

WORKERS' COMPENSATION SUBROGATION:

WHICH PAYMENTS CAN BE RECOVERED?

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In many respects it is as daunting and elusive as the search for the Holy Grail.

All 50 states allow for recovery of workers' compensation benefits paid to or on behalf of a claimant injured in the course of his or her employment. Not a single one, however, enunciates precisely which payments or costs paid by a compensation carrier constitutes "compensation" and can be recovered.

The result is an ongoing debate and argument with claimants' attorneys over what can and can't be included in a carrier's lien for recovery purposes. ►►

►► In addition to medical expenses, death benefits, funeral costs and/or indemnity benefits for lost wages and loss of earning capacity resulting from a compensable injury, workers' compensation insurance carriers also expend considerable dollars for case management costs, medical bill audit fees, rehabilitation benefits, nurse case-worker fees and the like.

Subrogation professionals and trial lawyers are not the only ones confused. Trial judges, too, scratch their heads and stare blankly into the courtroom when asked whether a carrier can include such payments in their subrogation liens. As is often the case when there is no answer in law – a good argument can often carry the day.

Judges like things that fit neatly into legal categories and definitions. When subrogating for more than basic medical and indemnity benefits, look first to the underlying workers' compensation subrogation statute. In **Texas** for example, the statute reads as follows:

...the net amount recovered by a claimant in a third-party action shall be used to reimburse the carrier for *benefits*, including medical benefits that have been paid for the compensable injury. V.T.C.A. Labor Code § 417.002.

Therefore, the question becomes whether or not such things as case management costs and medical bill audit fees are considered *benefits* or *medical benefits* which have been paid "for the compensable injury."

"Case management" is a collaborative process of a medical assessment, planning, facilitation and advocacy for options and services to meet an injured worker's health needs, through communication and available resources, in order to promote quality and cost-effective recoveries and outcomes. Fee audits ensure compliance with state fee guidelines, prevent fraud and keep liens to an absolute minimum. These efforts hold down costs of workers' compensation for employers and ensure that the smallest lien possible is taken from an injured worker's third-party recovery. Refusing to reimburse costs such as these is not only illogical, it's foolish. But logic doesn't always win the day, so let's look at the law.

The Texas Department of Insurance - Workers Compensation Division actually requires these services and expenses. Therefore, the carrier should be able to recover them. The Texas Administrative Code provides as follows:

(a) The ground rules and the medical service standards and limitations as established by the Fee Guidelines shall be used to properly calculate the payments due to the healthcare providers. Tex. Admin. Code Tit. 28, § 134.1.

The Texas Supreme Court has also indirectly weighed in on the issue. It has confirmed that § 417.002(a) requires that a carrier be reimbursed out of any third-party recovery for *all benefits* paid for an injury. *Texas Workers' Comp. Ins. Fund v. Serrano*, 962 S.W.2d 536 (Tex. 1998). It says that the statute does not limit reimbursement to only those benefits that are reasonable and necessary. Because the injured worker receives the benefit of all amounts paid, the carrier is entitled to reimbursement without proving that the amounts paid to or for the worker were reasonable and necessary medical expenses. The assumption is that if it was paid, it should be reimbursed. The Court essentially gave broad definitions to the terms "medical benefit" and "healthcare." The *Serrano* Court allowed reimbursement for costs and payments introduced in that case, which indicated on their face that they were paid in accordance with Commission guidelines.

Each state should be evaluated and argued differently, because each state's statute is different. In **California**, for example, the applicable statute reads as follows:

Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, or who pays or becomes obligated to pay an amount to the Department of Industrial Relations pursuant to Section 4706.5, may likewise make a claim or bring an action against the third person. In the latter event, the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he or she was liable including

all salary, wage, pension, or other emolument paid to the employee or to his or her dependents. Ann. Cal. Labor Code § 3852.

The workers' compensation carrier is entitled to recover in the same third-party lawsuit with the employee, the total amount of its expenditures for "compensation" and any other special damages, such as salary, wage, pension or other emolument paid to the employee. Ann. Cal. Labor Code § 3856(c). California law then defines "compensation" as:

...compensation under this division and includes every benefit or payment conferred by this division [Division IV] upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence. Ann. Cal. Labor Code § 3207.

