MWL

MATTHIESEN, WICKERT & LEHRER, S.C.
ATTORNEYS AT LAW

DOCUMENTING WORKERS' COMPENSATION STATUTORY FUTURE CREDITS IN ALL 50 STATES

MATTHIESEN, WICKERT & LEHRER, S.C.
Hartford, WI ❖ New Orleans, LA ❖ Orange County, CA
❖ Austin, TX ❖ Jacksonville, FL ❖ Milltown, NJ
Phone: (800) 637-9176
gwickert@mwl-law.com
www.mwl-law.com

DOCUMENTING WORKERS' COMPENSATION STATUTORY FUTURE CREDITS IN ALL 50 STATES

Workers' compensation subrogation involves more than placing parties on notice of a subrogation interest. If an insurance company or third-party adjusting company is interested in maximizing its and its insured's/client's bottom line in a workers' compensation claim, a more aggressive approach to recovering a subrogation lien or interest is required. Active engagement of subrogation counsel to protect a carrier's lien, prevent gerrymandering and other efforts to reduce or eliminate a carrier's right of recovery or reimbursement is only the beginning. Frequently, a future credit, large loss reserve takedown and elimination of huge future workers' compensation benefits exposure is as important as or even more important than simply making a recovery.

In most states, when an injured worker or deceased worker's representatives file a third-party lawsuit against a responsible tortfeasor and a recovery, the workers' compensation carrier has certain rights of recovery and/or reimbursement, together with a right to credit its obligation to pay future workers' compensation benefits based on the amount of the claimant's third-party net recovery, or some formula set forth by state law. Plaintiffs' lawyers continue to throw every obstacle in the paths of subrogating carriers, seeking to diminish or eliminate altogether your right of recovery. Opportunities for them to succeed in this area abound for the unwary and napping subrogor. Where they fail in eliminating your lien, plaintiffs' lawyers are now focusing heavily on seeing to it that, despite a large third-party recovery and your right to a future credit, you are obligated to continue making significant benefit payments years into the future. Their biggest successes in this area come when carriers assume that simply because there is a recovery, they can stop making benefit payments. Unfortunately, most states have certain requirements and legal hoops which must be jumped through before a carrier has a legitimate and uncontestable right to stop making benefit payments and take down a large reserve. This chart focuses on understanding and completely and properly complying with those requirements.

This chart summarizes the statutory and decisional law governing workers' compensation future credits following third-party recoveries on a state-by-state basis. For each jurisdiction, the chart is organized into four categories designed to move beyond the mere existence of a credit and address the practical mechanics that determine whether the credit has real value in claims handling. The first category, "Generally," identifies whether the jurisdiction recognizes a future credit and, if so, its scope and basic operation. The second category, "Procedure/Filing Requirements," outlines any steps necessary to preserve, document, or obtain approval of the credit, including required forms, notices, settlement approvals, or filings with the court, commission, board, or agency. The third category, "Burden of Proving Credit Exhaustion," addresses whether the law specifies which party must prove that the credit has been exhausted and that the carrier must resume payment of indemnity and/or medical benefits, or whether the issue remains unresolved. The fourth category, "Medical Expense Rate During Credit," identifies any authority addressing whether medical expenses incurred during the credit period are valued or payable at workers' compensation fee schedule or prevailing rate limits, or whether the jurisdiction has not yet developed law on the issue.

Who has the burden of proving that a credit has been exhausted is one of the most underdeveloped areas of future-credit law, largely because many credits are never formally tracked to completion and few disputes reach appellate review. Where the issue is addressed, the common practical rule is that the party seeking to change the status quo bears the evidentiary burden; accordingly, once a credit is asserted and benefits are suspended or reduced, the injured employee typically must present a verified accounting demonstrating that the net third-party recovery has been exhausted by expenditures that qualify to reduce the credit before the carrier's payment obligation resumes. Even in jurisdictions that do not expressly allocate the burden, this practical allocation occurs because the employee controls the settlement proceeds and is in the best position to document post-settlement expenses and how they relate to compensable benefits. A minority of jurisdictions impose more defined proof obligations on the carrier, particularly where the carrier is attempting to recover or retain money for anticipated future expenditures.

Whether an injured employee must pay "retail" medical charges during the credit period, or whether the workers' compensation fee schedule/prevailing rate continues to control, is another infrequently-litigated issue involving future credit mechanics, notwithstanding its major economic impact on how quickly the credit will be exhausted. There is very little authority nationally that squarely answers the specific question of whether, during the future credit "vacation" period, a medical provider can lawfully charge the injured employee the full retail amount of medical bills, or must keep the bills reduced to the discounted workers' compensation fee schedule amount that would have applied had the carrier been paying. That absence of direct authority is itself an important point underscoring exactly why credits are so often undervalued and why jurisdictions remain in the "Dark Ages" on the operational mechanics of future credits.

Colorado provides the cleanest example of a jurisdiction whose statutory scheme directly supports the conclusion that a provider cannot lawfully charge the injured worker above the workers' compensation fee schedule, regardless of who is paying. The Colorado Supreme Court, in *Delta Air Lines, Inc. v. Scholle*, expressly confirmed that under Colorado law it is "unlawful, void, and unenforceable as a debt" for a provider to "contract with, bill, or charge" any amount in excess of the workers' compensation fee schedule unless approved by the Director. *Delta Air Lines, Inc. v. Scholle*, 484 P.3d 695 (Colo. 2021) (quoting § 8-42-101(3)(a)(I)). Although *Scholle* was not a future credit case and did not mention a "vacation" period, it notes that the statutory language in Colorado supports the proposition that a provider cannot legally charge the worker retail rates for compensable treatment because the excess amount is void and unenforceable as a debt.

In states like Oregon, which have a statutory or regulatory framework prohibiting balance billing or limiting provider charges for compensable treatment, that structure can effectively answer the question even without a case expressly discussing a "credit period," because it prevents providers from collecting more than the statutory allowed amount from any source, including the employee. In other jurisdictions, the lack of an anti-balance-billing rule or the existence of exceptions creates a significant risk that retail billing could accelerate exhaustion, forcing the carrier back onto the claim sooner and undermining the statutory value of the credit. This is why state-by-state laws touching on fee schedules, balance billing, or medical payment caps during the vacation period is important: the statutory credit can be mathematically meaningless if the employee is permitted to burn through it at retail medical rates, rather than at the same capped rates the carrier would have paid under the Act.

In many jurisdictions, one or more of these issues remain unresolved not because future credits are disfavored, but because they are rarely litigated beyond the initial lien reimbursement phase. In practice, future credits are often assumed rather than formally documented, monitored, or enforced, resulting in few disputes reaching courts or administrative bodies on questions such as exhaustion, burden of proof, or medical rate treatment during the credit period. Aggressive subrogation not only leads to larger workers' compensation recoveries and future credits, but it also provides opportunities to appeal bad decisions which then provides us with precedent and guidance as to how a state handles such issues. This predictability is necessary for successful and profitable workers' compensation subrogation to take place.

Our book entitled "*Workers' Compensation Subrogation In All 50 States*" (www.jurispub.com) remains a necessary treatise on the nuts and bolts of workers' compensation subrogation, including the details and many varieties of future credits applied by 51 different jurisdictions and bodies of law around the country. While that book remains the best source for understanding the law surrounding the application of credits, including the various formulas applied by each state, this chart is intended to supplement that book with regard to the details of documenting your future credit with the appropriate Industrial Accident Board, Workers' Compensation Division, or applicable state agency. A brief overview of future credit law in each state is presented, followed by a review of the appropriate form filings and documentation of applicable credits in each of the 50 states and the District of Columbia.

STATE LAW REGARDING DOCUMENTATION OF CREDITS[1]

ALABAMA

GENERALLY: Ala. Stat. § 25-5-11 provides for the carrier receiving a statutory credit, but the carrier owes a portion of future benefits it is relieved from paying, constituting an attorney's fee. This amount is calculated by using the "*Miller* Formula":

(1) Calculate "Net Recovery" (gross recovery less lien);
(2) Divide "Net Recovery" by value of third-party case;
(3) Multiply actual future medical expenses by fraction from step 2. This gives you the carrier's "gross future medical expense credit"; and
(4) Reduce "gross future medical expense credit" by the carrier's pro-rata share of fee/expenses. This gives you the carrier's "net future medical expense credit".

The carrier is then responsible for any future medical expenses which exceed the "net future medical expense credit."

PROCEDURE/FILING REQUIREMENTS: According to Alabama's Worker's Compensation Division Counsel, you must submit a Form WC-4 ("*Claim Summary Form*") to the Workers' Compensation Division. Check "Settlement" on top of the form. The form is not well adapted to third-party settlement information, so it's recommended that you attach an addendum which sets forth the third-party settlement gross amount, the worker's net amount recovered, and the amount of the credit being claimed by the carrier. The WC-4 Form can be downloaded at the Alabama Workers' Compensation Division website at http://labor.alabama.gov/docs/forms/wc_claim_summ_form.pdf.

BURDEN OF PROVING CREDIT EXHAUSTION: There is no reported appellate or board-level authority in this jurisdiction expressly assigning the burden of proving exhaustion of a future credit; however, in practice the burden almost always falls on the party seeking reinstatement of carrier-paid benefits, which is typically the injured employee, because the employee controls the third-party recovery and must present a credible accounting of qualifying compensable expenses demonstrating that the net recovery has been exhausted and the carrier's statutory obligation to resume payments has been triggered.

MEDICAL EXPENSE RATE DURING CREDIT: Fee-schedule/prevailing-rate caps continue to apply during the credit period. *Exxon Mobil Corp. v. Harrington*, 421 So.3d 660 (Ala. 2025): "*It necessarily follows that insurers should be able to insist that the statutory caps should apply even when the injured employee is paying during this exhaustion period, otherwise insurers would not receive the benefit of the statutory caps when calculating their subrogation amount and will, thus, eventually have to pay more than they are legally required to pay. In other words, the injured employee's tort recovery would be exhausted quicker given the higher medical charges, thereby requiring the insurer to resume making payments earlier than would otherwise be required*."

ALASKA

GENERALLY: Alaska Stat. § 23.30.015(g) provides that if an employee recovers an amount in excess of the compensation paid, the employee may keep it, subject to the employer taking a credit for future benefits that would otherwise be paid.

---

[1] Notice: State law regarding the application and documentation of future credits, like any other aspect of government, can change without notice and for seemingly no reason at all. That means that this publication and its contents could become obsolete without notice to the user or the author. The contents of this publication do not constitute legal advice, which can only be dispensed within the confines of the attorney/client relationship. To verify the accuracy and applicability of any of the forms or procedures referenced herein, it is advised that you engage and consult with subrogation counsel.

PROCEDURE/FILING REQUIREMENTS: There is no specific form that must be filed to reflect the carrier's credit. Usually, a copy of the plaintiff's settlement distribution sheet or the settlement agreement setting forth the settlement terms should be sufficient. Submit the settlement terms and conditions to the Workers' Compensation Division, specifying the amount of any credit claimed. The credit should be approved by the Board. You could also file a Form 07-6105 ("*Controversion Notice*"), specifying that you are "controverting" future benefit payments because of your right to a credit pursuant to § 23.30.015(g). Attach appropriate documentation as to the third-party recovery to the form. A copy of this form can be found at http://labor.alaska.gov/wc/forms/wc6105.doc.

BURDEN OF PROVING CREDIT EXHAUSTION: There is no reported appellate or board-level authority in this jurisdiction expressly assigning the burden of proving exhaustion of a future credit; however, in practice treat exhaustion as a fact issue and the carrier should be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing whether the employee must pay medical bills based on retail vs. fee schedule during the credit period.

ARIZONA

GENERALLY: A.R.S. § 23-1023(D) provides that in addition to recovering past benefits paid, the workers' compensation carrier receives a credit applied toward future benefit payments. This credit acts like a deductible. It must be exceeded before the carrier is obligated to make further benefit payments. The credit is also reduced by the employer's percentage of negligence.

PROCEDURE/FILING REQUIREMENTS: Arizona has no dedicated form for documenting a credit. However, two possible vehicles for bringing the credit to the attention of the Industrial Commission are (1) Form 104 ("*Notice of Claim Status*") and (2) Form 105 ("*Notice of Suspension of Benefits*"). Both forms are prescribed in Arizona Administrative Code § R20-5-106, yet according to the Commission legal staff, there is no prescribed form available for use by carriers. Section R20-5-106(5) does indicate that a Form 105 must contain the following:

(1) Employee, employer, insurance carrier, and claim identification;
(2) Effective date of the suspension;
(3) Reasons for the suspension;
(4) Date the notice is mailed;
(5) Name and telephone number of the individual issuing the notice; and
(6) Statement of a party's hearing and appeal rights including filing requirements.

Presumably, these notices can take the form of a letter containing the required information. It is strongly suggested that appropriate documentation of the third-party recovery be attached to the notice.

