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Tennessee High Court Doubles Down on Questionable Future Credit Decisions

By [Gary Wickert](#) | March 7, 2013

For four decades, a workers' compensation carrier's right to a future credit in Tennessee has been chipped away at and limited in its scope. On January 16, 2013, the Tennessee Supreme Court was given a chance to correct its own mistakes and right wrongs which have complicated workers' compensation subrogation in Tennessee for decades. It chose to double down on a series of questionable decisions, continuing a long line of judicial legislating which has harmed future credits in that state.

Tenn. Code Ann. § 50-6-112 is clear when it comes to future credits. When the employee makes a third-party recovery, the workers' compensation carrier is entitled to a credit under § 50-6-112(c)(2) against any future benefits – indemnity or medical – in the amount of the employee's "net recovery." *Cooper v. Logistics Insight Corp.*, 2013 WL 163976 (Tenn. 2013). The carrier can cease payment of medical and indemnity benefits until the employee's "net recovery" from the third party is exhausted or until the carrier's obligation to pay future benefits is

exhausted. The “net recovery” is the total amount collected by the employee in the tort action against the third party, less reasonable expenses, including attorneys’ fees. *Cross v. Pan Am World Servs., Inc.*, 749 S.W.2d 29 (Tenn. 1987), overruled on other grounds by *Summers v. Command Sys., Inc.*, 867 S.W.2d 312 (Tenn. 1993).

A workers’ compensation carrier is entitled to a future credit out of any third-party settlement, in the amount of the “net recovery” by the employee, without regard to whether the employee is made whole. In circumstances in which a carrier has not discharged its “full maximum liability for workers’ compensation,” § 50-6-112(c) (2)(3) provides an employer with a “credit on the employer’s future liability, as it accrues, to the extent that the net recovery collected exceeds the amount paid by the employer.” Tenn. Code Ann. § 50-6-112(c)(2); Cooper, *supra*. Tenn. Code Ann. § 50-6-112(c)(2) and (3) reads:

(2) In the event the net recovery by the worker, or by those to whom the worker’s right of action survives, exceeds the amount paid by the employer, and the employer has not, at the time, paid and discharged the employer’s full maximum liability for workers’ compensation under this chapter, the employer shall be entitled to a credit on the employer’s future liability, as it accrues, to the extent the net recovery collected exceeds the amount paid by the employer.

(3) In the event the worker, or those to whom the worker’s right of action survives, effects a recovery, and collection of that recovery, from the other person, by judgment, settlement or otherwise, without intervention by the employer, the employer shall nevertheless be entitled to a credit on the employer’s future liability for workers’ compensation, as it accrues under this chapter, to the extent of the net recovery.

For the purposes of a carrier’s future credit, an employee’s “net recovery” is “the total amount collected by the employee in the tort action [against the third party], less reasonable expenses, including attorneys’ fees.” Cross, *supra*. However, previous Supreme Court decisions have brought the extent of this future credit into question.

For four decades, Tennessee placed serious and ill-conceived limitations on a carrier’s future credit with regard to future medical. Understanding these limitations requires a look back at the history of § 50-6-112 and its predecessor statutes.

In 1950, an injured employee was entitled to medical benefits paid by his employer for a period not to exceed six months after the injury. Tenn. Code Ann. § 6875 (1950). Liability for medical benefits could not exceed \$800, and the total liability

for workers' compensation benefits could not exceed \$7,500. Tenn. Code Ann. §§ 6875, 6878(e) (1950). The law has been amended numerous times to increase the time period for which the employer is responsible for the employee's medical care and to increase the total amount of medical benefits an employee may receive. In 1977, the General Assembly removed the limitation on the duration of medical benefits, thereby opening the door to future medical benefits to the employee that were unlimited in both duration and amount. Act of May 19, 1977, ch. 417, § 1, 1977 Tenn. Pub. Acts 1039, 1040.

The statute governing suits against third-party tortfeasors (currently § 50-6-112) also has undergone changes.

The Workers' Compensation Law originally provided that an injured employee must elect to pursue a remedy against either the employer or the third party responsible for his injury. *Millican v. Home Stores, Inc.*, 270 S.W.2d 372 (Tenn.1954)(citing Tenn. Code Ann. § 6865 (1932)). In 1949, that election was removed and an injured employee could pursue both simultaneously. Act of April 14, 1949, ch. 227 § 1, 1949 Tenn. Pub. Acts 897, 897-98. The amended statute provided for the first time that an employer was "subrogated to the extent of the amount paid or payable under this chapter." In 1954, the Tennessee Supreme Court in *Millican* construed the statute to provide a credit against workers' compensation benefits owed to the employee. However, the *Millican* case involved death benefits, not future medical expenses.

