

## Section 40 Lien Does Not Exclude Medical Benefits from a Third Party Settlement for Pain and Suffering

In the matter of *Dorflaufer v. PMA Management Corp*, the Appellate Division, in an unreported decision, found reimbursement of medical expenses of a workers' compensation lien are not barred from being recovered in a third party settlement. The Division also found the workers' compensation lien applies where payment from a third party settlement represents payment for pain and suffering.

The issue in *Dorflaufer* was the injured worker's appeal from the Law Division's order granting summary judgment to PMA to attach its workers' compensation lien to the employee's third party settlement.

*Dorflaufer* involved a claim wherein the injured worker was struck by a motor vehicle while working as a crossing guard for Livingston Township. The worker filed suit against the motor vehicle driver and settled for \$95,000 for pain and suffering.

The day before settlement, PMA asserted a lien pursuant to Section 40 in the amount of \$46,856.22. This lien was for the medical expenses paid by PMA on the workers' compensation claim. The injured worker refused to pay the lien arguing PMA was only entitled to reimbursement of temporary total disability benefits paid and not medical benefits. PMA filed a motion to enforce its lien rights, but the Workers' Compensation Court chose not to decide the motion until the workers' compensation claim concluded. The Law Division had jurisdiction to address the lien as PMA was asserting a lien for benefits already disbursed, not benefits to be paid. Both PMA and the injured worker filed motions for summary judgment with the Law Division.

The Law Division granted PMA's cross-motion, specifically citing the language of Section 40 that "any sum the plaintiff recovers from a third party settlement is subject to a lien provided by these rules." The Law Division noted the injured worker had not supported her contention that reimbursement to PMA of medical expenses was exempt from a settlement for pain and suffering. The injured worker also contended PIP medical payments were not recoverable from a tortfeasor; therefore medical expenses from the workers' compensation claim should not be recoverable.

In reviewing the plain language of Section 40, the Court found medical expenses are not excluded from reimbursement in a third party settlement. While the language of the PIP statute exclusively bars the injured party from recovering for medical expenses in a tort claim, there is no such language in Section 40 of the workers' compensation statute.

**Comment:** The key information to take away from this decision is that until the language of Section 40 of the workers' compensation statute exclusively excludes a workers' compensation carrier from seeking reimbursement of medical expenses from a third party settlement, the carrier can continue to assert its lien inclusive of all workers' compensation benefits paid to the injured worker. This is the second Appellate Division decision to go against the ruling in *Dever v. NJM*. In *Dever*, the Court decided a Section 40 lien in a third party lawsuit cannot include medical bills from the workers' compensation carrier. The Court in the more recent decision of *Dorflaufer* did not follow *Dever*, giving a win to workers' compensation carriers. *Dorflaufer* makes clear, Section 40 allows reimbursement from any portion of a third party settlement of all benefits, including medical expenses. For more on Section 40 liens see [Section 40: A Way to Prevent Double Dipping](#).

If you have any questions regarding these issues, please contact Vanessa Mendelewski at [vmendelewski@wglaw.com](mailto:vmendelewski@wglaw.com) or 973.854.1061.