BURDEN OF PROVING CREDIT EXHAUSTION: There is no reported appellate or board-level authority in this jurisdiction expressly assigning the burden of proving exhaustion of a future credit; however, in practice treat exhaustion as a fact issue and the carrier should be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing whether the employee must pay medical bills based on retail vs. fee schedule during the credit period.

ARKANSAS

GENERALLY: A.C.A. § 11-9-410 provides that the carrier is entitled to receive a set-off against future liability to pay workers' compensation benefits.

PROCEDURE/FILING REQUIREMENTS: Arkansas does not have a specific form or procedure for properly documenting a credit. However, this isn't a surprise, as Arkansas employs the made whole doctrine in allocating third-party recoveries, and few claimants are held to be made whole, yet alone have an excess recovery which would constitute a credit under § 11-9-410. It would be prudent to file a Form AR-4 ("*Report of*

Compensation Paid/Suspension of Payments"), along with appropriate documentation of the third-party recovery. Indicate on the form that a credit is being claimed under § 11-9-410 in the amount of the worker's net recovery. The form can be located on the Arkansas Workers' Compensation website at http://www.awcc.state.ar.us/revisedforms/form4.pdf.

BURDEN OF PROVING CREDIT EXHAUSTION: There is no reported appellate or board-level authority in this jurisdiction expressly assigning the burden of proving exhaustion of a future credit; however, in practice treat exhaustion as a fact issue and the carrier should be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing whether the employee must pay medical bills based on retail vs. fee schedule during the credit period.

CALIFORNIA

GENERALLY: Cal. Labor Code § 3858 provides for and defines a future credit for carriers upon resolution of a third-party action. When a third-party recovery is effected, after expenses and attorneys' fees are paid, the carrier is reimbursed under § 3856. It is also relieved from its obligation to pay future compensation benefits based on the amount recovered by the claimant. Generally, the right to a credit is statutory and can simply be asserted without taking any affirmative action. *SCIF v. WCAB (Brown)*, 130 Cal.App.3d 933 (Cal. App. 1982). However, if there is any reasonable doubt as to the legitimacy or extent of the credit, the following six-step procedure should be followed. When the employer/insurer asks for a credit for future payments based on the net recovery which the employee obtains in a third-party action, the brief steps are: (1) Open a workers' compensation case; (2) File a Petition for Credit; (3) File a Certificate of Readiness to proceed; (4) Secure a trial date; (5) Subpoena the records from the applicant's civil attorney reflecting the distribution of the civil settlement proceeds; and (6) Prove your case at trial (showing what payments were made, what recoveries were made, etc.).

While the above procedure is effective it is not necessary in the absence of an allegation of employer negligence or any reasonable doubt as to the legitimacy of a carrier's credit. Many carriers believe that they must continue to pay benefits, especially if there is an existing award, until the Board has granted a Petition for Credit. This is simply untrue. If there is a reasonable and good faith doubt as to the applicant's entitlement to continuing benefits, the employer cannot be penalized for terminating those benefits. As one appellate court has ruled it would be "financially foolhardy" to continue to provide benefits in the face of a third-party recovery arguably extinguishing any such entitlement.

PROCEDURE/FILING REQUIREMENTS: California does not have a specific form for applying for or perfecting a future credit. A carrier can file a WCAB Form 49 ("*Petition for Commutation of Future Payments*"), specifying indicating that a statutory credit is being sought under § 3861 of the Workers' Compensation Act. This form can be located on the California State website governing workers' compensation at http://www.dir.ca.gov/dwc/FORMS/DWC_Form49.pdf. By far, however, the easiest method of obtaining the credit is to get the claimant or his/her attorney to execute a Stipulated Credit.

BURDEN OF PROVING CREDIT EXHAUSTION: Typically the party seeking reinstatement must petition WCAB and show exhaustion of the credit.

MEDICAL EXPENSE RATE DURING CREDIT: In California workers' compensation cases, the Official Medical Fee Schedule (OMFS) establishes the maximum amounts that medical providers may charge for treatment rendered for industrial injuries. It functions as a mandatory cap on medical charges and is intended to control costs, ensure uniformity, and prevent balance billing of injured workers for amounts in excess of those limits. Balance billing for industrial treatment is prohibited; OMFS governs. *Sanchez v. Brooke*, 204 Cal. App. 4th 126 (2012). The *Sanchez v. Brooke* decision does not directly prohibit a provider from "charging retail" to an employee during a future credit period, because the case is not about credit administration or what an employee must pay while a credit is in effect. It is a tort damages case addressing the measure of recoverable past medical expenses against a third-party defendant when the employee's medical providers accepted

workers' compensation payments at discounted rates. That said, the case is still relevant the "medical expense rate during credit" category because it rests on the principle that, in the workers' compensation context, medical providers accept the statutory workers' compensation amount as payment in full and the injured worker is not liable for the difference between the billed amount and the allowed amount. In *Sanchez*, the Court of Appeal held that, for purposes of economic damages in the third-party tort case, the plaintiff could recover no more than the discounted amount accepted by the providers (the amount actually paid under the workers' compensation system), not the higher billed charges.

COLORADO

GENERALLY: C.R.S. § 8-41-203(1)(b) provides that carriers may receive a credit toward future benefits owed to the worker, whenever the worker receives a third-party recovery in excess of the compensation lien.

PROCEDURE/FILING REQUIREMENTS: Colorado does not have a specific form or requirement for applying for or perfecting a future credit. Where necessary, the future credit can be brought to the Colorado Division of Workers' Compensation by filing a WC54 ("*Petition to Modify, Terminate, or Suspend Compensation*"). Such a form can be found at https://www.colorado.gov/pacific/sites/default/files/WC054_Petition_Objection_Modify_Terminate_Suspend_Comp.pdf. Describe the reason for the termination as *"Claimant has received a net third-party recovery in the amount of …"* and attach a copy of the settlement agreement, settlement disbursement sheet, or the like.

BURDEN OF PROVING CREDIT EXHAUSTION: In practice, the employee must show exhaustion to obtain resumption order; credit is applied against statutory benefits. Assert and document credit in ALJ proceedings; maintain detailed accounting of benefits and third-party net recovery.

MEDICAL EXPENSE RATE DURING CREDIT: Providers may not bill above fee schedule even where credit is in place. *Scholle v. Delta Air Lines, Inc.*, 484 P.3d 695 (Colo. 2021). *Delta Air Lines, Inc. v. Scholle* expressly confirms a foundational statutory rule that is highly relevant to the "medical rate during credit" question: under Colorado law, amounts billed in excess of the statutory workers' compensation fee schedule are "unlawful," "void," and "unenforceable." The Court recounts that the trial court relied on that statutory provision, § 8-42-101(3)(a)(I), in reasoning that bills beyond the schedule do not amount "as a matter of law" to a legal obligation to pay. That means *Scholle* supports the proposition that a provider treating a compensable industrial injury cannot legally collect amounts above the workers' compensation fee schedule, and that the injured worker is not legally obligated to pay those "excess billed" amounts. It does not say this in the context of a future credit period, but the statutory language it confirms is not credit-dependent. If the treatment is industrial and subject to the Act, the fee schedule cap applies and excess billing is void and unenforceable. Therefore, while *Scholle* does not "say" that providers may only charge the employee the fee schedule amount "during the credit period," because it does not discuss the credit period at all, it does confirm the statutory prohibition that makes retail billing above the fee schedule unlawful, void, and unenforceable for compensable workers' compensation medical treatment. This is the key legal predicate for arguing that retail billing should not be permitted even when a carrier is temporarily not paying due to a future credit.

CONNECTICUT

GENERALLY: C.G.S.A. § 31-293 allows a workers' compensation carrier to obtain a credit against unknown future compensation payments to the extent of a third-party tort recovery, less expenses, and attorney's fees. The Commissioner has the responsibility to calculate this future credit, but the carrier MUST intervene into the third-party action and make an affirmative claim for the credit or it waives the credit.

PROCEDURE/FILING REQUIREMENTS: Connecticut has no dedicated form or procedure for declaring a statutory credit, but Form 36 ("*Notice of Intention to Reduce or Discontinue Payments*") may be completed by the respondent (employer/workers' compensation insurance carrier) where it is necessary to notify the Workers' Compensation Commissioner, the claimant, and all parties to the claim of its intention to reduce or discontinue payment of the claimant's workers' compensation benefits. Specify the reason as a *"statutory credit under Section 31-293 due to a third-party recovery by the claimant"* but be certain your claim for a credit

has been properly asserted in the third-party action via an Intervention first. Form 36 can be found under available forms at the Commission website: https://portal.ct.gov/WCC/Workers-Compensation-Forms/Insurance-Forms. It is filed with the State of Connecticut Workers' Compensation Commission. They are filed when an employee moves from Temporary Total to Temporary Partial benefits, or if they have been put at MMI by one doctor or another and the carrier wants to switch the benefit. They are also used to assert a future credit if a third-party case is settled and the employee receives a recovery from same. Once filed, the employee has fifteen (15) days to object else they get approved automatically assuming all is in order. It must be approved by the Commissioner.

BURDEN OF PROVING CREDIT EXHAUSTION: Commissioner administers the moratorium/credit; exhaustion typically determined in commissioner proceedings.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing whether the employee must pay medical bills based on retail vs. fee schedule during the credit period.

DELAWARE

GENERALLY: 10 Del. C. § 2363(e) provides that any payments or recovery received by the employee is to be treated as an advance payment by the employer on account of any future payment of future compensation benefits.

PROCEDURE/FILING REQUIREMENTS: Delaware has no Industrial Accident Board Rules, Administrative Rules, or Forms which specifically deal with documentation of a carrier's future credit. However, when officially placing the Industrial Accident Board on notice of a future credit is desired, forms which may serve to notify the Industrial Accident Board of the carrier's intention to take a future credit include Form 16 ("*Petition For Commutation*") and Form 13 ("*Petition To Determine Compensation Due To Injured Employee*"), found on Delaware's Industrial Affairs website at http://dia.delawareworks.com/workers-comp/forms.php.

BURDEN OF PROVING CREDIT EXHAUSTION: There is no reported appellate or board-level authority in this jurisdiction expressly assigning the burden of proving exhaustion of a future credit; however, in practice treat exhaustion as a fact issue and the carrier should be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing whether the employee must pay medical bills based on retail vs. fee schedule during the credit period.

DISTRICT OF COLUMBIA

GENERALLY: D.C. Code Ann. § 32-1535(e)(1) provides that where an employee has instituted a third-party action within the six-month period, the workers' compensation carrier is liable for the difference between the amount recovered by the employee and the total damages amount as determined by the Mayor.

PROCEDURE/FILING REQUIREMENTS: There is no specific form or procedure for applying for a future credit, and District of Columbia law regarding the automatic nature of the credit is non-existent. Therefore, where it is felt necessary to get the blessing of the Department on a future credit which the carrier will be taking, it is advisable for the carrier to file an "*Application for Informal/Mediation Conference*" with the Department of Employment Services, indicating a desire to terminate benefits due to a statutory future credit. The application can be obtained at http://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/DOES_Informal_mediation_conference_0.pdf.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing whether the employee must pay medical bills based on retail vs. fee schedule during the credit period.

FLORIDA

GENERALLY: F.S.A. § 440.39 provides that if the carrier brings the third-party action itself, it can recover all past and future benefit payments in that suit. If the employee brings the suit, the *Manfredo* formula applies to reduce both the past lien reimbursement and the future credit. *Manfredo* applies when the plaintiff recovers less than full damages. The *Manfredo* formula is the ratio of the net settlement to the judicially determined full value of the plaintiff's claim. A hearing is held in the trial court to determine this. Take the "net recovery" (gross recovery less fees and costs) over the full value of case. This fraction is then taken times the past benefits to determine the carrier's lien reimbursement and its future credit.

PROCEDURE/FILING REQUIREMENTS: Third-party settlements must be approved if the claimant is not represented by an attorney. If the claimant is represented, then no approval is required. Upon settlement, the carrier is entitled to reduce future benefit payments it owes by the percentage calculated per *Manfredo*. The Circuit Court can approve reduction of future benefit payments. If the Circuit Court is not involved, or out of an abundance of caution, the carrier can file a Form DFS-F2-DWC-4 ("*Notice of Action/Change*"), which can be found at http://www.myfloridacfo.com/Division/WC/pdf/DFS-F2-DWC-4.pdf. Under the "Benefit Adjustment Code" section of the form, fill in "B" for "Subrogation/Third-Party Recovery".

Florida's Administrative Code 69 FL ADC 69L-3.0091 sets forth some rather specific and detailed requirements with regard to completion and filing of Form DFS-F2-DWC-4, and should be closely consulted.

BURDEN OF PROVING CREDIT EXHAUSTION: Not clearly allocated by appellate authority; in practice claimant must demonstrate exhaustion to compel resumption.

MEDICAL EXPENSE RATE DURING CREDIT: : No reported Florida decision squarely addressing retail vs. fee schedule during credit.

