

Subrogation Rights Attach to Both Future Medical Bills and Future Wage Loss Benefits

In a recent en banc decision, the Pennsylvania Commonwealth Court has reiterated that an insurer's subrogation rights may be asserted against future medical expenses, as well as against future wage loss benefits, when there is a balance of recovery after satisfying the insurer's accrued lien for workers' compensation benefits already paid.

In *Whitmoyer v. WCAB (Mountain Country Meats)*, No. 614 C.D. 2015; FILED: 12/1/2016, the Court rejected several new novel arguments that attempted to prevent subrogation against future medical expenses. The third-party recovery exceeded the accrued lien by \$189,416.27. This "balance of recovery" constituted a fund available to satisfy the insurer's subrogation interests against future workers' compensation obligations as they accrue. In this case, there were no future wage loss or indemnity benefits to be paid because the employee's specific loss benefits were commuted and previously paid in a lump sum. The insurer remained responsible for future medical expenses. The employee first argued that the insurer was not entitled to a subrogation "credit" against future medical expenses because they did not constitute "installments of compensation" under Section 319 of the Pennsylvania Workers' Compensation Act. The Court rejected this argument and followed past precedent holding that "compensation" includes medical as well as indemnity benefits despite the installment language in Section 319.

The Court rejected the employee's second argument that a letter from the employee's counsel created a binding agreement when it enclosed payment of the accrued subrogation lien and stated the employee's position that no credit can be applied to future medical bills because they do not constitute future installments of compensation. The Court held that the letter was not an agreement and it was inconsistent with the Third-Party Settlement Agreement, a document that specifically addressed the subrogation rights of the parties. The Court also rejected the employee's third argument that acceptance of the subrogation payment combined with the employee's explanation of his position that subrogation credit would not apply to future medical benefits constituted a waiver of future subrogation rights. The Court reasoned that the alleged waiver was not clear and was certainly not supported by the necessary "consideration."

Finally, the Court rejected the employee's fourth argument that the insurer should be estopped from asserting a claim for credit against future medical expenses because the insurer took no action to assert its credit for 13 years. The Court reasoned that that insurer's right to subrogation is absolute and is not barred by delayed conduct to assert that right unless the insurer engages in deliberate bad faith conduct, which was absent here.

Comment: An insurer clearly has the right to assert subrogation against future medical expenses to the extent that the balance of recovery exceeds the net accrued lien. However, that credit, allowing the insurer to not pay future medical bills (a holiday on medical payments), is subject to a pro rata reimbursement to the employee of the costs of recovery, i.e., attorneys' fees and litigation costs. The insurer should think of that as paying for the holiday it gets each time it does not have to pay a medical bill. As a practical matter, when medical bills are infrequent or insignificant, an insurer may choose to assert its subrogation credit/holiday only against the ongoing disability/indemnity payments as a matter of administrative convenience, as long as such benefits are being paid. While the insurer's subrogation rights are absolute under the law, careful drafting of Third-Party Settlement Agreements clearly stating the understanding of the parties can help avoid challenges to an insurer's subrogation rights.