In 1956, the Supreme Court in *Reece v. York*, followed the clear language of the statute and held that the carrier was entitled to a future credit and could suspend future indemnity payments until its future credit – in the amount of the balance of the employee's recovery – was exhausted. *Reece* held that workers' compensation installment payments (such as indemnity benefits) are to be deferred and not commence until the sum total of the net credits of weekly installments that would have accrued from the date of the injury would be equal to the net credit, rather than taking a lump-sum future credit at the beginning of the payments. Future medical benefits were not at issue in *Reece*, and later decisions would say it is unlikely that future medical benefits were considered. *Cooper v. Logistics Insight Corp.*, 2013 WL 163976 (Tenn. 2013).

In 1963, § 50-914 (redesignated in 1983 as § 50-6-112) was amended to clearly provide as follows:

...if the employee's recovery in a suit against a third party exceeds the amount paid by the employer, and the employer has not, at [that] time, paid and discharged his

full maximum liability for [workers'] compensation ..., the employer shall be entitled to a credit on his future liability, as it accrues, to the extent the net recovery collected exceeds the amount paid by the employer. Tenn. Code Ann. § 50-914 (1963) (redesignated in 1983 as § 50-6-112).

At that time, the employer was required to provide medical benefits for a maximum of one year, and the medical benefits provided could not exceed \$1,800 plus \$700 for “unusual medical expenses.” The amendment codified the *Reece* decision.

In 1971, the Supreme Court in *Royal Schmid* held the carrier’s future credit is allowable even though it may equal and thus terminate the carrier’s future liability for future death benefits. *Royal Indem. Co. v. Schmid*, 474 S.W.2d 647 (Tenn. 1971). In 1972, the Supreme Court in *Beam* confirmed that the intent of the legislature was to “reimburse an employee for payments made under [the Act] from ‘the net recovery’ obtained by the employee.” *Beam v. Maryland Cas. Co.*, 477 S.W.2d 510 (Tenn. 1972). However, this too, was a death case which did not involve future medical benefits.

In 2000, error crept into the future credit issue when the Tennessee Supreme Court decided the case *Graves v. Cocke County*, 24 S.W.3d 285 (Tenn. 2000). The Court in *Graves* held that the credit provided for in § 50-6-112 does not encompass future medical payments when the employer and employee settle the compensation claim for a lump sum award. Instead of following the clear language of the statute, the Court legislated from the bench by fabricating four “policy considerations” as follows:

1. that employees will be restrained from spending their workers’ compensation benefits “for fear that some or all of those benefits may have to be returned to the employer if needed medical treatment is sought;”
2. employers might seek reimbursement and obtain a judgment against employees for benefits already paid;
3. employees might not seek needed medical treatment because they will be required to pay for it themselves; and
4. a concern over the finality of judgments.

In 2004, the Supreme Court decided the case of *Hickman v. Continental Baking Co.*, further sliding down the slippery slope of ignoring clear statutory language. In *Hickman*, an injured employee received workers’ compensation benefits and filed a third-party action. After a sizeable third-party recovery, the employee tried his workers’ compensation claim and there was no lump sum settlement as there had been in *Graves*. The Supreme Court made an arbitrary, unprecedented, and non-

statutory distinction between indemnity benefits and medical benefits, holding that, even where there is no lump sum settlement, the employer is entitled to a credit against future periodic indemnity benefits but no future credit as to future medical expenses. The Court used an illogical hypothesis to justify its decision:

Employees should not be placed in the difficult position of not being able to spend their workers' compensation benefits for fear that some or all of those benefits may have to be returned to the employer if needed medical treatment is sought. If the employee is unwilling or unable to pay the employer when the employer seeks reimbursement from the employee, the employer could obtain a judgment against the employee and presumably be in a position to collect that judgment on the employee's personal assets and whatever income stream the employee might have at the time. This situation is an untenable one that should be avoided.

The Court further ignored the clear language of the Tennessee statute and judicially legislated a contrary outcome, based on the "difficult position" giving full effect might put employees in:

Employees will be placed in the difficult position of not being able to spend their third-party recoveries even if period payments are credited against the third-party recovery. Holding these funds hostage for an indefinite period of time is just as unacceptable under these circumstances as it was in *Graves*. As such, the logic underlying *Graves* compels us to reach a similar result in this case. We therefore apply the holding of *Graves* to the present case and conclude that [the employer] is not entitled to a credit against future liability for medical expenses that are unknown or incalculable at the time of the trial of the workers' compensation case.