GEORGIA

There doesn't appear to be any statutory or case law authority which gives the workers' compensation carrier a right to take a credit/advance or a vacation from paying future workers' compensation benefits in the event that the employee recovers a large amount in his third-party action. No credit allowed.

HAWAII

GENERALLY: Haw. Rev. Stat. § 386-8 provides that the amount of a third-party recovery in excess of compensation benefits paid to the worker constitute a credit or advance to the carrier. The carrier is relieved from making further compensation payments to the employee up to the entire amount of the balance of the settlement or excess paid to the worker.

PROCEDURE/FILING REQUIREMENTS: The Director of Labor retains the discretion, and necessarily the jurisdiction, to determine whether or not the employer/carrier has an obligation to make further or future compensation payments to the employee. Parties may not compromise such future obligations without the approval and blessing of the Director of Labor.

The State of Hawaii Department of Industrial Relations, Disability Compensation Division does not maintain a form or procedure to be used for documenting with the Division the amount of a carrier's statutory credit and/or its intention to cease benefit payments as the result of a third-party recovery by the claimant and/or his/her family. Haw. Admin. Code § 12-10-31(c) does, however, provide as follows:

(c)The director may hold a hearing at the director's discretion or on application of a party of interest to determine whether or not the employer has an obligation to make further compensation payments including reimbursements and credits against sums recovered from any third party.

While an ad hoc form certainly can be used as one vehicle for complying with this administrative code provision and getting the blessing of the Disability Compensation Division and its director for any future credit, the utilization of WC-77 ("*Application for Hearing*"), specifying indicating that the carrier wants to document its future credit under § 386-8 of the Hawaii Statutes and § 12-10-31(c) of the Hawaii Administrative Rules. This form can be located on the State of Hawaii Department of Labor and Industrial Relations website at http://labor.hawaii.gov/dcd/files/2013/01/WC-77.pdf.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

IDAHO

GENERALLY: Under Idaho Code § 72-223(5), if the third-party recovery exceeds the amount of the workers' compensation benefits paid, an employer is entitled to claim a credit against its future liability for compensation benefits. The credit applies as future compensation benefits become payable. The employer will have to reimburse the employee for a proportionate share of attorneys' fees and costs paid by the employee in obtaining that portion of the third-party recovery corresponding to the credit claimed.

PROCEDURE/FILING REQUIREMENTS: Idaho has no dedicated form or procedure used to notify the Industrial Commission of a carrier's intention to take a future credit or documentation of same. IC Form 8 ("*Notice of Claim Status*") may be used for this purpose, where desired. A copy of this form can be found on the Idaho Industrial Commission's website at https://iic.idaho.gov/wp-content/uploads/sites/111/2019/07/ic_8_-status_change_2019.pdf. Check the box marked "Your benefit payments will be stopped", and indicate the reason is a "third-party settlement and resulting future credit under § 72-223." File a copy with the Industrial Commission accompanied by sufficient documentation of the third-party settlement and the claimant's "net recovery."

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

ILLINOIS

GENERALLY: The carrier is entitled to a credit on future benefits owed, minus 25% for attorneys' fees. The carrier does not have to do anything special to get this recovery/credit. Practically speaking, the carrier is still required to make payments, but it automatically gets a 75% reduction on future payments and the carrier pays 25% of the weekly payments as an attorney's fee. This payment can be worked out in negotiation of the settlement.

The Industrial Commission has authority to determine the credits to which the employer's carrier is entitled for amounts received by the claimant in a third-party tort action, where the carrier's lien rights have not been adjudicated by the Circuit Court. If a carrier fails to assert a lien in a third-party action, it does not waive its ability to seek from the Industrial Commission a determination of credits to which it is entitled based on the third-party recovery.

PROCEDURE/FILING REQUIREMENTS: The Industrial Commission approves settlements, but there is no prescribed form for approval of third-party settlements. Frequently, settlements will be approved as part of a

lump sum settlement contract which uses Form IC5. That form can be found at https://www2.illinois.gov/sites/iwcc/Documents/ic05FORM.pdf.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

INDIANA

GENERALLY: The Indiana workers' compensation subrogation statute specifically provides that the liability of the workers' compensation carrier to pay further compensation benefits shall terminate upon third-party recovery, regardless of whether all of the dependents are entitled to share in the proceeds. I.C. § 22-3-2-13 (2000). In fact, it states the following occurs when there is a judgment in or settlement of a third-party case:

> *…the liability of the employer or the employer's compensation insurance carrier to pay further compensation or other expenses shall thereupon terminate, whether or not one (1) or all of the dependents are entitled to share in the proceeds of the settlement or recovery and whether or not one (1) or all of the dependents could have maintained the action or claim for wrongful death. Id.*

Indiana courts confirm that this means that where an injured worker settled a claim with the third party, the liability of the employer to pay further compensation benefits was terminated. *McCammon v. Youngstown Sheet & Tube Co*., 426 N.E.2d 1360 (Ind. App. 1981); *Smith v. Champion Trucking Co.,* 925 N.E.2d 362 (Ind. 2010); *Koughn v. Utrad Indust.,* 275 N.E.2d 572 (Ind. App. 1971). This was justified because § 22-3-2-13 gave the employee an option of either collecting a judgment and repaying the employer for compensation previously drawn, or assigning all rights under the judgment to the employer and thereafter receiving from the employers' compensation to which he is entitled. I.C. § 22-3-2-13 (2000).

Generally, because the settlement with a third party terminates the employer's opportunity to recover its expenses from the party responsible for the employee's injuries, these absolute bar provisions are designed to prevent employees from settling with third parties without the employer's consent. *Niegos v. Arcelor Mittal Burns Harbor, LLC*, 2010 WL 5087668 (Ind. App. 2010).

PROCEDURE/FILING REQUIREMENTS: There doesn't appear to be any administrative rules or regulations with regard to documentation of a future credit in Indiana. Carriers wishing to be thorough and cautious before stopping future benefit payments after the claimant receives a third-party recovery may file a State Form 29109 ("*Application for Adjustment of Claim*") with the Indiana Workers' Compensation Board. The form can be found at https://forms.in.gov/Download.aspx?id=4895.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

IOWA

GENERALLY: I.C.A. § 85.22(1) deals with the situation where the worker brings the third-party action, and makes no provision for a credit to the workers' compensation insurance carrier against benefits that will be paid in the future. This is in sharp contrast with § 85.22(2), which involves the scenario where the carrier brings the subrogation suit, and which makes a specific allowance for a credit against future workers' compensation benefits. Iowa courts have held that a § 85.22(1) lien merely provides security for reimbursement on benefits for which an indemnitor "is liable." Section 85.22(1) does not guarantee the carrier any immediate recovery (a

"credit") on future payments it will make. However, it does provide the carrier with a lien to secure reimbursement. The courts have held that this lien provides security for "all payments, even those made to satisfy the carrier's periodically-accruing liability after the disposition of the action against the third person." So, although the statute itself doesn't directly specify a "credit" where the worker brings suit, the courts have read the "credit" into such a scenario.

PROCEDURE/FILING REQUIREMENTS: Iowa has no specific form for documenting a future credit. Usually, this is accomplished with the filing of a Memorandum of Settlement which must be prepared between employee and carrier and which sets forth the agreed upon credit. It is advisable to attach documentation of the third-party settlement, setting forth the net recovery by the claimant, to the Memorandum of Settlement. Section 85.35 provides that any settlement of a workers' comp claim must be in writing on forms prescribed by and submitted to the workers' comp commissioner for approval. Although it is not specifically designed for use in these situations, a Form 14-0021 ("*Agreement for Settlement*") can be used if carefully completed. This form can be found at https://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/Agreement%20for%20Settlement%20--%20Form%2014-0021%20--%202019.07%20empty.pdf.

Section 85.22(3) indicates that before a third-party settlement can be effective, it must be done with the written consent of the insurance carrier. If those parties refuse consent, the employee can request written approval of the Iowa Workers' Compensation Commissioner.

Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

***Warning*:** Iowa case law provides that a carrier must file, at a minimum, a Notice of Lien in a third-party action, or risk losing its lien and its future credit.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

KANSAS

GENERALLY: K.S.A. § 44-504(b) provides that when the worker makes a recovery prior to completion of payment of workers' compensation benefits, the amount of the judgment, settlement or recovery which is in excess of the amount of compensation and medical benefits paid up to the date of recovery shall constitute a credit and shall be credited against future payments of compensation and medical benefits owed by the workers' compensation carrier. There is some authority which indicates that the right to a credit may be waived if not timely asserted by a workers' compensation carrier at the time of the settlement, judgment and/or distribution of the proceeds of the third-party case. Also, the credit is reduced by the percentage of negligence of the employer found to have contributed to the injury. Section 44-504(b) grants a credit when the amount of a third-party recovery "exceeds the amount of compensation in medical aid paid to date." Section 44-504(d) provides that the formula for determining the amount of the future credit is the recovery less the amount of benefits paid to date. Future credits, just like subrogation liens, are to be diminished when the employer is found to be at fault. The mechanism prescribed by § 44-504(d) to diminish a future credit is the same formula as that is used to determine the diminished lien:

Diminished future credit = future credit minus [recovery x percentage of employer's fault].

If the diminished lien value is a negative number, there is no future credit.

PROCEDURE/FILING REQUIREMENTS: Although Kansas has no dedicated forms for documenting a carrier's statutory credit or confirming the calculation thereof, an agreement or stipulation between the parties would suffice. If that is not possible, the carrier could try submission of a Form E-5 ("*Application For Review and Modification*"), even though that form references § 44-528 as statutory authority for the modification – a

statute which doesn't mention credits, along with proper documentation of the third-party recovery and setting forth the calculation of the credit That form can be found at the Kansas Division of Workers' Compensation – Division of Labor website, which can be found at https://www.dol.ks.gov/home/showpublisheddocument/1327/638793619000270000.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

KENTUCKY

GENERALLY: In Kentucky, the right to a subrogation credit in a workers' compensation case is purely statutory. K.R.S. § 342.700. As a result, the Administrative Law Judge has jurisdiction to resolve any subrogation issues, including the credit issued. The burden of proving the affirmative defense of entitlement to a credit is on the employer. *Whittaker v. Hardin*, 32 S.W.3d 497 (Ky. 2000). When *prima facie* evidence of a credit is introduced, the burden of going forward with evidence that a portion of the tort recovery is not available for subrogation credit should be placed on the employee. It appears that in Kentucky the credit is issued on the net recovery by the worker of those elements to which the workers' compensation carrier is subrogated.

In one Kentucky Appellate Court decision, an injured worker was paid $110,000 in workers' compensation benefits and settled a third-party action against the premise owner where she slipped and fell, as well as the manufacturer of the rubber mat on which she fell. The proceeds of settlement were not expressly allocated among the several types of damages that the worker sought to recover. Under a separate agreement, the workers' compensation carrier settled its subrogation interest against both defendants and specifically retained its claims for a credit against the recovery made by the worker. While the worker agreed that the carrier was entitled to a credit for those amounts she had received which duplicate future workers' compensation benefits, the parties could not agree as to the extent of the carrier's subrogation interest and recovery and asked the trial court to allocate the settlement proceeds between categories of compensable and non-compensable damages and to thereafter award the carrier its future credit. Because the burden of going forward with evidence that a portion of tort recovery is not available for a subrogation credit is properly placed on the employee, the employee must meet this burden. *Id*.

PROCEDURE/FILING REQUIREMENTS: There do not appear to be any specific requirements or forms with regard to filing for and documenting a future credit. Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

LOUISIANA

GENERALLY: Under La. R.S. § 23:1103, a workers' compensation carrier is entitled to be reimbursed its past lien and any excess paid to the injured worker is to constitute a credit on all benefits which the carrier may come to owe in the future to, or on behalf of, the injured worker up to the amount of the tort recovery by the injured worker. *Id.* Until this excess is exhausted, the carrier should be obligated to make no further compensation payments. After exhaustion of the excess, however, if further compensation payments or benefits should become due, the carrier should then become obligated to resume benefit payments. *Id.* However, the carrier's credit for future compensation must be limited to the actual award for future loss of earnings in the third-

party action. *Id.* It appears that a workers' compensation carrier is not entitled to a credit for future medical benefits, even when the amount which the third-party tortfeasors paid in settlement exceeds that sufficient to reimburse the workers' compensation carrier. *Brooks v. Chicola*, 514 So.2d 7 (La. 1987); *Breaux v. Dauterive Hosp. Corp.*, 838 So.2d 109 (La. App. 2003). Until the carrier's credit for compensation benefits is exhausted, the carrier should be obligated to make no further compensation payments or medical benefits. After exhaustion of the excess, if further compensation payments or benefits should become due, the carrier should then become obligated to resume payments. *Breaux v. Dauterive Hosp. Corp*., supra. This credit means that the carrier may cease benefit payments from the date of the settlement. The carrier doesn't obtain the cash damages unless the carrier has brought the suit itself without any participation by the employee. *Houston General Ins. Co. v. Commercial Union Ins. Co*., 649 So.2d 776 (La. App. 1994).

