THE COMMONWEALTH OF MASSACHUSETTS
Department of Industrial Accidents

1 Congress Street, Suite 100
Boston, Massachusetts 02114-2017

DEVAL L. PATRICK
Governor

TIMOTHY P. MURRAY
Lieutenant Governor

PHILIP L. HILLMAN
Director

CIRCULAR LETTER NO. 341

TO: All Interested Parties

FROM: Omar Hernandez, Senior Judge

RE: NEW § 15 SETTLEMENT APPROVAL FORM AND PROCEDURE

DATE: April 12, 2012

NEW § 15 SETTLEMENT APPROVAL FORM AND PROCEDURE

On October 5, 2011, the Massachusetts Appeals Court issued its decision in Curry v. Great American Insurance Co., 80 Mass. App. Ct. 592 (2011), rev. denied 461 Mass. 1103 (2011), petition to reconsider denied February 3, 2012. The plaintiff in Curry was the executrix of the estate of an employee who died from injuries suffered in a work-related motor vehicle accident. A wrongful death claim was submitted to arbitration, resulting in a $300,000 award. The defendant, who paid the employee benefits under the workers' compensation act, asserted its lien rights under § 15 of the act. The plaintiff sought to allocate money for "loss of consortium and conscious pain and suffering" of the employee "to which [the insurer's] lien would not attach. . . ." Id. at 593.

Following the submission of two sets of proposals from each party, each detailing how the tort recovery should be allocated, a Superior Court judge approved the plaintiff's second proposal. The approved proposal allocated sums for the plaintiff's loss of consortium claims and the employee's conscious pain and suffering. The defendant appealed, challenging the plaintiff's right to allocate the settlement proceeds as described.

Following the Supreme Judicial Court's decisions in Hultin v. Francis Harvey & Sons, Inc., 40 Mass. App. Ct. 692 (1996) and Eisner v. Hertz Corp., 381 Mass. 127 (1980), the court concluded that the damages allocated for loss of consortium were "not

reimbursable to Great American under § 15." Curry, supra at 596. Next, the court addressed the issue of whether the insurer's reimbursement right extended to the employee's pain and suffering allocation. Noting "that workers' compensation benefits do not compensate an injured employee for conscious pain and suffering," the court concluded that "Great American's claim that it is entitled to the allocation for conscious pain and suffering is therefore without merit." Curry, supra at 597.

The department is presently revising its § 15 interactive calculator and petition in light of the Curry decision.

Henceforth, § 15 petitions submitted to the industrial accident board for approval should specify the amount allocated to compensate the employee for her/his conscious pain and suffering, as well as any amount(s) recoverable in damages for the loss of consortium claims of family members. Amounts so allocated are beyond the reach of the workers' compensation insurer's lien, and therefore are not subject to offset against the employee's future entitlement to c. 152 benefits. See Hunter v. Midwest Coast Transport, 400 Mass. 779 (1987).

Where the employee and the workers' compensation insurer are unable to agree on the amount of an allocation, either party may submit a petition delineating the amounts of all proposed allocations and request a hearing before the board. After notice to all parties, the matter will be assigned to an administrative law judge to consider "the merits of the settlement" as proposed. G. L. c. 152, § 15. The judge will approve or reject proposed settlement petitions. The judge will *not* "substitute[] his judgment of that of the parties and impose[] upon them his own formula. See Walsh v. Telesector Resources Group, Inc., supra at 233." Hultin, supra, at 698 n.8.