

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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WIEDNER & MCAULIFFE, LTD.
ATTORNEYS AT LAW

CONTENTS

1 ATTORNEY HELD LIABLE FOR REIMBURSEMENT OF MEDICARE CONDITIONAL PAYMENTS - IT COULD BE YOU!

USA v. Paul J. Harris

No. 5:08CV102, decided November 13, 2008

2 APPELLATE COURT LIMITS MEDICAL WAIVER IN LUMP SUM SETTLEMENT CONTRACT

Hagene v. Derek Polling Construction,

No. 5-07-0225, Fifth District, decided February 24, 2009

3 EMPLOYER COULD NOT INCLUDE ALLEGATIONS IN WORKERS' COMPENSATION SUBROGATION CLAIM EXCEPT FOR THOSE ALLEGED BY THE EMPLOYEE

Pederson v. Mi-Jack Products, Inc., et al

Nos. 1-07-2327 and 01-07-3228 (consolidated), decided March 10, 2009

Wiedner & McAuliffe, Ltd
One North Franklin, 19th Floor
Chicago, IL 60606
(312) 855-1105
wmlaw.com

ATTORNEY HELD LIABLE FOR REIMBURSEMENT OF MEDICARE CONDITIONAL PAYMENTS - IT COULD BE YOU!

Dan Anders of our office issues the following warning when the parties ignore the set aside requirements.

In a strong example of Medicare's right to recover for payments it claims are related to an accidental injury, a federal district court in West Virginia issued a decision on November 13, 2008 finding a plaintiff's attorney liable for repayment of funds paid by Medicare for medical treatment stemming from that injury.

In the case of *USA v. Paul J. Harris*, Attorney Harris represented a plaintiff who was allegedly injured by a defective ladder bought at a hardware store. Medicare paid the plaintiff's medical bills to the extent of \$22,549.67. The plaintiff sued the retailer who sold him the ladder and the case was settled for \$25,000.00. Following the settlement payment, Attorney Harris forwarded the details of the settlement to Medicare and Medicare calculated that it was owed \$10,253.59 out of the \$25,000.00 settlement. After sending a lien notice to Attorney Harris, and after the expiration of 60 days, Medicare started enforcement proceedings against Attorney Harris.

Attorney Harris filed a motion to dismiss on the basis that his only duty was to advise

Medicare of the settlement, after which Medicare could not hold him individually liable. The court disagreed and held that a primary plan, i.e. insurance company, and an attorney, as well as other entities can be held liable for Medicare conditional payments. The following Medicare regulation was cited:

Recovery from parties that receive primary plan payments. CMS has a right of action to recover its payments from any entity, including any beneficiary provider, supplier, physician, attorney, state agency or private insurer that has received a primary payment. 42 C.F.R. §411.24(g)

Since Attorney Harris received payment from the primary plan in the form of his fee from the settlement amount, he could also be held individually liable for the lien from Medicare.

EDITOR'S NOTE: This is a stark reminder that Medicare is avoided at your own peril. What is unclear from the facts in this case is whether or not the attorney had knowledge of the Medicare conditional payments prior to the settlement. Given the fact that he forwarded the approved contract to Medicare following the settlement payment implies there was some knowledge on the attorney's part.

We recommend that anytime an individual is eligible for Medicare benefits, that an itemization of conditional payments, if any, should be obtained from Medicare prior to settlement. Further, the settlement terms should dictate which party is responsible for resolving the lien with Medicare.

APPELLATE COURT LIMITS

MEDICAL WAIVER IN LUMP SUM SETTLEMENT CONTRACT

Mark Matranga of our office has called our attention to exposure for medical expenses when the settlement contract is not sufficiently explicit.

The Appellate Court, Fifth District, recently decided a case which will affect the practice of how medical bill issues are addressed in lump sum settlement contracts. The claimant, Thomas Hagene, injured his right shoulder as a result of a fall from a scaffold, underwent surgery to this member, and was paid temporary total disability benefits for 39 weeks. When he settled his case in July 2005 by way of the customary lump sum settlement form provided by the Compensation Commission, the contract contained a statement on page one, in the "Medical Expenses" section, that his employer had paid all medical bills. Medical bills were also addressed on the second page of the contract, in the "Terms of Settlement" section, where the terms purported to settle all "past, present and/or future medical and hospital bills," and contained a statement that petitioner had submitted all related bills and that respondent had "fully satisfied same" prior to the approval date of the contract. Counsel for respondent drafted the contract.

Petitioner filed an application for judgment pursuant to section 19(g) of the Act in January 2007, alleging that the settlement required respondent to pay \$19,977.25 in bills due his surgeon and the facility where the surgery took place, among others, which remained unpaid. Respondent moved to dismiss on the basis that the "Terms of Settlement" section of the contract disposed of all questions relating to medical bills. The circuit court held that the respondent's obligation to pay related bills had been

satisfied by the contract and dismissed the application for judgment.