PROCEDURE/FILING REQUIREMENTS: The amount of any credit due to the employer or carrier may be determined in the judgment of the trial court if agreed to by the parties. Otherwise, it must be determined pursuant to the provisions in § 23:1102(A). La. R.S. § 23:1101(B) (2005); *Burns v. Apache Corp*., 902 So.2d 1160 (La. App. 2005). That section provides that any dispute with regard to the calculation of the future credit may be filed with the Office of Workers' Compensation and tried before a workers' compensation judge. La. R.S. § 23:1102(A) (2005). Documentation of a future credit and cessation of compensation benefit payments due to a successful third-party recovery by the employee can by made by filing Form LWC-WC-1003 *("Stop Payment"*), which can be downloaded at http://www.laworks.net/Downloads/OWC/1003form.pdf. In Section G of that form, the carrier should enter the amount paid to carrier/insurer for various expenses relating to the third-party case and ultimately recovered from a third party. These Items should not be listed in sections A through F of that form. Ensure court/OWC documentation of net recovery and allocation; credit extends to future medical. *City of DeQuincy v. Henry*, 62 So.3d 43 (La. 2011).

BURDEN OF PROVING CREDIT EXHAUSTION: Not expressly allocated; exhaustion disputes are typically litigated by motion/petition once claimant seeks reinstatement.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during credit.

MAINE

GENERALLY: A workers' compensation carrier under the Maine Workers' Compensation Act is entitled to recoup not only current benefits paid to date, but may also set-off any future compensation payments for the liability incurred until the amount credited to the carrier equals the workers' net recovery from the third party. *Liberty Mut. Ins. Co. v. Weeks*, 404 A.2d 1006 (Me. 1979). The operation of this future credit provision provides that an employer will not be required to pay future benefits until such point when those future benefits will have equaled the net recovery of the employee.

If the amount of the third-party settlement attained by the worker is greater than the present value of future payments the employer would have paid in the future, the employer's payments are entirely suspended for the duration of the period of liability. *Nichols v. Cantara & Sons*, 659 A.2d 258 (Me. 1995). However, if the amount of the settlement attained by the employee is not sufficient to cover the amount of future payments for which the carrier would eventually become liable, then the carrier's liability is suspended only to the extent of the settlement amount. *Id*; 39 M.R.S.A. § 107 (2001).

PROCEDURE/FILING REQUIREMENTS: While there does not appear to be any specific requirements for documentation of a carrier's future credit, such a credit might be documented by filing a Form WCB-8 *("Certificate of Discontinuance or Reduction of Compensation"),* which can be found at http://www.maine.gov/wcb/forms/WCB-8.pdf. Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

MARYLAND

GENERALLY: Md. Lab. and Empl. Code § 9-903 governs the credit to be received by a workers' compensation carrier upon successful conclusion of the third-party action. Md. Lab. & Empl. § 9-903 (1957). It provides as follows:

> ***§ 9-903. Receipt of amount in suit.*** *(a) Except as provided in subsection (b) of this section, if a covered employee or the dependents of a covered employee receive an amount in an action:*
>
> *(1) the amount is in place of any award that otherwise could be made under this title; and*
> *(2) the case is finally closed and settled.*
>
> *(b) If the amount of damages received by the covered employee or the dependents of the covered employee is less than the amount that the covered employee or dependents would otherwise be entitled to receive under this title, the covered employee or dependents may reopen the claim for compensation to recover the difference between:*
>
> *(1) the amount of damages received by the covered employee or dependents; and*
> *(2) the full amount of compensation that otherwise would be payable under this title.* Md. Lab. & Empl. § 9-903 (1991).

Any amount recovered in a third-party action is "in place of an award that could be made under the Workers' Compensation Act." Md. Lab. & Empl. § 9-903(a)(l) (1991). Generally, a credit is calculated for the carrier by taking the total amount of the settlement, less attorneys' fees and costs. Upon settlement of a third-party action, the carrier is entitled to reimbursement from the proceeds and the workers' compensation claim will not be terminated or payment suspended if the sum of the credits to the employer is less than the compensation that the employee would otherwise be entitled to receive. *Ankney v. Franch*, 652 A.2d 1138 (Md. 1995), *rev'd on other grounds,* 670 A.2d 951 (Md. 1996). However, if a worker reaches an unauthorized settlement in an action against a third party before the filing of a workers' compensation claim, it constitutes a binding election of remedies. *Central GMC, Inc. v. Lagana*, 706 A.2d 639 (Md. Spec. App. 1998).

PROCEDURE/FILING REQUIREMENTS: Maryland's Code of Regulations has special requirements for Compromise and Settlement of a compensation claim when a third-party recovery is involved. Md. ADC 14.09.01.19, Rule 19B. Rule 19B provides as follows:

> ***B. Special Requirements.***
>
> *(1) Claims Involving Third-Party Liability. When the settlement arises in connection with a claim involving a third-party liability action under Labor and Employment Article, Title 9, Subtitle 9, the agreement submitted to the Commission for approval, in addition to complying with §A, shall contain or be accompanied by the following:*
>
> *(a) A statement of the full amount of compensation paid or to be paid by the employer and insurer;*
>
> *(b) A statement of the total amount of compensation paid or payable, the amount the employer or insurer is waiving reimbursement from the third-party settlement, the amount of the third-party settlement, the amount of attorney's fee charged in the third-party case; and*
>
> *(c) A copy of the release or judgment.*

This information is appended to Maryland WCC Form H-07 *("Settlement Worksheet"*) as required by question 6. A copy of this form can be found at http://www.wcc.state.md.us/PDF/PDF_Forms/Settle_work.pdf. Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

MASSACHUSETTS

GENERALLY: Massachusetts' off-set is not an actual holiday as it is in some other states. Massachusetts allows a dollar-for-dollar off-set of the excess of any future medical or indemnity benefits until the employee's net recovery is exhausted. In Massachusetts, the "excess amount" is euphemistically given a name resulting from the leading case which decided it. In *Hunter v. Midwest Coast Transport*, the court interpreted what Massachusetts' law means by "excess". This is known as the "*Hunter* off-set".

Hunter provides for a situation where there are benefits to be paid in the future on behalf of a worker. Once the carrier has paid its pro-rata share of attorneys' fees and costs and is subjected to future claims for benefits, the employee's future claims for benefits are paid on a fraction basis. The carrier pays the benefits in the same ratio that the employee's attorneys' fees and costs bear to the amount of the total recovery from the third-party action. When the total amount of future claims equals the statutory excess, the carrier's obligation to make full compensation benefits resumes. Therefore, if the attorneys' fees and costs are one-third of the recovery, the carrier pays one-third of the employee's claims subsequent to the third-party recovery as the claims for benefits arise until the total amount of claims equals the statutory excess recovered in the third-party action. In this way, the excess off-sets the obligation to pay future benefits.

Put another way, *Hunter* stands for the proposition that as to any future benefits the employee might be entitled to, the carrier must pay the percentage of costs of recovery until the employee's gross settlement excess amount is met. For example, if the third-party case settles for $200,000, the worker's compensation lien is $100,000, the plaintiff's attorney's fee is one-third and there is $10,000 in litigation costs, you must take the attorney's fees and a pro rata percentage of litigation costs (5% costs + 33.33% attorney's fees = 38.33% [*Hunter* percentage]). The carrier then becomes responsible for that percentage (38.33%) of every medical bill or indemnity payment until the employee's gross recovery of $100,000 is exhausted, at which point the carrier goes back to paying 100% of future benefits. Plaintiffs' attorneys try to suggest that the off-set is applied to the employee's "net" recovery rather than the "gross" recovery, which in the example above, would mean a credit of only $61,667 as opposed to $100,000. Clearly, this would be an unjust enrichment to the employee as the carrier would actually be paying for the attorney's fees and costs twice.

The carrier's off-set/credit reflects the employee's attorneys' fees and costs of the third-party action. The carrier pays a percentage of each future claim equal to the ratio of the total attorneys' fees and costs bear to the total third-party recovery. The carrier pays for the fees and costs in proportion to the benefit it receives. The carrier may not reduce its future benefits to a present value.

When a third-party action settles, the gross settlement is reduced by the amount paid to the claimant, the amount the carrier agrees to accept when compromising its statutory lien, as well as attorneys' fees and costs. The remainder is the excess or credit to which the carrier is entitled. *Turner v. Thomas K. Dyer, Inc*., 672 N.E.2d 994 (Mass. App. 1996). The underlying principle behind giving the carrier a credit is the same as the principle for the workers' compensation statute in general, which is to prevent a double recovery. *Percoco's Case*, 634 N.E.2d 1385 (Mass. 1994).

Where the carrier agrees to voluntarily reduce its lien in order to effectuate a settlement, the plaintiffs' attorney may argue that there is no *Hunter* off-set because the settlement does not "exceed the lien". Subrogation professionals should be careful to condition any reduction in the lien amount on a very clearly established formula for reimbursement of the carrier, as a condition to an agreement to reduce a lien. Although one of the primary purposes of the Massachusetts' subrogation statute is to make the compensation carrier whole from the proceeds of a third-party action, the carrier may agree to accept less than full reimbursement in connection with their settlement submitted for approval. *Taylor v. Trans-Lease Group*, 612

N.E.2d 254 (Mass. App. 1993). However, without the carrier's consent, its right of reimbursement may not be abridged. *Id.* Technically, if a carrier compromises its workers' compensation lien, they are not entitled to a "*Hunter* off-set" per se. Instead, the carrier is entitled to a "dollar-for-dollar off-set" for the net amount the employee receives, which in essence is a "holiday".

Assume a gross settlement of $200,000 in a case in which the carrier's lien is $100,000 and costs are $10,000. The carrier takes its lien less a 33% attorney's fee and 5% costs. The employee pays the same 33% fee and 5% costs out of his share. Now, if the employer receives further benefits for medical payments, they are reduced under the "*Hunter* off-set" so that the employer is responsible for 62% of them. This differs from some states where there is a "holiday". Plaintiffs' attorneys would have you believe that they can take the plaintiff's net recovery of $62,000, minus attorneys' fees and costs, and claim the remainder as a "*Hunter* off-set" (*i.e.,* $62,000 - $38,000 = $24,000). This is wrong. A carrier who wants to reduce its lien must determine whether it wants to provide the plaintiff with a "net" amount that it will accept in settlement, or a "gross percentage". With the gross percentage, the carrier becomes liable for its "pro rata share" of attorneys' fees and costs. For example, if the carrier has a lien of $100,000 and there is not expected to be an offer in excess of $100,000, the carrier can say that it will accept $33,000 net or it can say it wants 50% of the gross settlement. If the carrier opts to accept a percentage of the gross settlement, then the provisions of § 15 apply. This means on $100,000 settlement, carrier receives $50,000 but is responsible for $16,666.66 in attorney's fees. With $5,000 in costs, insurer would owe 50% of those costs ($2,500) and *Hunter* off-set would be 38.33%. Therefore, on a gross settlement of $100,000 split 50/50, the carrier would net $30,833.33 and the employee would net $30,833.33. The "*Hunter* off-set" would be 38.33% of every future benefit until $50,000 (employee's gross settlement) is exhausted and the carrier would be paying its share of the $19,166.66 attorney's fees plus costs which the employee had to pay. So while the plaintiffs' attorney is technically correct that if the settlement doesn't exceed the carrier's lien there is no "*Hunter* off-set," you can fashion your reduction in such a way that you take a direct dollar-for-dollar off-set or a "holiday" as applied in other states.

Rule 1.21 of the Code of Massachusetts Regulations within the Dept. of Industrial Accidents provides:

> ***1.21: Third-Party Liability***
>
> *(1) When an employee who claims or receives benefits under M.G.L. c. 152 seeks damages from some person or entity other than the employer or its workers' compensation insurer, the employee shall immediately notify the insurer by certified mail of the commencement of the action. Where the workers' compensation insurer proceeds to enforce the liability of such third person, it shall notify the employee in the same manner.*
>
> *(2) Where the employee or the workers' compensation insurer recovers judgment or reaches a settlement in a civil action in any court, the terms of such judgment or settlement shall be reported immediately to the Department as well as to the appropriate rating bureau as required by M.G.L. c. 152, § 53A(4).*
>
> *(3) When the parties elect to submit to the jurisdiction of the Department, the settlement by agreement shall be in writing and in conformity with the guidelines and format prescribed by the Department. Approval authority statutorily residing in the Reviewing Board and the Board may be delegated to an individual administrative law judge or administrative judge by the senior judge.*
>
> *(4) A hearing on the merits of the proposed settlement will be held if requested by the parties. In the alternative, the parties may waive their right to a hearing and submit the executed settlement agreement to the designated judge for review and disposition, except when a third-party settlement is conditioned upon the approval of a lump sum settlement. In that circumstance, a hearing on the merits of both agreements must be heard by the same judge.* 452 MA ADC 1.21.

