Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr. IAS PART 32
Justice

----------X

GEORGANN BURKHARDT, Index. No.: 11007/2015

Petitioner, Motion Dated: October 5, 2015
Seq. No. 1
Cal. No. 23

-against-

AMTRUST NORTH AMERICA, INC. a Workers' Compensation carrier, through its insurance company, WESCO INSURANCE COMPANY,

Respondent.

----------X

The following papers numbered 1-11 read on the petition by Georgann Burkhardt for an order granting the following relief: 1. approving and confirming the settlement in the underlying matter pursuant to Workers' Compensation Law §29(5); 2. ordering that out of the settlement proceeds the law firm representing petitioner be paid their fee of $32,138.25, and reimbursed in the amount of $3,585.23 for costs and expenses; 3. ordering that respondent be directed to retain their files in an open status and continue to pay petitioner and her medical providers benefits pursuant to Workers' Compensation Law; and 4. ordering that any claimed liens held by respondent be waived and declared null and void, or alternatively be reduced to a *pro rata* share of the value of the underlying action.

	Papers Numbered
Notice of Petition, Affirmation, Petition, Exhibits.....	1-5
Opposition, Exhibits.....	6-8
Reply, Exhibits.....	9-11

This Court's previous order scheduling the instant motion for a conference/hearing dated February 24, 2016 (J. Greco) is hereby vacated *sua sponte*, and, upon the foregoing papers as well as extensive oral arguments the following is this Court's decision on the motion:

This matter arises from the settlement of a related action entitled *Georgann Burkhardt vs. Lori A. Lynch a/k/a Lori Ann Fiore* bearing Supreme Court, Queens County index number 3292/2011, wherein plaintiff/petitioner settled her personal injury claim resulting from a motor vehicle accident that occurred during the course of her employment for the full amount of defendant's policy, $100,000.00. The Court notes that there were numerous orders to show cause filed in the underlying action seeking essentially the same relief as that which is sought herein. These orders were denied for various reasons and ultimately with the direction to proceed by separate

petition hence, the instant action.

Following the accident petitioner became eligible for and received Workers' Compensation benefits from her employer through respondent WESCO Insurance Company (now known as Amtrust North America, Inc.- "WESCO/Amtrust"). The total amount of medical benefits and lost wages paid out is unclear however, what is apparent is that such amount exceeds the total amount of the third-party settlement. Also, that WESCO/Amtrust sent a letter dated February 11, 2014 asserting a lien in the amount of $77,168.26. Satisfaction of this lien would result in a zero recovery for petitioner from the proceeds of her settlement. In light thereof, petitioner seeks the aforementioned relief.

Workers' Compensation Law §29(5) permits an employee to settle a lawsuit arising out of the same accident as his or her Workers' Compensation claim for less than the amount of compensation received if the employee has received written consent from the compensation carrier, or has obtained judicial approval within three months after the case has settled, (*see* Hargrove v Becom Real, 287 AD2d 598 [2nd Dept. 2001]; *see also* Matter of Johnson v Buffalo & Erie County Private Indus. Council, 84 NY2d 13, 19 [1994], Harosh v Diaz, 253 AD2d 850, 851 [2nd Dept. 1998]). If more than three months passed a judicial order approving the settlement may be obtained *nunc pro tunc* provided the following is established: 1. the settlement amount is reasonable; 2. the delay in applying for approval was not through plaintiff's fault or neglect; and 3. delay did not cause prejudice to the carrier, (*see* Hargrove *supra*, Baiano v Squires, 113 AD2d 732, 734 [2nd Dept. 1985], Balkam v Miesemer, 74 AD2d 629 [2nd Dept. 1980]). Resolution of these issues and ultimate approval of the settlement is left to the discretion of the trail courts, (*see* Matter of Hermance v Fireman's Fund Ins. Co., 265 AD2d 328 [2nd Dept. 1999]).

Here, although there is written consent from the carrier petitioner seeks judicial approval, and does so in excess of three months after settlement that occurred sometime in December 2014[1]. The above enumerated factors necessary for review under these circumstances are not in dispute save reasonableness, and as to this issue *petitioner* speaks from both sides of her mouth. It is asserted in the moving papers that the settlement was and is fair and reasonable and for the benefit of and in the best interest of both petitioner and WESCO/Amtrust in that it is for the full policy amount, there are no excess policies from which to recover and there were issues concerning liability in the underlying action. However, in her reply petitioner argues that a settlement which results in $0.00 recovery to the injured party, with a payment of the net proceeds to the carrier, is not fair and reasonable. This sentiment begs the question why seek judicial approval rather than to set aside the settlement.