On appeal, the court reversed, citing the purposes of the Act and what it considered an ambiguity in the contract. First, the court emphasized that the obligation to pay medical bills flows not from a settlement contract but from the Act. If there is a dispute over whether an employee's injuries are causally connected to an on-the-job accident or if there is a disagreement over whether all or part of the medical bills are causally related, the parties may resolve these disputes as part of a settlement. However, there was no indication in the settlement contract that there was a dispute regarding whether any of the bills were causally related - the "Medical Expenses" section indicated that all bills had been paid. And the court noted that the settlement amount was equal to 30% loss of the arm, so that it was clear that no part of the settlement was allocated to unpaid medical bills.

An injured employee can waive his rights under the Act, but any waiver must be explicit. The court disagreed that the "Terms of Settlement" constituted an explicit waiver, citing the need to give effect to all relevant contractual language, namely the recital on page one of the contract wherein respondent stated that all medical bills had been paid. This language constituted the context through which the "operational portion" of the contract should be understood. In light of the recital on page one of the contract, the court held that the parties did not intend to discharge respondent's statutory obligation to pay petitioner's past related medical bills. The "surrounding circumstances" made clear that the settlement was premised on the understanding that all bills had in fact been paid, and to find otherwise would result in a windfall for respondent. The court reasoned

that the parties never could have intended this result and that the court would not interpret a contract "in such a way to defeat a claim not then in the minds of the parties."

The *Hagene* decision will have application in any case where there has been no dispute over liability: the respondent will be liable for unpaid bills as long as the page one recital of the contract states that all medical bills have been paid. In order for an employer to avoid liability for past unpaid bills, the contract must be unambiguous that medical bills are in dispute and that the disputed bills will be petitioner's responsibility. This will be necessary in any contract where no sums are settled on a claimant for medical bills. Given the strong wording of this decision, it is doubtful an employer will escape responsibility for medical in an apparently undisputed case unless the contract contains explicit reference to the "surrounding circumstances" for the dispute wherein liability for medical bills transfers to the claimant.

**EMPLOYER COULD NOT
INCLUDE ALLEGATIONS IN
WORKERS' COMPENSATION
SUBROGATION CLAIM EXCEPT
FOR THOSE ALLEGED BY THE
EMPLOYEE**

John Pederson, an employee of Henkels and McCoy, Inc. (Henkels), was injured on March 23, 1999 when a boom jib from a truck-mounted crane fell on him. Two days prior to the expiration of the two-year statute of limitations, Pederson filed a complaint sounding in negligence and product liability against Mi-Jack Products, Inc. (Mi-Jack), which was the company that leased the crane to Henkels; United Rentals, a company that purchased equipment from Mi-Jack and Terex

Corporation (Terex), the alleged manufacturer of the crane. Four months later, after learning that Terex-Ro, Inc. (Terex-Ro), a subsidiary of Terex Aerials, Inc. (a Terex subsidiary) was the actual manufacturer of the boom crane and after the limitations period had expired, an amended complaint named Terex-Ro as an additional defendant. Based on the limitations argument, the trial court dismissed Terex-Ro from Pederson's lawsuit. United Rentals was voluntarily dismissed and Mi-Jack and Terex each filed third party complaints for contributions against Henkels. Thereafter, the most significant issue in the case concerned the dispute between the plaintiff, Pederson, and Henkels, who was both a third party defendant and Pederson's employer.

Thereafter, Pederson's attorney filed a motion for leave to withdraw because an "irreconcilable conflict" had developed. This "irreconcilable conflict" was the legal malpractice complaint by Pederson against his attorney for failure to timely file suit against Terex-Ro. Thereafter, Pederson stated he was unable to obtain substitute counsel and proceeded to handle his claim *pro se*. Subsequently, Henkels filed an intervenor complaint for its subrogation claim, which complaint sounded in negligence, product liability and breach of warranty. Mi-Jack filed a motion to dismiss Henkels' intervenor complaint but after a hearing, the trial court found that Henkels could remain a party plaintiff to protect its lien but would not be permitted to sue in its own right. Henkels would be required to "stand by the complaint of the plaintiff." The trial court also held that Pederson would not be able to settle the case or "do anything that's going to interfere with the protection of the intervenor's lien." Henkels and Pederson would thereby share joint control over the litigation.