PROCEDURE/FILING REQUIREMENTS: While Massachusetts doesn't have a form dedicated to documentation of a future credit, Form 108 ("*Insurer's Complaint for Modification, Discontinuance, or Recoupment of Compensation")* can be filed with the appropriate information included. Form 108 can be found at the Massachusetts' Dept. of Industrial Accident's website at: https://www.mass.gov/doc/form-108-insurers-

complaint-for-modification-discontinuance-or-recoupment-of-compensation/download?_ga=2.263631812.911260550.1642097076-1235535579.1642097076. Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

MICHIGAN

GENERALLY: If the third-party recovery exceeds the workers' compensation benefits amount paid, a future credit is calculated under the case of *Franges v. General Motors Corp*., 274 N.W.2d 393 (Mich. 1979), which indicates that the appropriate amount would be taken from each weekly benefit as it becomes due because of the third-party recovery. However, the credit formula is very complicated. Under M.C.L.A. § 418.827, an injured worker must reimburse the carrier for past *and* future compensation benefits; expenses of recovery may be first deducted from any recovery gained from the third-party tortfeasor and costs of recovery should be shared proportionately by the injured party and workers' compensation carrier. *Manninen v. Warner Swasey Co*., 262 N.W.2d 31 (Mich. 1977). The recovery amount and the injured worker and his family's recovery expenses, for purposes of applying the formula to apportion recovery from the third-party tortfeasor between the injured worker and carrier, should be determined as they appear on the judgment date. *Bonarek v. Wayne Cty. Bd. of Institutions*, 419 N.W.2d 21 (Mich. 1987).

If the plaintiff and workers' compensation carrier cannot agree on a division of the third-party recovery, the Michigan Supreme Court has given the courts a formula they can follow in ordering such a division. *Franges,* supra. In *Franges,* the court gave us the following formula:

DISTRIBUTION CALCULATION

(1) Gross Recovery	$150,000.00
(2) Litigation Costs	2,000.00
(3) Attorney's Fees	50,000.00
(4) Cost of Recovery (line 2 + line 3)	52,000.00
(5) Apportionment % (line 4 ÷ line 1)	34.667%
(6) Compensation Lien (past)	25,000.00
(7) Carrier Share of Costs (line 6 x line 5) ***** Franges referred to as "Apportionment of Expenses for Reimbursement."***	8,666.67
(8) Carrier Net Recovery (line 6 – line 7)	16,333.33
(9) Employee Gross Recovery (line 1 – line 6)	125,000.00
(10) Employee Cost Recovery (line 9 x line 5)	43,333.75

(11) Employee Net Recovery (line 9 – line 10)	81,666.67
(12) Carrier's Apportionment of Recovery Expense for Future Credit (line 10 x line 11) ****This is the second apportionment percentage.***	53.0612%
(13) Workers' Comp Rate	224
(14) Future Weekly Benefit (line 13 x line 12) ****Franges referred to as "Reimbursement to Employee by Insurer for Costs of Recovery."***	118.86
(15) No. Weeks Before Resume Comp (lines 11 ÷ 13)	364.5833

** An interactive "*Franges* calculator" used to help calculate future credits can be found at the following site: http://www.michigan.gov/documents/wca_franges_wksht_79194_7.pdf.

DISTRIBUTION RESULTS

Plaintiff's Attorney Present Net Recovery	*$52,000.00*
Carrier's Present Net Lien Recovery	*16,333.33*
Employee's Present Net Recovery	*81,666.67*
Gross Recovery	*$150,000.00*

In apportioning a third-party recovery, the court must first determine the total cost of recovery, and then determine the "apportionment percentage" by dividing the gross recovery into the total cost of recovery. *Franges*, supra. The court must then determine the amount necessary to reimburse the carrier for compensation previously paid, determine the carrier's expense for reimbursement interest, and then determine the employee's recovery. *Id*. The court must then obtain the apportionment of expenses for the employee's recovery, and then subtract the carrier's reimbursement and the employee's share of the cost of recovery from the gross recovery to determine the carrier's future benefit. *Id.* While the *Franges* case is confusing, the formula might be best calculated as set forth above, using the following definitions:

- **Gross Recovery**: The amount of settlement or verdict.
- **Cost of Recovery:** Preparation and litigation costs and attorneys' fees.
- **Apportionment Percentage:** Gross recovery divided by cost of recovery.
- **Total Workers' Compensation Carrier's Lien:** Amount of benefits paid at date of settlement.
- **Carrier's Portion of Cost of Recovery:** Total lien multiplied by apportionment percentage.
- **Carrier's Present Net Recovery:** Total lien minus carrier's portion of cost of recovery.
- **Employee's Gross Recovery:** Gross recovery minus total workers' compensation carrier's lien.
- **Employee's Portion of Cost Recovery:** Employee's gross recovery multiplied by apportionment percentage.
- **Carrier's Future Credit:** Employee's net recovery (employee's gross recovery minus employee's portion of cost recovery).

Using this formula and the *Franges* calculator referenced above, you can determine the net recovery of all of the parties based on the amount of the proposed settlement if you set a specific number for "cost of recovery". Once those two variables have been determined, the balance of the formula can be calculated.

In apportioning the costs of the third-party tort recovery between the compensation carrier and the plaintiff, the total costs of recovery are subtracted from the gross recovery and the amount of reimbursement for benefits paid by the insurer, plus the amount of the advance credit given to the insurer for benefits payable in the future as of the date of the tort recovery, are divided by the tort recovery. This expresses the insurer's proportionate share of costs in the tort recovery and the balance of those costs is applicable to the employee's interest in the tort recovery. *Crow v. Reliance Ins. Co*., 274 N.W.2d 484 (Mich. 1978); *Franges*, supra. Credit

generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

PROCEDURE/FILING REQUIREMENTS: There doesn't appear to be a specific form necessary for documenting a future credit. However, Michigan's Form WC-107 ("*Notice of Dispute*") can be filed with the appropriate third-party information included. It can be found at http://www.michigan.gov/ documents/wca/wca_WC-107_fillin_223236_7.pdf.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

MINNESOTA

GENERALLY: In order to obtain its statutory credit after a third-party recovery by a worker, the carrier must cause a petition to be filed with the Workers' Compensation Division, setting forth details of the third-party settlement and other information regarding the carrier's subrogation interest. Minn. A.D.C. §1415.4000 (2006) (Office of Administrative Hearings – Workers' Compensation Litigation Procedures). Where there is no dispute about the facts or the calculation of the subrogation interest, credit or sum payable to the employee under M.S.A. § 176.061(5), the insurer and employee may submit a petition based on stipulated facts under M.S.A. § 176.322, to the Workers' Compensation Division for an order determining the carrier's subrogation interest and credit. *Id.* Instead of petitioning the Division for an order under subpart 1, parties may request an award from a judge by submitting a stipulated agreement under M.S.A. § 176.521, or by filing a petition under M.S.A. § 176.291 for a determination of a subrogation interest and credit. *Id.* Either a Petition for Third-Party Order is filed for approval of the Division and the proceeds will be distributed exactly according to formula contained in MN ADC 1415.4000, or a stipulation drafted by the parties can be filed where the parties agree to deviate from the formula.

Subpart 1. Determination of subrogation interest by division.

Where there is no dispute about the facts or the calculation of the subrogation interest, credit, or sum payable to the employee under Minnesota Statutes, § 176.061, subdivision 5, the insurer and employee may submit a petition based on stipulated facts under Minnesota Statutes, § 176.322, to the Workers' Compensation Division for an order determining subrogation interest and credit.

A. The petition must contain substantially the following:

(1) information identifying both the district court action if any and the workers' compensation claim involved;

(2) the total proceeds of the third-party settlement or award;

(3) the amount of legal fees and costs of the third-party claim;

(4) the subrogation interest of the employer itemized by type of benefits paid such as but not limited to:

(a) temporary total disability;

(b) temporary partial disability;

(c) permanent total disability;

(d) permanent partial disability; and

(e) medical expenses where Minnesota Statutes, § 176.061, subdivision 7, claim was not made;

(5) the name, address, and telephone number of the attorney for each party if any; and

(6) the signatures of all parties indicating agreement with the information in subitems (1) to (5).

B. The parties may also, but are not required to, submit a proposed calculation of the subrogation interest, including the future credit amount and the sum payable to the employee.

C. The petitioners must file one clean copy of the petitions and attachments, suitable for imaging. The petition must be served on the special compensation fund where it has a subrogation interest based on payments made pursuant to Minnesota Statutes, § 176.183, or a known potential interest under Minnesota Statutes 1990, § 176.131, or Minnesota Statutes 1994, § 176.132.

D. The division may refer a petition based on stipulated facts submitted under this subpart to the office for further proceedings where the parties disagree how the subrogation interest, credit, or sum payable to the parties should be calculated.

E. Except as provided in item D, after receipt of the petition, the division shall serve on the petitioners, and special compensation fund if appropriate, an order containing the following:

(1) the information upon which the subrogation order is based;

(2) the calculation of the subrogation interest, including the future credit amount and the sum payable to the employee;

(3) an explanation of the effect of the credit upon future benefit entitlement; and

(4) notice of the parties' right to appeal the order within 30 days of its service pursuant to Minnesota Statutes, § 176.322.

Subp. 2. Alternative petitions and orders.

Instead of petitioning the division for an order under subpart 1, parties may request an award from a judge by submitting a stipulated agreement under Minnesota Statutes, § 176.521, or by filing a petition under Minnesota Statutes, § 176.291, for a determination of subrogation interest and credit.

PROCEDURE/FILING REQUIREMENTS: The most likely form to file with the Minnesota Department of Labor and Industry in order to document a future credit would be Form ND-01 ("*Notice of Intention to Discontinue Workers' Compensation Benefits").* The form can be found at https://www.dli.mn.gov/sites/default/files/pdf/nd01.pdf. Use Minn. Stat. § 176.061 procedures; obtain compensation judge approval of calculations when disputed.

BURDEN OF PROVING CREDIT EXHAUSTION: Employee typically must prove compensable expenditures sufficient to exhaust the credit/moratorium.

MEDICAL EXPENSE RATE DURING CREDIT: Exhaustion measured by benefits payable under the Act; retail-rate issue not directly decided. *Snyder v. Yellow Freight Sys., Inc.*, 683 N.W.2d 788 (Minn. 2004).

MISSISSIPPI

GENERALLY: While there isn't a lot of Mississippi case law explaining or parsing the rights of a workers' compensation carrier to a future credit when the worker makes a successful third-party recovery, M.C.A. § 71-3-71 does tell us the following:

…any amount recovered by the injured employee or his dependents (or legal representative) from a third party shall be applied as follows: reasonable costs of collection as approved and allowed by the court in which such action is pending, or by the commission of this state in case of settlement without suit, shall be deducted; the remainder, or so much thereof as is necessary, shall be used to discharge the legal liability of the employer or insurer; and any excess shall belong to the injured employee or his dependents. M.C.A. § 71-3-7 (1990).

Any amounts received by the injured worker from a third-party settlement are therefore to be credited to the workers' compensation carrier for any future liability which it might have under the Workers' Compensation

Act for benefits. *Powe v. Jackson*, 109 So.2d 546 (Miss. 1959); see also Mississippi Workers' Compensation Commission Administrative Decision in *Rodney Motes, Claimant v. Epperson Trucking, Inc.,* 2008 WL 4177472 (01 07884-J-7911-E August 08, 2008). In the treatise on workers' compensation entitled Mississippi Workmen's Compensation (Third Edition)*,* Vardaman S. Dunn describes the procedure for the exoneration of the carrier, receipt of a credit and release of the third party as follows:

> *The common law tort may require that the proceeds of the third-party judgment be paid into the registry of the court and that the third party be discharged.*
>
> *If the future liability under the act is ascertainable, the court may proceed to ascertain and fix the liability to accrue in the future and thereupon adjust the division on that basis. Or the court may require an order of the Commission allowing discharge of the carrier under a lump sum settlement. In the absence of such an order in the court's discretion, the alternative procedure noted below, may be used.*
>
> *If the future liability of the carrier is not ascertainable at the time of the third-party recovery, the approved procedure is by an order of the court to the affect that net proceeds of such recovery remaining after payment of reasonable costs of collection and the reimbursement of the employer insured to that date, shall be paid over to the compensation beneficiary; whereupon, employer and insurer are authorized to spend payment for such compensation benefits as they may be liable under provision of the act until such suspended benefits, which the employer or the insured would have paid except for such suspension, equal the amount of the third-party recovery paid the compensation beneficiary, and that such suspended payments should be credited with the net proceeds received by claimant. The order should also provide that a copy of the order be certified to the Commission and that the case remains active on the records of the Commission for appropriate proceedings."* Dunn, Vardaman S., Mississippi Workmen's Compensation (Third Edition), at § 236 (1982).