Nevertheless, while at first glance the latter position comports with an overall sense of fairness it ignores the fact that petitioner did receive a benefit throughout the pendency of her lawsuit vis-a-vis payment of her medical expenses and lost wages that as a litigant in cases such as this she was aware, or should have been aware would have to be repaid. Petitioner should not expect a

---

[1]Petitioner asserts that settlement occurred on December 8, 2014, the date jury selection was to commence. Although at that time no statement was placed on the record and no general release or stipulation of discontinuance were served upon defense counsel. These documents were later executed in connection with petitioner's final order to show cause filed in the underlying action.

windfall, i.e. retention of her settlement proceeds, (or a portion thereof), and waiver of a Workers' Compensation lien, simply because she sustained injuries from an insured who failed to carry sufficient coverage to compensate such injuries; especially since had the settlement exceeded the lien such lien would have been satisfied presumably without issue. Petitioner suffered strokes of bad luck in both the happening of the accident and in the individual with whom she collided which, should not inure to the detriment of the carrier. Furthermore, settlements such as this are not unheard of and the law has made allowances for these so called deficiency cases relative to payment of legal fees, (*see below*). For these reasons, the Court grants petitioner's request to approve and confirm the settlement in the underlying matter in the sum of $100,000.00.

The Court next addresses petitioner's request to pay legal fees and expenses from the settlement proceeds, and to declare null and void, or alternatively reduce the amount of the Workers' Compensation Lien. Workers' Compensation Law §29 grants a carrier a lien on settlement proceeds equal to the amount of past compensation paid with interest. This lien is subordinate to a deduction for costs and attorney's fees (*see* Workers' Compensation Law §29[1]; *see also* Matter of Kelly v State Ins. Fund, 60 NY2d 131, 136-137 [1983]). Should the recovery be greater than the amount of compensation paid the carrier must contribute the costs of litigation in proportion to the benefit it has received, (*id* at 140; Hammer v Turner Constr. Corp., 39 AD3d 705 [2nd Dept. 2007]; *see also* Burns v Varriale, 34 AD3d 59, 61-62 [3rd Dept. 2006]). However, if the injured party settles for less than the compensation paid, as in this case then the carrier assumes the entire cost of obtaining the recovery and is entitled to recover the net amount remaining after taking such deduction, (*see* Matter of Kelly, *supra* at 138-139, Smith v Spinoccia, 119 AD2d 660, 662 [2nd Dept. 1986]; *see also* Lodestro v Upstate Milk Coops, Inc., 37 AD3d 1075, 1076 [4th Dept. 2007], Martin v Agway Petroleum Corp., 161 AD2d 1129, 1130 [4th Dept. 1990]).

In accordance with the above, the Court must grant petitioner's request that the whole of the legal fees and expenses of obtaining recovery be paid from the settlement proceeds and borne by the carrier. Concurrently, the alternative requests to declare the lien null and void or reduce the amount to a *pro rata* share of the value of the underlying action must be denied. There is no support for effectuating this relief. The Court recognizes that this nets the injured party zero from their settlement however, again this view loses sight of the compensation benefits paid to such injured party during the pendency of the action.

Petitioner attempts to rely on *Matter of Miller v Arrow Carriers Corp.* (130 AD2d 279 [3rd Dept. 1987]), which, in addition to not binding this Court, is also distinguishable in that the carrier eventually stipulated and agreed to the Court's compromise that reduced the amount of their lien. This stipulation lead the Court to modify its order. Contrary to petitioner's assertion the Appellate Division did not approve of the lower's court's decision to reduce, rather it was never addressed and the matter was remanded for further proceedings regarding the carrier's right to a future offset, the central issue to such case, (*id* at 282). The Court further notes that no cases have cited or relied on *Miller* in support of the contention that the Supreme Court is permitted to compromise and reduce a carrier's lien over their objection. There just doesn't seem to be any support for this premise. Finally, petitioner's attempt to liken this matter to those involving the equitable allocation of a medicaid lien while not novel, (*see* Scheer v New York State Ins. Fund, 22 Misc.3d 239, 244-245 [Sup Ct, Erie County 2007]), remains unpersuasive and the Court although not bound by the

reasoning in *Scheer* agrees with same, (*id* at 245).

In light of the above, those branches of the petition to approve and confirm the settlement in the sum of $100,000.00, and to pay from such sum legal fees and expenses in the amounts requested are granted, with the remaining relief sought being denied.[2] Requests by each party for the fees and costs associated with the instant application are likewise denied.

Dated: July 8, 2016

Rudolph E. Greco Jr.
J.S.C.

[2]The Court notes that no arguments were offered in support of petitioner's request to direct respondent to retain the files of this matter in open status and to continue paying compensation benefits (#3).