On or about February 7, 2007, Pederson filed a *pro se* motion to obtain court approval to approve a settlement offer and also to adjudicate the workers' compensation lien. Pederson revealed that Mi-Jack had agreed to settle his lawsuit for \$50,000, of which he would offer to pay Henkels the sum of \$29,404.66 for the workers' compensation lien. Henkels refused to accept the terms of this settlement offer. Consequently, the trial court, over Henkels' objection, entered an order dismissing all claims with prejudice, the order also providing that Henkels would be compensated out of the proceeds. Pursuant to the court order, Henkels and Pederson would share joint control over the litigation.

Pederson again moved to dismiss his case and the trial court, over Henkels' objection, entered an order dismissing all claims with prejudice. The order explicitly provided that Henkels "will be compensated out of the proceeds of the parties' settlement in accordance with the Illinois Workers' Compensation Act to the extent of the available proceeds after payment of all attorneys fees and expenses." The order also denied Henkels' request to maintain a separate action following the dismissal of Pederson's case.

Pederson refiled a motion seeking adjudication of attorneys fees and expenses as of August 1, 2007. In his motion, Pederson now sought \$46,991.60, of which \$34,491.60 was sought for expenses and \$12,500 as attorneys fees. The net distribution to Henkels was now \$3,008.40, which Henkels refused to accept, deeming it a "sham." On October 16, 2007, the court found that Henkels waived its right to claim any portion of the settlement proceeds, and therefore, waived its workers' compensation lien. Accordingly, Pederson was awarded the entire proceeds of the \$50,000 settlement. On

appeal, Henkels contended that the court order prevented it from proceeding as a plaintiff in order to protect its workers' compensation lien contending that the malpractice case created a conflict between it and Pederson and as a result it was denied the protection generally afforded to employers under Section 5(b) of the Act. The court, by reply, stated:

In most workers' compensation cases, employees and employers have identical interests in maximizing the recovery an employee receives because the employer receives compensation first from the monetary award the employee receives from a third party; however, courts have recognized that the interests of an employee and an employer may not always align. Notwithstanding the existence of, or potential for, any conflict of interest between an employer and an employee, it is still the rule that an employer may not intervene and participate as a party plaintiff absent the consent of the employee, because the Act is designed to protect the employee from an employer's unwanted intrusion. (Emphasis added)

Henkels asserted that the trial court failed to protect it by court order as required by the Act when it did not consent to the settlement and that the settlement failed to fully indemnify it. The trial court's order stated:

Specifically, the court's order provided that Henkels "will be compensated out of the proceeds of the parties' settlement, in accordance with the terms of the Illinois Workers' Compensation Act, to the extent of the available proceeds after payment of all

attorneys fees and expenses, if any, in accordance with In re Estate of Dierkes and Kleeman v. Fragman Construction Co." Accordingly, Henkels was protected by court order as required by section 5(b) of the Act. See Kleeman v. Fragman Construction Co. (finding that an order providing that the employer "shall be compensated in accordance with the applicable statute" provided adequate protection to the employer as required by the Act.)

Henkels further contended that the trial court ignored the fact that it was to Pederson's advantage to settle his law suit for a nominal amount in order to circumvent its lien rights and remove an impediment to his pending malpractice case. The court stated:

There is no evidence that the trial court failed to adequately consider the circumstances surrounding the settlement. While the settlement amount may have been less than the amount of compensation benefits which Henkels paid to Pederson, the Act does not require a workers' compensation settlement agreement to fully compensate the employer in order to be valid. See In re Estate of Dierkes, (recognizing that the compensation that an employer pays may exceed an employee's recovery from third parties). Moreover, in detailing the circumstances surrounding the settlement, Henkels ignores the fact that the terms of the settlement resulted from Pederson's failure to timely bring suit against the manufacturer of the allegedly defective piece of equipment that caused his injury.

EDITOR'S NOTE: Henkels was correct in stating that the settlement for a smaller amount did limit the amount of his subrogation lien on the basis that Henkels had no subrogation rights in the legal malpractice case. The court did not indicate that it was aware of the possible reason for limitation of the settlement amount other than Pederson had sufficient cause to settle for that amount because he may not have had any recovery possibilities from the manufacturer who was not named within the limitations period.

The language in the decision makes it quite clear that the employer cannot, without the employee's consent, participate in the method of handling the litigation. The court noted that Pederson had not filed an action until two days before the two-year limitations statute had expired whereas the employer had refiled the complaint in the three-month period before the limitations period had been reached. Actually, the conflict described in this case is rather unique and most employers have very few opportunities to file the subrogation action because the plaintiff seldom waits for this milestone to be reached. Should the employer or its workers' compensation carrier have filed its subrogation suit 21 months after the accident date if the employee failed to file? Perhaps so, but often the employer does not have the liability investigation to permit it to do so in a case of this complexity. Note the employee's investigation also failed to produce the identity of the prime defendant.

FRANK J. WIEDNER
Editor