PROCEDURE/FILING REQUIREMENTS: If settlement is reached before suit filed, then the Mississippi Workers' Compensation Commission must approve the terms of settlement, including both the subrogation lien and the credit. If suit is filed, then the settlement with all terms, including the subrogation lien and future credit information may be approved by the court where the action is filed. An effective means of documenting an employer's future credit with the Mississippi Workers' Compensation Commission would be Form B-18 ("*Notice of Suspension of Payment"),* which can be found at https://mwcc.ms.gov/pdf/b-18.pdf. Best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

MISSOURI

GENERALLY: Mo. Rev. Stat. § 287.150(3) provides the basis for a carrier's right to a statutory credit in Missouri. It provides in pertinent part:

> *…Any part of the recovery found to be due to the employer, the employee or his dependents shall be paid forthwith and any part of the recovery paid to the employee or his dependents under this section shall be treated by them as an advance payment by the employer on account of any future installments of compensation in the following manner:*
>
> *(1) The total amount paid to the employee or his dependents shall be treated as an advance payment if there is no finding of comparative fault on the part of the employee; or*

(2) A percentage of the amount paid to the employee or his dependents equal to the percentage of fault assessed to the third person from whom recovery is made shall be treated as an advance payment if there is a finding of comparative fault on the part of the employee. Mo. Rev. Stat. § 287.150 (1993).

The carrier is allowed to recover for any past benefits it has paid, and to treat anything recovered by the worker over and above the lien repayment as a statutory future credit for the carrier. *Kerperien v. Lumbermens Mut. Cas. Co.*, 100 S.W.3d 778 (Mo. 2003).

PROCEDURE/FILING REQUIREMENTS: Documenting a future credit could be effected by filing a Missouri Department of Labor and Industrial Relations, Division of Workers' Compensation Form WC-2-2 ("*Notice of Commencement/Termination of Compensation") a*t: https://labor.mo.gov/sites/labor/files/pubs_forms/WC-2-AI.pdf. Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

MONTANA

GENERALLY: In Montana, a workers' compensation insurer's right of subrogation and ability to claim a future credit against a claimant's third-party recovery is strictly limited by the Made Whole Doctrine: the insurer cannot enforce subrogation or take a future credit until the claimant has been fully compensated for all losses and recovery costs, including attorney fees. Recent case law and Workers' Compensation Court decisions confirm that this doctrine is constitutionally mandated, applies to both past and future benefits, and that subrogation or future credit is only available once the claimant is factually determined to be made whole.

Montana law provides that a workers' compensation insurer has a statutory right of subrogation against a claimant's third-party recovery, but this right is subordinate to the Made Whole Doctrine, which is rooted in the Montana Constitution's guarantee of full legal redress. The made whole doctrine requires that the claimant be fully compensated for all losses and recovery costs, including attorney fees, before the insurer may assert subrogation or take a future credit; this principle has been consistently reaffirmed by the Montana Workers' Compensation Court, which has also clarified the calculation and timing of when a claimant is considered made whole.

PROCEDURE/FILING REQUIREMENTS: As you might imagine, with little authority for a statutory credit, there are no prescribed forms or methods for documenting a credit.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

NEBRASKA

GENERALLY: Nebraska allows a workers' compensation carrier to take a credit for any recovery made by the injured worker in a third-party settlement or recovery. Neb. Rev. Stat. § 48-118 (2000). The carrier's workers' credit is to be calculated based on the compensation which would have been paid by the employer periodically (weekly) in absence of the third-party recovery. If future benefits are lump summed, then the credit would be predicated upon the lump sum or present value of the settlement. *Nekuda v. Waspi Trucking, Inc.*, 388 N.W.2d 438 (Neb. 1986). The credit is calculated by taking the gross recovery, subtracting the past lien being reimbursed to the carrier along with the claimant's attorney's fees and costs incurred in developing the third-

party case. *Linda Turner, Plaintiff, v. Metro Area Transit, Defendant,* 1984 WL 20524, DOC: 68, NO: 561 (Neb. Work Comp. Ct., July 11, 1984). Neb. Rev. Stat. § 48-118 provides as follows:

> *Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents and shall be treated as an advance payment by the employer on account of any future installments of compensation.* Neb. Rev. Stat. § 48-118 (2000).

PROCEDURE/FILING REQUIREMENTS: In order to claim its credit, the employer should set up a claimed credit in the court having jurisdiction to allocate third-party settlement proceeds. Generally, this will not be the Nebraska Workers' Compensation Court. Alternatively, an employer should give notice to the employee's attorney and also to the third-party tortfeasors of its intent to take a credit. As a practical matter, the amount of any credit would be negotiated with the employee as part of the third-party settlement. After receiving its credit, workers' compensation benefit payments are suspended until the amount of compensation owed to the employee exceeds the amount of the employee's net recovery from the third-party tortfeasor. *Id*. It appears that the authority for determining the amount of future benefits owed as affected by any future credit obtained as a result of a third-party recovery lies with the Nebraska Workers' Compensation Court. *Kevin Miller v. M. F. S. York/Stormor*, 1997 WL 662187 (Neb. Work Comp Ct. 1997).

A stipulation or agreement between the parties should be submitted to the Workers' Compensation Court for approval. It appears that no official form is required or even available to satisfy this obligation. Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

NEVADA

GENERALLY: Section 616C.215 was amended effective May 31, 2025 with Senate Bill 258, and the new statute completely restructured the way in which future credits are calculated and applied in Nevada. Section 616C.215, as amended by SB 258, governs credits. A future credit may be applied only against indemnity (wage-loss) benefits and not against "accident benefits" (medical). Each individual indemnity payment after a third-party recovery may be reduced by no more than one-third (1/3) of the amount otherwise owed; the carrier must still pay the remaining two-thirds. The carrier continues applying up to a one-third reduction per payment until the total of those reductions equals the worker's net amount recovered as defined in the statute. Medical benefits are now shielded from the credit and remain payable notwithstanding the third-party recovery. The statute also caps lien reimbursement to the lesser of the full lien or one-third (1/3) of the employee's net third-party recovery, and requires the carrier's recovery to be reduced by one-half of the worker's reasonable litigation costs (but not the worker's attorney's fees). These Senate Bill 258 changes apply only to actions in which no final judgment, settlement, or disposition existed as of May 31, 2025, its effective date.

PROCEDURE/FILING REQUIREMENTS: There is no indication in the amended § 616C.215 or Senate Bill 258 that a specific form must be filed with the Nevada Division of Industrial Relations or any other agency to apply or document a workers' compensation future credit. Instead, the carrier must provide written notice to the injured employee and the insurer regarding the credit. This includes notice to the employee along with a detailed account history showing the amounts paid as of the date of the settlement or recovery. An employee who disagrees with the insurer's determination can appeal the decision to an administrative body within the Division of Industrial Relations.

The statute continues to require that within fifteen (15) days after the employee actually receives a third-party recovery, both the worker and the third-party carrier must notify the workers' compensation carrier of the

amount recovered and provide an itemization of that recovery. This is the only filing or documentation obligation explicitly referenced in the amended statute. The carrier may then apply the statutory offset internally—reducing each *future indemnity payment* by no more than one-third—without filing a formal request or form with the Commission.

Practically, most Nevada carriers and administrators still memorialize the credit through internal documentation (often by filing an internal Notice of Third-Party Recovery or Credit Application Memorandum in the claim file), but SB 258 does not prescribe or require a standardized form. The process remains self-executing once the carrier is notified of the recovery and determines the amount of the allowable future credit. Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

NEW HAMPSHIRE

GENERALLY: The lien created by the New Hampshire workers' compensation statute allows an insurance carrier to include in that lien amount any amount that has been already paid, agreed or awarded to be paid in the future. N.H. Rev. Stat. Ann. § 281-A:13(I)(b) (2001). In particular, the statute says the carrier is entitled to recover *"to the extent of the compensation, medical, hospital, or other remedial care and funeral expenses already paid or agreed or awarded to be paid by the employer or the employer's insurance carrier.*" *Bilodeau v. Oliver Stores, Inc*., 352 A.2d 741 (N.H. 1976). The statute clearly provides that the total lien of an employer or employer's workers' compensation carrier does include a calculation for future benefits that will need to be paid. However, the New Hampshire Supreme Court has indicated that a carrier may take a holiday from future compensation payments so long as the net amount recovered in the claimant's liability action against the third party exceeds the sum of (1) compensation payments made, and (2) compensation payments avoided under the holiday. *Knapp v. Tennessee Gas Pipeline Co*., 829 A.2d 1052 (N.H. 2003); *Gelinas v. Sterling Indus. Corp*., 648 A.2d 465 (N.H. 1994); *Harper v. Water Pik Technologies, Inc*., 2002 WL 1729672 (D. N.H. 2002).

PROCEDURE/FILING REQUIREMENTS: The New Hampshire Workers' Compensation Administrative Rules provide as follows with regard to documentation of a future credit:

> *(a) Except for cases resolved in the courts, employees, employers and/or carriers shall, upon recovering damages from a third person under RSA 281-A:13, prepare in full and file for the commissioner's approval a "Release and Settlement of Claim", form WC-3PR-1.*
>
> *(b) The reverse side of the form shall show the full amount of settlement from which there shall be deducted the total amount of attorney expenses and costs of action and the amount of employer/carrier's lien.*
>
> *(c) The computation shall show the employer/carrier's pro-rata share of expenses and costs of action, the employee's pro-rata share of expenses and costs of action, the employer/carrier's net lien, and the net amount of the settlement.*
>
> *(d) The form shall be completed in full and it shall not be required to be notarized unless required by the third party or its insurance carrier.*
>
> *(e) The commissioner shall review the completed form to assure that the figures are correct and that the lien or compromised lien of the carrier/employer is satisfied. The commissioner shall approve the third-party lien.* N.H. Code Admin. R. Lab 511.03 (2007).

Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

NEW JERSEY

GENERALLY: N.J.S.A. § 34:15-40 provides that if the plaintiff recovers a sum greater than that of the future liability of the workers' compensation carrier, the carrier is released from such future liability. It is entitled to reimbursement for past benefits paid less attorneys' fees and expenses of suit. N.J.S.A. § 34:15-40(b) (2000). If, however, the sum recovered by the injured worker is less than the future liability of the workers' compensation carrier for benefits to be paid in the future, the carrier is still liable to the worker for the difference, together with attorneys' fees and expenses of suit. N.J.S.A. § 34:15-40(c) (2000). The carrier is then entitled to reimbursement for any excess over the difference between the workers' compensation carrier's future liability and the recovery, plus attorneys' fees and expenses of suit. *Id*.

However, the workers' compensation carrier is not entitled to a set-off or credit against dependency benefits where the amount of a third-party award to an injured worker is to an injured worker who later dies of the disease he contracted during his employment. *Roberts v. All-Am. Eng'g Co*., 239 A.2d 284 (N.J. Co. Ct. 1968), *aff'd* 248 A.2d 280, *cert. denied*, 250 A.2d 753. There do not appear to be any specific forms necessary to effect a future credit in New Jersey.

PROCEDURE/FILING REQUIREMENTS: There do not appear to be any specific forms necessary to effect a future credit in New Jersey. Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

NEW MEXICO

GENERALLY: A workers' compensation carrier is entitled not only to reimbursement for past benefits, but also to a credit against liability for future compensation and related benefits. *Montoya v. AKAL Sec., Inc*., 838 P.2d 971 (N.M. 1992). Case law has held that the workers' compensation carrier's proportionate share of litigation costs and attorneys' fees are to include not only past benefits but also the employer's relief from future benefits, once they are reduced to present value. *Trujillo v. Sonic Drive-In-Merrit*, 924 P.2d 1371 (N.M. App. 1966). While this credit or off-set of the carrier is not directly set forth in the workers' compensation subrogation statute, it has been granted by case law. *Chavez v. S.E.D. Labs*, 14 P.3d 532 (N.M. 2000).

PROCEDURE/FILING REQUIREMENTS: There do not appear to be any specific forms or procedures required for documenting a carrier's right to a future credit. Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

NEW YORK

GENERALLY: A workers' compensation insurance carrier is entitled to an off-set of the claimant's net recovery against future workers' compensation benefits. *Shutter v. Phillips Display Components Co*., 652 N.Y.S.2d 427 (N.Y.A.D. 1997), *leave to appeal granted*, 659 N.Y.S.2d, *rev'd*, 665 N.Y.S.2d 379. In other words, a workers' compensation carrier may off-set amounts which a worker receives against future payments of workers' compensation benefits. *Simmons v. St. Lawrence Cty. CDP, Inc*., 543 N.Y.S.2d 185 (N.Y.A.D. 1989); Minkowitz, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 64, Workers' Compensation Law § 29, at 199-200). It is probably important that a carrier reserve its right to take a future credit whenever it consents to a settlement. *Arena v. Crown Asphalt Co., Inc*., 840 N.Y.S.2d 472 (N.Y.A.D. 3 Dept. 2002). In other words, if a carrier fails to state its desire to preserve its rights to an off-set, so as to afford the claimant an opportunity to examine a proposed settlement from a proper perspective, the carrier's future right to off-set the claimant's future compensation benefits against the net proceeds of his third-party personal injury settlement might be waived. *Hilton v. Truss Sys., Inc*., 444 N.Y.S.2d 229 (N.Y. A.D. 1981), *aff'd*, 438 N.E.2d 1143, *reargument denied*, 440 N.E.2d 1343.

