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## The Pennsylvania Supreme Court Defines the Grace Period for Excess Subrogation Recoveries to Exclude Future Medical Benefits

In a landmark decision running against Commonwealth Court precedent, the Pennsylvania Supreme Court has held that the subrogation grace period allowing credit against ongoing workers' compensation benefits does not apply to future medical expenses.

Until now, third party recoveries in excess of the accrued lien for workers' compensation indemnity and medical benefits already paid could be applied against ongoing indemnity and medical benefits. That was accomplished by taking a holiday from further indemnity and medical payments until the excess (balance of recovery) was exhausted. At that point, if an employee remained entitled to workers' compensation then full benefits would be restored. During the holiday or grace period, the employer/insurer had to reimburse employee the pro rata expenses of the third party recovery each time it realized a subrogation benefit or credit. Instead of paying the next disability installment or medical expense the employer/insurer would reimburse the employee a portion of that installment or expense, generally 35 to 45 percent.

In *Whitmoyer v. WCAB (Mountain Country Meats)* No. 52 MAP 2017 (Decided June 19, 2018), the Pennsylvania Supreme Court utilized a statutory construction analysis to conclude that the language of Section 319 of the PA Workers' Compensation Act, treating excess recoveries as advance payments of workers' compensation "installments of compensation," applies only to regular periodic payments, e.g. disability, specific loss and dependency payments, but not to irregular medical expense payments. In *Whitmoyer* the injured worker suffered a partial amputation of his arm. The parties reached agreement regarding the payment of specific loss benefits of 370 weeks plus a healing period of 20 weeks. These benefits were later commuted and paid in a lump sum. Several years later the injured worker obtained a third party case settlement (\$300,000) in excess of the gross accrued lien for indemnity and medical already paid (\$110,583.86). The injured worker paid the employer/insured a net accrued lien of \$81,627.87 after deducting a pro rata portion of the expenses of the third party recovery. This left a balance of recovery of \$189,416.27 to serve as a fund for credit against future workers' compensation benefits payable subject to reimbursement to the employee of the expenses of recovery at the rate of 37 percent on the credit used per the terms of the Third Party Settlement Agreement.

For the next 13 years, the insurer continued to pay medical expenses in full without taking any credit, then it filed a petition for modification essentially asserting a credit against medical expenses. The Workers' Compensation Judge granted the insurer's request for a credit. The Appeal Board and the Commonwealth Court affirmed. However, the Pennsylvania Supreme Court accepted employee's argument that no credit can be applied to future medical bills because under the language of Section 319 such credit applies only to "future installments of compensation" and that concept does not include "future medical expenses." The Court reasoned that the clear and unambiguous terms of Section 319 limited the credit against future benefits to installment payments, that were regular and periodic in nature, and this excluded medical expenses.

Because *Whitmoyer's* indemnity payments had already been completed and the insurer was not allowed to assert a credit against ongoing medical expenses, the balance of recovery in this case could not be utilized by the insurer as a credit against future workers' compensation payments. The injured worker was allowed to keep his remaining third party recovery and have the insurer continue to pay his medical bills. The Court recognized that this holding created the possibility of a "double recovery" of those medical expenses to the injured worker and it made the insurer partially responsible for payments necessitated by the negligence of a third party. However, the Court determined that the plain language of the statute prevented it from

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considering issues of legislative intent in enacting the subrogation section.

**Comment:** While an employer/insurer may no longer assert a holiday/credit against future medical expenses, it may still assert a holiday/credit against future indemnity installments (disability, specific loss and dependency payments). In effect, this will lengthen the grace period during which periodic benefits need not be paid. It may also encourage injured workers to continue medical treatment because they will not be responsible to fund such treatment out-of-pocket.

Employers and insurers should review their subrogation cases and existing Third Party Settlement Agreements to bring them into compliance with the *Whitmoyer* decision. After subrogation recoveries, employers and insurers must carefully manage ongoing medical expenses and also consider the effect of ongoing full medical payment obligations in settlement evaluations. It should be noted that the Court did not address whether this change in subrogation law will be applied retroactively. Some commentators believe that this decision invites legislative action in the area of subrogation rights.