In actual practice, carriers receiving a future credit simply stop making medical and indemnity payments and notify the health care providers to look to the employee for future medical care. This renders the logic underlying the *Graves* decision unsound.

After the *Graves* decision, the rule regarding future credits became that a carrier is not entitled to a credit toward future medical expenses that are "unknown or incalculable" at the time of the trial of the workers' compensation case. This departure from the clear future credit language of the statute was countenanced in 2013 when the Tennessee Supreme Court doubled down on both the *Graves* and *Hickman* decisions.

Cooper v. Logistics Dissent

Justice Koch penned one of the most logical and well-substantiated dissents I have ever read. Astutely pointing out that the “mindless obedience to the Doctrine of Stare Decisis can confound the truth”, the dissent felt that the Court should have departed from the questionable precedent of *Graves* and *Hickman*, stating:

In accordance with the plain meaning of Tenn. Code Ann. § 50-6-112(c)(2), (3), the credit to which an employer is entitled does not operate as a refund out of the employee’s recovery. Rather, it negates an employer’s responsibility to pay additional workers’ compensation benefits until the employee’s net recovery from the third party is exhausted or until the employer’s obligation to pay workers’ compensation benefits is exhausted. Consistent with this Court’s decision in *Reece v. York*, an employee who obtains a recovery from a third party must use his or her “net recovery” to pay for future medical care relating to the injury until the net recovery is exhausted. An employer’s liability for the medical expenses related to the employee’s injury recommences only after the employee has exhausted his or her net recovery in paying for the necessary and reasonable medical expenses from the work-related injury.

The dissent argued that a subrogated workers’ compensation carrier is entitled to a lien on any third-party recovery. This lien includes both recovery of past benefits paid and a credit under § 50-6-112(c)(2) against any future benefits – indemnity or medical – without regard to the nature of the future medical benefits. The carrier can cease payment of medical and indemnity benefits until the employee’s “net recovery” from the third party is exhausted or until the carrier’s obligation to pay future benefits is exhausted. “Net recovery” is “the total amount collected by the employee in the tort action [against the third party], less reasonable expenses, including attorneys’ fees.” *Cross v. Pan Am World Servs., Inc.*, 749 S.W.2d 29 (Tenn. 1987) (overruled on other grounds by *Summers v. Command Sys., Inc.*, 867 S.W.2d 312 (Tenn. 1993)). Employees must once again use their net recovery to pay for future medical care and the carrier’s obligation to pay for medical expenses recommences only after the employee has exhausted his net recovery in paying future reasonable and necessary medical expenses. It is no longer material whether future medical benefits are “unknown” or “incalculable” and no longer is a factual inquiry into the nature of future medical expenses required.

Justice Koch’s dissent did more than point out that the Cooper decision perpetuates 40 years of bad interpretation of § 50-6-112. It also suggested that both the carrier and employee should be able to take advantage of the reduced schedule of medical expenses paid by a workers’ compensation carrier. In other states, in order for the claimant to take advantage of the reduced medical fee schedules under which carriers pay medical benefits, thereby extending a future credit considerably,

collusive arrangements involving the continued payment of medical by the carrier and periodic reimbursement by the claimant had to be entered into. The Cooper dissent observed that the cost of medical care provided pursuant to the Workers' Compensation Law is governed by a fee schedule established by the Department of Labor and Workforce Development. Tenn. Code Ann. § 50-6-204(i). That schedule is applicable to "all medical care and services provided to any employee claiming medical benefits under the Tennessee Workers' Compensation Act." Tenn. Comp. R. & Regs. 0800-02-17-.01(1) (2009). The dissent suggested that because medical care provided to an employee subject to the future credit is derived from the employee's workers' compensation claim and, it should be governed by this fee schedule, extending the carrier's future credit significantly longer than if the future credit was reduced by the "wholesale" cost of medical expenses without the reduction under the fee schedule.

Modern Rule

Nonetheless, the rule in Tennessee regarding future credits remains the rule set forth in *Graves* and *Hickman*. The credit provided for in § 50-6-112 does not encompass future medical payments when the employer and employee settle the compensation claim for a lump sum award. A carrier is not entitled to a credit toward future medical expenses that are "unknown or incalculable" at the time of the trial of the workers' compensation case.

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