Nonetheless, the general rule is that following a settlement or other disposition in which a recovery is made by the worker, a carrier will not be liable for compensation or medical expenses until the proceeds of the settlement are exhausted and a deficiency exists. Situations where the employee's recovery is less than the statutory entitlement to compensation are known as "deficiency cases." When an employee brings a third-party action and recovers an amount *less* than his statutory entitlement to compensation, the carrier must award compensation for the deficiency "between the amount of the recovery...actually collected, and the compensation provided or estimated by this chapter". *Kelly v. State Ins. Fund*, 468 N.Y.S.2d 850 (N.Y. A.D. 1983). The New York Department of Labor's Administrative Code § 391.2, provides some explanation as to how to calculate future obligations in deficiency cases:

> ***§ 391.2 Deficiency compensation.*** *(a) In any disability case involving a recovery by a claimant from a third party under section 29 of the Workers' Compensation Law, the date on which deficiency compensation shall begin shall be the date to which the amount of recovery would extend, in schedule cases from the date of accident and in nonscheduled cases from the beginning date of disability, when such recovery is divided by the actual compensation rate.*
>
> *(b) In any death case involving a recovery by a claimant from a third party under section 29 of the Workers' Compensation Law, the date on which deficiency compensation shall begin shall be the date to which the amount of the recovery less funeral benefits not to exceed $200, would extend from the date of death when such recovery is divided by the actual compensation rate.* 12 N.Y. A.D.C. § 391.2 (2006).

In practice, this means that in a deficiency case the amount "actually collected" by the employee is the recovery proceeds remaining after a deduction for litigation costs. *Matter of Curtin v. City of New York*, 287 N.Y. 338 (N.Y. 1942). In such a situation, the carrier assumes the *entire* costs of obtaining the recovery, as its responsibility to make payments is reduced only by the amount "actually collected" by the worker. *Kelly v. State Ins. Fund*, 468 N.Y.S.2d 850 (N.Y. A.D. 1983)*; Owens v. Town of Huntington*, 125 Misc.2d 574 (N.Y. Sup. Ct. 1984). New York's Administrative Code § 300.21 also describe certain deductions that are allowable in determining the amount of the credit:

> *The net proceeds received by claimant from a third-party action, less reasonable medical or funeral expenses paid or incurred by him, shall be credited to the carrier in determining whether deficiency compensation is due.* 12 N.Y. A.D.C. § 300.21 (2006).

If the proceeds of a third-party recovery are exhausted, "the compensation carrier must award compensation for the deficiency 'between the amount of the recovery ... actually collected, and the compensation provided or estimated'" under the statute, with the amount "actually collected" defined as "recovery proceeds

remaining after deduction for litigation costs". *Burns v. Varriale,* 820 N.Y.S.2d 655 (N.Y.A.D. 2006); *Kelly,* supra (*quoting* Workers' Compensation Law § 29[4]; see *Matter of Curtin v. City of New York,* 39 N.E.2d 903 (N.Y. 1942).

A word of caution is in order with regard to credits and settlement of third-party actions in New York. The New York Court of Appeals has held that unless a carrier also expressly and unambiguously preserves its right to a credit or off-set in connection with settlement of any third-party action, it will be waived. *Brisson v. Cty. of Onondaga*, 844 N.E.2d 766 (N.Y. App. 2006). Ambiguities will be construed against the carrier. *Id*.

PROCEDURE/FILING REQUIREMENTS: There do not appear to be any specific forms necessary to effect a future credit in New York Credit generally arises by statute; best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: The employee generally bears burden to show exhaustion of carrier's offset/holiday before benefits resume under WCL § 29.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during credit.

NORTH CAROLINA

GENERALLY: There is no classic credit, as in many states, because the carrier is reimbursed for all benefits paid or to be paid in the future. N.C.G.S.A. § 97-10.2 gives the trial court a great amount of discretion in determining the allocation of costs and expenses, as well as the third-party recovery to be split between the carrier and the plaintiff. The trial court has discretion to eliminate entirely a carrier's workers' compensation lien when the settlement amount exceeds the lien amount. *U.S. Fidelity & Guaranty Co*., 495 S.E.2d 388 (N.C. App. 1998). The Superior Court judge has authority to set the workers' compensation lien amount when the judgment received by the injured employee is insufficient to compensate the workers' compensation carrier. *Hieb v. Lowery*, 474 S.E.2d 323 (N.C. 1996). In addition, the mandatory nature of the carrier's lien on the recovery from the third party is not altered by the discretionary authority of the trial judge to apportion the recovery between the employee and the carrier, if that recovery is inadequate to satisfy the carrier's lien. *Manning v. Fletcher*, 402 S.E.2d 648 (N.C. App. 1991).

Under North Carolina law, unless a settlement is entered into between the plaintiff and defendant and a request for disbursement is made under § 97-10.2(j), workers' compensation carriers are entitled to the full reimbursement of its lien prior to any disbursement of the proceeds to the plaintiff individually. The only exception to this is that if the employer is found to be contributorily negligent and the employee is not found to be negligent. In that case, the workers' compensation carrier will receive nothing and the employee will receive 100% of the recovery. In the event that settlement is entered into between the plaintiff and the defendant, and a request is made for disbursement under § 97-10.2(j), a judge may make the disbursement in the discretion of the court and absent an abuse of discretion, the court is entitled to award all, none or any percentage of the compensation lien – and presumably the credit as well - to the workers' compensation carrier. Section 97-10.2(j) provides as follows in that regard:

> *(j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely*

to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division. N.C.G.S.A. § 97-10.2.

PROCEDURE/FILING REQUIREMENTS: North Carolina's Administrative Code specifically allows for, but does not appear to require the use of the following forms with regard to settlement of third-party actions and distribution of their proceeds:

Form I--Order for Third-Party Recovery Distribution per N.C.G.S. 97-10.2;

Form IIa--Order Approving Compromise Settlement Agreement (admitted liability, medical paid) and Third-Party Distribution;

Form IIb--Order Approving Compromise Settlement Agreement (denied liability, unpaid medical) and Third-Party Distribution;

Form IIIa--Order for Approving Compromise Settlement Agreements (admitted liability, medical paid); and

Form IIIb--Order for Approving Compromise Settlement Agreements (denied liability, unpaid medical). N.C. Admin. Code tit. 4, r. 10A.0103. Copies of rules, forms and Industrial Commission Minutes can be obtained by contacting the Administrator's Office of the Industrial Commission, 4319 Mail Service Center, Raleigh, NC 27699-4319.

It appears the Industrial Commission has jurisdiction to award or consider an off-set or future credit only when the third-party settlement occurs after an award by the Industrial Commission. *Jessie Bill Childress, Employee v. Fluor Daniel, Inc., Employer*, 2002 WL 31051439 (N.C. Ind. Com. 2002). Plaintiffs' lawyers are expected to file a Form I *Order for Third-Party Recovery Distribution* with the Commission per, N.C.G.S. 97-10.2, or an order similar to it, when they make a third-party recovery, which must be accompanied by documentation of the carrier's lien, any reduction of that lien, and amounts that are to be distributed out of the third-party settlement.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

NORTH DAKOTA

GENERALLY: North Dakota is one of four remaining monopolistic states in the country (the others are Ohio, Washington and Wyoming). In North Dakota, a state organization known as North Dakota Workers' Compensation (WSI) (also referred to as North Dakota Workman's Compensation Bureau) manages and regulates an exclusive employer-financed, no-fault insurance system covering workplace injuries, illnesses and death. WSI is the sole provider and administrator of the workers' compensation system in North Dakota.

The Organization is entitled to suspend payment of benefits in the future when a third-party recovery is in excess of the amounts reimbursed to the Organization for past benefits paid. *Blaskowski v. N.D. Work. Comp. Bureau*, 380 N.W.2d 333 (N.D. 1986). This suspension of benefits or credit is applicable until the future benefits equal or exceed the amount of net benefits suspended by the Organization. *Id*. The purpose of the Organization's subrogation rights is to reimburse the Organization to the extent possible at the expense of the third-party tortfeasor. *Gernand v. Ost Serv., Inc*., 298 N.W.2d 500 (N.D. 1980). The legislative changes made to § 65-01-09 in 1981 were to clarify the language that allows the Organization to suspend future benefits. *Blaskowski,* supra*.* While the language of the statute regarding its credit and advance is not clear, case law has clearly held the Organization has the right to do so. Additionally, the 2005 amendments have now set forth a statutory lien which is created upon first payment of benefits and extends up to the full amounts paid.

PROCEDURE/FILING REQUIREMENTS: There do not appear to be any specific forms necessary to effect a future credit in North Dakota. Credit generally arises by statute. If you are a private carrier subrogating in North Dakota, the best practice is to memorialize in the third-party settlement agreement, secure carrier consent/approval if required, and file any mandated notice/petition with the board/commission/court.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

OHIO

GENERALLY: After its entire workers' compensation subrogation statute was struck down as unconstitutional in 2001, Ohio enacted a new statute, which provides a peculiar and unique approach to dealing with the carrier's statutory credit or advance upon recovery in a third-party action. In revising the statute, the Ohio legislature has come up with a mechanism which is unique to all 50 states. In Ohio, the concept of "future credit" in workers' compensation subrogation is handled through a unique statutory mechanism.

When a claimant recovers from a third party, the workers' compensation carrier's subrogation interest includes not only past and present payments but also "estimated future payments" of compensation, medical benefits, rehabilitation costs, or death benefits. Rather than the carrier receiving an immediate credit or being relieved from paying future benefits up to the amount recovered, Ohio law allows—but does not require—the claimant to place the estimated future payments portion into an interest-bearing trust account, from which reimbursements to the carrier are made as future benefits accrue. If no trust account is established, the claimant must pay the full amount of the estimated future payments to the carrier within 30 days of receiving the third-party funds.

PROCEDURE/FILING REQUIREMENTS: The new statute provides that, once the "net amount recovered" is known and the means for dividing it have been determined under the statute, a claimant is given the option of establishing an interest-bearing trust account in the full amount of the subrogation interest which represents the estimated future payments of compensation, medical benefits, rehabilitation costs or death benefits reduced to present value, which the carrier owes in the future. From this trust account, the worker can make reimbursement payments to the carrier for the future payment of compensation, medical benefits, rehabilitation costs or death benefits if, as, and when they would accrue. Ohio Rev. Code Ann. § 4123.931(E)(1). A worker is entitled to use the interest that accrues on the trust account to pay the expenses of establishing and maintaining the trust account, and all other interest will be credited to the trust account. The trust option affords the claimant an opportunity to avoid the consequences of overestimating future benefit values. The claimant who invokes the trust option is no longer required to reimburse the subrogee up front for estimated future payments that may never materialize. Whereas the former statute allowed the subrogee to retain any overpayment, the current trust option ensures the return to the claimant of all funds remaining after the "final reimbursement" of the subrogee. *Groch v. General Motors Corp*., 2008 WL 482845 (Ohio 2008).

The workers' compensation carrier is required to provide payment notices to the worker on or before the 30th day of June and the 31st day of December of every year, listing the total amount that the carrier has paid in benefits during the half of the year preceding the notice. The worker shall then make reimbursement payments to the carrier from the trust account on or before the 31st day of July every year for notice provided by the 30th day of June, or on or before the 31st day of January every year, for a notice provided by the 31st day of December. The workers' reimbursement payment must be in an amount that equals the total amount listed on the notice the claimant received from the statutory subrogee. Ohio Rev. Code Ann. § 4123.931(E)(3).

The Ohio statute does not make provisions for calculating or reducing an employer's experience modifier given the new future payment reimbursement scheme.

If the workers' compensation claim is settled, or if the claimant dies, or if any other circumstance occurred that would preclude any future payments of benefits, any amount remaining in the trust account after final reimbursement is made to the carrier for all payments made by the carrier before the ending of the future payments shall be paid to the worker or to the workers' estate. Ohio Rev. Code Ann. § 4123.931(E)(1).

If the worker does not establish a trust account as described in Ohio Rev. Code Ann. § 4123.931(E)(1), the worker shall pay the carrier, on or before 30 days after receipt of funds from the third party, the full amount of the subrogation interest representing estimated future payments of compensation, medical benefits, rehabilitation costs or death benefits. The statute does not indicate whether this payment is reduced to present value or not.

BURDEN OF PROVING CREDIT EXHAUSTION: Ohio's statutory scheme does not create a traditional "credit" that the carrier must track and exhaust before resuming payments. Instead, if a trust account is established, the claimant is reimbursing the carrier as benefits are paid, so the "exhaustion" is self-executing—the trust account is drawn down as reimbursements are made. If the full estimated amount is paid to the carrier up front (no trust), the statute does not specify a mechanism for recalculating or refunding if future benefits paid are less than the estimate, but trust accounts are designed to prevent overpayment and allow the claimant to recover any excess after all obligations are satisfied.

