages, the employee's attorney noted that his case showed that there were a few methods by which a workers' compensation award could be increased.

"It's important for employees' counsel to look at the case to determine if there are any claims that might enhance the value of a workers' compensation claim," Sabra maintained. "Section 28 is one of those options."

Although mediated settlements of workers' compensation claims are rare, according to the Somerset lawyer, he noted that the use of alternative dispute resolution in



The site where the plaintiff was electrocuted after holding a metal pole that hit a power line

this case ended up being beneficial to his client in more ways than one.

Not only did it produce a favorable settlement, but it also kept Sabra's client from testifying — a fact that may have affected the ongoing third party liability claim that the employee's lawyer said is pending in Superior Court.

Sabra said he would recommend the use of ADR in workers' compensation cases to other lawyers, but he cautioned that "substantial" cases were better suited for mediation than the typical, smaller amounts found in most workers' compensation claims.

Shocking Injuries

On Sabra's request, the names of the

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parties have been withheld due to the nature of the settlement.

The employee was working with his crew of fellow employees to dismantle a pump jack scaffolding on a building in Woods Hole.

While one co-employee on the roof of the building lowered a rope attached to an aluminum pole in order to bring the pole to the ground, the employee and his other co-workers guided the pole from the ground.

Unfortunately, on the way down, conduction occurred between the pole and a nearby power line and the employee was severely injured.

A co-employee was killed.

The employee suffered severe injuries to his arms and hands which resulted in amputation of his right arm below the elbow and amputation of his left middle and index fingers.

He also suffered the loss of flexor tendons in his hand and "degenerative changes to the proximal row of the carpal bones."

The employee had to undergo numerous operations, including two reconstructive surgeries, and he experienced complications from some of the procedures that delayed healing and required repeat hospitalizations.

He has since suffered from episodes of cellulitis and depression, and his treating physician indicated that additional surgeries will need to be performed.

According to his attorney, the employee will probably not be able to work again because most of his previous jobs and skills required the use of his arms and hands.

Based on his average weekly wage of approximately \$555, the employee was paid weekly benefits for life under section 34 of the workers' compensation statute in the amount of \$332 — 67 percent of his prior weekly wage and \$785,695 in present value.

The employee filed a claim for further

damages under section 28 alleging that the employer violated G.L.c. 166, §21A-G, by not providing notice to the utility.

His claim was further enhanced by the findings of an Occupational Safety and Health Administration investigation which also found violations of the Code of Federal Regulations.

Although the section 28 claim was denied at a hearing, the employee appealed, but the two sides agreed to have the suit settled in mediation before the appeal was heard.

At a mediation presided over by retired Judge James V. Ryan at JAMS/Endispute, the employee was awarded a guaranteed benefit of \$1,121,925 in structured payments over 25 years.

If he lives until his life expectancy, the employee's mediated award will be worth approximately \$2,250,475.

The employee's attorney has also filed a lawsuit in Suffolk Superior Court against the property owner and the utility that is still pending.

Section 28 Forced Settlement

Although his client initially lost his section 28 claim alleging serious and willful misconduct on the part of the employer, the employee's attorney said he believed that it was the possibility of doubling the award on appeal that may have ultimately caused the employer to want to settle.

"The exposure to the insurer and the employer under section 28 was the key to getting a substantial settlement in this case," Sabra said. "I don't think either side was necessarily confident that they would be successful on the section 28 claim."

The veteran personal injury lawyer credited the OSHA investigation as providing much of the evidence that supported the section 28 claim, and he added that it helped cut down on his own expenses as well.

Sabra also had a bit of luck on his side as a significant Supreme Judicial Court decision regarding whether an insurer would still be liable for double compensation under section 28 came down in his favor during negotiations.

The case of *CNA Insurance Companies v. Slishi*, decided in March 2001, apparently held that even though an employer would normally be liable for the extra compensation, the employer's insurer could not get off the hook if that employer became insolvent.

"That decision removed that issue [of the employer possibly seeking bankruptcy protection] from the equation as a negotiating point," Sabra said.

Although the Somerset attorney remarked that not all cases are eligible to claim a section 28 violation, he said he felt he had a good shot at the claim in this case.

"There are not a lot of workers' compensation cases where you can legitimately make a section 28 argument, but this happened to be one of them and it enhanced the value of the employee's case," observed Sabra.

While he admitted that the negotiations were hard fought during mediation, the employee's attorney said he was pleased with the final settlement because his client, who can no longer work, would now be provided for during the rest of his life with the structured settlement.



"ADR is not used that much in workers' compensation cases, but it worked well in this case."

— Steven P. Sabra, counsel for plaintiff

Other Enhancing Techniques

Sabra maintained that there were other issues in his case that helped his client get an enhanced award, and that other attorneys could benefit by looking into them as well when confronted with a workers' compensation claim.

He also credited the use of ADR for providing some additional benefits to his client.

Aside from the section 28 claim, he noted that third party claims may be one way to enhance an employee's compensation.

For example, in his case, Sabra has a pending lawsuit against the property owner and the utility at Suffolk Superior Court.

He said he especially benefited by the use of ADR in this case because his client never had to testify, and the third party defendant's would not have any testimony that could possibly be used against him at the pending Superior Court case.

The Somerset lawyer also noted that if an attorney can prove that his client would be under a permanent and total disability, section 34, which has more favorable conditions for employees, would apply.

Unlike a normal workers' compensation claim which would only provide for compensation in the amount of 60 percent of an employee's former salary for a definite term of seven years, a section 34 claim would allow 67 percent of the employee's former salary for life.

The employee's attorney also noted that his client will probably see a slight increase in the amount of Social Security Disability benefits he will receive because the settlement he gained through mediation was structured as opposed to one lump sum.

"ADR is not used that much in workers' compensation cases, but it worked well in this case," commented Sabra.

— JASON M. SCALLY

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