"Compensation," therefore, includes medical and hospital expenses (Ann. Cal. Labor Code §§ 4600-4608), medical-legal expenses (Ann. Cal. Labor Code §§ 4620-4628), vocational rehabilitation expenses (Ann. Cal. Labor Code §§ 4635-4647), disability indemnity payments (Ann. Cal. Labor Code §§ 4650-4663), death benefits (Ann. Cal. Labor Code §§ 4700-4709) and interest (Ann. Cal. Labor Code § 5800).

Most penalties are arguably recoverable as mandated by Division IV, and even the cost of utilization review should now arguably be recoverable as the use of such process is now mandated by California law. Ann. Cal. Labor Code § 4610. The cost of utilization review may not be a "benefit" or "payment conferred on an injured employee," however. Aside from the logic arguments above, California law apparently does not directly support recovery of these items, but it does require mitigation of damages. One Court of Appeals decision does allow a plaintiff to recover the cost of mitigation efforts as a recoverable item of damages: *Kleinclause v. Marin Realty Co.*, 94 Cal.App.2d 773 (1949).

Another interesting and cogent argument is an analogy to the right to a future credit. When a recovery by a claimant is made, the carrier is given a credit toward future "benefit" payments. A close look at this law

reveals that “medical-legal” costs should be costs against which a carrier can press a credit, implying that they constitute “compensation” under California law and should be recoverable by a workers’ compensation carrier. *Adams v. Workers’ Comp. Appeals Board*, 18 Cal.3d 226 (1976).

Arguments in each state should be fashioned from the only tools available – statutory language and common sense. In **North Carolina**, for example, the workers’ compensation statute provides for reimbursement to the carrier of “all benefits by way of compensation or medical compensation expense paid or to be paid.” N.C.G.S.A. § 97-10.2. Further legal archaeology reveals the definition of compensation as follows:

The term ‘compensation’ means the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided therein. N.C.G.S.A. § 97-2.

North Carolina case law reveals no further clarification on exactly what

“medical compensation expenses” refers to, but the door seems open wide enough to include some of the case management costs referenced above, yet not quite wide enough to include interest. *Buckner v. City of Asheville*, 438 S.E.2d 467 (N.C. App. 1994).

In North Carolina, however, there is also the possible appeal to the Industrial Commission to have something declared as a “benefit” recoverable in subrogation. Before the Commission can declare that a carrier is entitled to a particular expense, it must make a factual determination that the services were rehabilitative in nature and reasonably “required to effect a cure or give relief” to the claimant. *Walker v. Penn Nat’l Security Ins. Co.*, 608 S.E.2d 107 (N.C. App. 2005). This state has a higher burden to meet in order to recover something as a “benefit” in subrogation.

Illinois has totally ignored the cost savings to the claimant of such case management fees and expenditures. It has declared such items unrecoverable

because such medical rehabilitative services provided by the claims coordinator at the insurance company’s direction were presumably provided for the benefit of the carrier and were not reimbursable necessary medical or rehabilitative services. *Cole v. Byrd*, 656 N.E.2d 1068 (Ill. 1995). The particular expense at issue was the medical rehabilitation coordinator services of a licensed professional nurse provided by Professional Rehabilitation Management (PRM).

When attempting to recover for costs or expenses beyond the basic indemnity and medical benefit payments, a subrogation professional’s first strategy should be to look at the law of the particular state involved, to determine exactly what the subrogation statute allows the carrier to recover. For example, if it allows for recovery of “benefits” or “compensation” paid, then the definitions of those terms in other areas of the workers’ compensation law should be determined and an argument fashioned that those definitions include case management type fees and expenses. ►►

If that proves to be a dead end, a logical argument should be made that by discouraging the spending of such amounts, the subrogation lien will actually increase and the recovery of the injured worker will decrease. Such expenditures actually assist in holding down the cost of workers' compensation insurance premiums and every incentive to hold down liens and reduce fraud will make workers' compensation systems more cost-effective and affordable for businesses.

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As a last resort, simply include these reasonable costs in the lien totals provided to plaintiffs’ lawyers, putting the burden on them to affirmatively challenge such expenses. While it is perhaps a stretch to include attorney’s fees and other overhead charges in the lien total, it is reasonable to expect reimbursement of expenses and costs which actually benefit the claimant by keeping the benefits total to its absolute minimum. If the totals are not questioned, there is no foul. If they are, remember the words of Mark Twain, “Whatever you say, say it with conviction.” ■