

Workers' Compensation Section 40 Lien Rights vs. PIP

There has been much discussion over the past few years concerning the right to subrogate medical benefits that are provided in a workers' compensation claim when the work accident involves a motor vehicle collision.

Under normal circumstances, when an individual is injured as a result of a work related accident, and that accident gives rise to a third party claim, the workers' compensation carrier has the right of subrogation against any recovery obtained by the injured worker from the third party tortfeasor pursuant to NJSA 34_15-40. That subrogation lien attaches to any medical, temporary and permanent disability benefits provided by the workers' compensation carrier. Pursuant to statute, the carrier is entitled to the full recovery of all benefits provided, less counsel fees paid in the third party action, subject to the amount of the third party recovery.

In situations where the third party claim may have liability, and/or limited coverage issues, workers' compensation liens are often compromised to accommodate such issues for the mutual benefit of the parties involved.

One discrepancy to the right of subrogation that is often raised by the plaintiff's bar is when the work accident involves a motor vehicle accident where PIP would normally have covered the injured worker's medical expenses. Under the no-fault laws, PIP is provided regardless of who is at fault as to the cause of the accident and such benefits cannot be considered as "damages" when litigating the third party claim. As a result of this exception to damages, the plaintiff's bar has argued that if such medical expense could not be argued as damages in a third party claim, then such medical benefits that are provided in workers' compensation should not be subject to subrogation.

This issue came to a proverbial head in an unreported Appellate Division case known as *Dever vs. New Jersey Manufacturers*. In that case, which is not precedent setting, the workers' compensation carrier was not permitted to recover medical expenses from the employee's UIM carrier. The decision was very limited in scope, and while unreported, it has often been used to argue that medical benefits for all motor vehicle accidents where PIP would normally apply, are not subject to reimbursement.

Since *Dever*, there have been a number of unreported cases that have ruled in favor of the workers' compensation carrier's statutory right of reimbursement of all benefits, including medical, that is contrary to the *Dever* logic. This past year, two unreported appellate decisions also found that the statutory right of recovery under Section 40 of the Workers' Compensation Act is preemptive when it comes to the reimbursement of medical expenses from a motor vehicle accident claim.

While one may sympathize with the arguments of an injured worker who may feel his or her right to a recovery of damages from a third party defendant is prejudiced under these circumstances, the Section 40 right of reimbursement remains statutorily clear. Medical benefits are recoverable, and subject to reimbursement, no matter what type of accident occurs, motor vehicle or otherwise.

The real issue here is the conflicting interests of two statutes that only the legislature is equipped to address. That is, the interests of the workers' compensation law that is designed to avoid the injured worker from obtaining a double recovery when the work accident also involves a potential third party claim of any type; and the interests of the No-Fault insurance laws that were designed to reduce the cost of motor vehicle insurance in New Jersey. Until and unless any changes are made to either statute, it is time to stop

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using the argument that when it comes to workers' compensation liens, medical benefits that could be provided under PIP laws, are not subject to subrogation in workers' compensation.

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