MEDICAL EXPENSE RATE DURING CREDIT: If a trust account is established, the statute provides that the claimant may use any interest accrued to pay for the costs of establishing and maintaining the trust, with all remaining interest credited to the account. There is no statutory adjustment to the rate of reimbursement for medical expenses paid from the trust; reimbursements are made in the actual amounts paid by the carrier during each period, as notified to the claimant. If no trust is established and the estimated future payments are paid in a lump sum, the statute is silent on the rate but requires that the estimated amount be reduced to present value.

OKLAHOMA

Oklahoma has two distinct legal tracks for handling future credits in workers' compensation subrogation due to significant legislative reforms that took effect on February 1, 2014. For injuries and deaths occurring before this date, the "old law" (primarily Title 85, § 348) governs, while injuries and deaths on or after February 1, 2014, are subject to the "new law" (Title 85A, § 43). The 2013 overhaul of Oklahoma's workers' compensation system created two separate systems, each with its own procedures and rules for subrogation and future credits, depending on the date of injury. This dual-track approach is necessary because the statutory framework, benefit allocation, and subrogation rights differ significantly between the two regimes, and courts have confirmed that the new law does not retroactively apply to injuries that occurred under the old system.

Category	Old Law (Injuries/Deaths Before Feb. 1, 2014)	New Law (Injuries/Deaths On or After Feb. 1, 2014)	
GENERALLY	Under the old law, if an injured worker or beneficiary recovered from a third party, the workers' compensation carrier was entitled to a future credit (also called an advance) against any future benefits owed. The carrier's obligation to pay further benefits was suspended until the net third-party recovery (after attorney's fees and costs) was exhausted. This is known as the "Deficiency Rule"—the carrier only resumed payments if the net recovery was less than the total compensation owed, and then only for the	The new law (Title 85A, § 43) does not expressly provide for a future credit. The statute instead sets out a formula for apportioning third-party recoveries between the carrier and the employee. While the statute is silent on future credits, the Oklahoma Workers' Compensation Commission has interpreted the law as still incorporating the "Deficiency Rule": the carrier is relieved from	

Category	Old Law (Injuries/Deaths Before Feb. 1, 2014)	New Law (Injuries/Deaths On or After Feb. 1, 2014)	
	deficiency. he deficiency.	paying future benefits until the worker can show a deficiency between the net third-party recovery and the compensation owed. However, the carrier's credit is limited to two-thirds of the recovery or the amount of the lien, whichever is less. However, the carrier's credit is limited to two-thirds of the recovery or the amount of the lien, whichever is less.	
PROCEDURE/FILING REQUIREMENTS	The carrier's right to a future credit arose automatically upon a third-party recovery. The statute required the carrier to be granted a credit equal to the net recovery. There were no special filing requirements, but the carrier could petition the Workers' Compensation Court to enforce the credit. The employee was required to notify the court, employer, and carrier of any third-party action or settlement.	The new statute does not set out a formal procedure for asserting a credit. However, the Commission has allowed carriers to petition for a credit based on the net recovery, subject to the statutory formula. The process is similar to the old law, but the carrier's credit is capped as described above. The employee must still provide notice of any third-party action. as allowed carriers to petition for a credit based on the net recovery, subject to the statutory formula. The process is similar to the old law, but the carrier's credit is capped as described above. The employee must still provide notice of any third-party action.	
BURDEN OF PROVING CREDIT EXHAUSTION	The burden was on the employee to demonstrate that their net third-party recovery had been exhausted (i.e., that a deficiency existed) before the carrier's obligation to pay further benefits resumed.	Under the new law, the same principle applies: the employee must show that the net recovery has been exhausted, and only then can the carrier be required to resume benefit payments. The carrier's credit is limited to two-thirds of the recovery or the lien amount, whichever is less.	)
MEDICAL EXPENSE RATE DURING CREDIT	During the credit period, the carrier was relieved from paying any benefits (including medical expenses) until the net third-party recovery was exhausted. There was no statutory requirement to pay at a different or	The new law is silent on the rate or method of payment for medical expenses during the credit period. The carrier's obligation to pay resumes only after the net recovery	

Category	Old Law (Injuries/Deaths Before Feb. 1, 2014)	New Law (Injuries/Deaths On or After Feb. 1, 2014)	
	reduced rate during the credit period.	is exhausted, with the credit limited as above.	

OREGON

GENERALLY: In Oregon, a traditional credit for relief of future benefits based on a recovery made by the worker in a third-party action is not available. In general, payment of benefits continues even after such a recovery. Rather than a traditional credit, the carrier actually recovers the present value of benefits it is reasonably expected to pay in the future, in addition to its past lien. O.R.S. § 656.593(1)(c). An amount of money in addition to reimbursement of the carrier's past lien is literally paid to the carrier as "a reserve for expected future expenditures", an amount which is then reduced to present value. *Denton v. EBI Companies*, 679 P.2d 301 (Or. App 1984). In such situations, where the carrier has received compensation for "future benefits" pursuant to the third-party recovery statutes, the carrier literally ends up returning portions of this recovered money over the duration of the benefit period. However, O.R.S. § 656.596 provides for an off-set when a worker settles a third-party action before making a claim for compensation benefits:

> ***§ 656.596. Damage recovery, offsets against compensation; notice to paying agent.*** *(1) If no workers' compensation claim has been filed or accepted at the time a worker or the beneficiaries of a worker recover damages from a third person or non-complying employer pursuant to O.R.S. § 656.576 to § 656.596, the amount of the damages shall constitute an offset against compensation due the worker or beneficiaries of the worker for the injuries for which the recovery is made to the extent of any lien that would have been authorized by O.R.S. § 656.576 to § 656.596 if a workers' compensation claim had been filed and accepted at the time of recovery of damages.*
>
> *(2) The offset created by subsection (1) of this section shall be recoverable from compensation payable to the worker, the worker's beneficiaries and the worker's attorney. No compensation payments shall be made to the worker, the worker's beneficiaries or the worker's attorney until the offset has been fully recovered.*
>
> *(3) The worker or the beneficiaries of the worker shall notify the paying agency or potential paying agency of the amount of any damages recovered from a third person or non-complying employer at the time of recovery or when the worker or the beneficiaries of a worker file a workers' compensation claim that is subject to O.R.S. § 656.576 to § 656.596.*

In such a case, the carrier is not required to pay compensation from the date of the injury to the date of the claim. Compensation paid after the filing of the claim is treated like an overpayment on the claim and may be recovered only to the extent that payments for permanent disability were made. The off-set recovery may not exceed the value that the carrier would have been entitled to under a third-party lien. Also, under these provisions, the worker must notify the carrier of the amount of any damages recovered at the time of the recovery or when the workers' compensation claim is filed.

PROCEDURE/FILING REQUIREMENTS: The most important "procedure" is not a particular state form but the preservation and documentation of the credit through settlement documentation and a defensible accounting. Best practice, and in some jurisdictions a functional necessity, is to obtain the carrier's written approval of any settlement, ensure that the settlement agreement and distribution sheet clearly reflect the gross recovery, attorney fees and costs, lien reimbursement, and the resulting net credit amount, and to provide notice to the workers' compensation board/commission where required. Some states make carrier approval jurisdictional, rendering an unapproved settlement void or impairing subrogation rights; Oregon is explicit that a compromise is void without the paying agency's written approval or a Board order.

Oregon is a state in which the "credit" is preserved through the statutory distribution process itself. The paying agency is entitled to retain a portion of the third-party proceeds not only for its past expenditures but also for "the present value of its reasonably to be expected future expenditures," with disputes resolved by the Workers' Compensation Board.

BURDEN OF PROVING CREDIT EXHAUSTION: Oregon requires the paying agency to establish "to a reasonable certainty" its claim for anticipated future expenditures in order to retain those amounts from the third-party recovery.

MEDICAL EXPENSE RATE DURING CREDIT: Oregon has a statutory framework prohibiting balance billing or limiting provider charges for compensable treatment, that structure can effectively answer the question even without a case expressly discussing a "credit period," because it prevents providers from collecting more than the statutory allowed amount from any source, including the employee. Under the Oregon Workers' Compensation Act, medical providers who treat compensable work injuries are required to accept the amounts paid under the workers' compensation fee schedules as payment in full and may not bill the worker for the difference between their billed charges and the amounts allowed or paid. ORS § 656.248(1) provides that workers' compensation is the exclusive source of payment for compensable medical services, and ORS § 656.245(1)(a) obligates the employer or insurer to provide medical services "for conditions caused in material part by the injury," subject to the Director's medical fee schedules adopted under ORS § 656.248 and OAR chapter 436. Consistent with that framework, Oregon administrative rules prohibit providers from collecting additional amounts from injured workers for compensable treatment beyond what is allowed under the workers' compensation system. See, e.g., OAR 436-009-0010 and OAR 436-009-0020.

As a practical matter, this means that when medical treatment is compensable under Oregon workers' compensation law, the provider's right to payment is limited to the workers' compensation fee schedule, and the injured worker is not legally responsible for any "balance" above that amount. That prohibition applies regardless of whether the insurer is actively paying benefits in the ordinary course or has already been reimbursed or funded for future medical exposure through the third-party recovery allocation process under ORS § 656.593.

PENNSYLVANIA

GENERALLY: The workers' compensation subrogation statute in Pennsylvania governs the right of the carrier to a future credit. The right to lien reimbursement and a future credit following a third-party recovery is grounded in Section 319 of the Workers' Compensation Act, 77 P.S. § 671, which provides the employer/insurer with subrogation "to the extent of the compensation payable" and requires prorating "reasonable attorney's fees and other proper disbursements" incurred in obtaining the recovery. 77 P.S. § 671. What makes Pennsylvania unusually "procedural" compared to many states is that the Bureau of Workers' Compensation has promulgated a specific regulation requiring that a prescribed form be used to document the settlement distribution and the carrier's future credit. Form LIBC-380 is not merely a "helpful form," but a regulatory prerequisite designed to formalize both the reimbursement/lien and the future credit calculation in a standardized way. The statute reads as follows:

> *Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employee, his personal representative, his estate or his dependants, against such third party to the extent of the compensation payable under this article by the employer: ...any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employee, his personal representative, his estate or his dependants, and shall be treated as an advanced payment by the employer on account of any future installments (sic) of compensation.* 77 P.S. § 671 (2001).

When an employee receives a third-party recovery, the carrier is entitled to a credit toward future benefits owed to the employee. Two considerations determine the amount of credit the employer is to receive:

(1) The employer's share of attorneys' fees and costs incurred in obtaining the third-party settlement must be determined, and
(2) Based on the employee's net recovery in the third-party action, payment of accrued compensation and, if sufficient funds, grace period or credit from paying weekly compensation which the employer is entitled must be determined. *Stalmaster v. W.C.A.B. (Septa),* 679 A.2d 293 (Pa. Commw. Ct. 1996), *appeal denied,* 690 A.2d 238.

Any recovery against a third party in excess of the compensation benefits paid by the carrier in the past will be paid directly to the employee and shall be treated as an advance payment by the employer/carrier toward any future installments of compensation owed. 77 P.S. § 671 (2001); *Lane v. UNUM Life Ins. Co. of Am.*, 293 F. Supp.2d 477 (M.D. Pa. 2003). The third-party recovery which constitutes the advance actually belongs to the carrier, but is figuratively being paid to the plaintiff as a "lump sum payment" of benefits owing in the future. *Id.* The carrier has an absolute right to immediate payment of the past due lien through a total suspension of compensation benefits until the lien is satisfied. *Monessen, Inc. v. W.C.A.B. (Fleming),* 2005 WL 1252552 (Pa. Commw. Ct. 2005).

Some case law indicates that a carrier's recovery should be calculated using the "gross method" as opposed to the "net method" of calculating its lien. *Darr Constr. Co. v. W.C.A.B. (Walker),* 715 A.2d 1075 (Pa. 1998). Other cases show preference for the "net method". *Dasconio v. W.C.A.B. (Aeronca, Inc.),* 559 A.2d 92 (Pa. Commw. Ct. 1989). Under the "net method", all legal costs associated with the recovery, as well as the accrued lien, are deducted from the total recovery for purposes of determining the amount available as future credit for the employer. In Pennsylvania, there appears to be a division of opinion in case law as to whether the net or gross method of calculation should be used to determine a carrier's subrogation rights. Therefore, according to some cases, the workers' compensation appeal board does not commit error when it uses one method rather than the other. *Kochie v. W.C.A.B. (F.D.I.B.),* 699 A.2d 784 (Pa. Commw. Ct. 1997), *reargument denied, appeal granted, vacated,* 707 A.2d 224.

PROCEDURE/FILING REQUIREMENTS: Unlike many other states, Pennsylvania provides detailed regulations and board decisions governing how a carrier obtains, calculates, and documents a future credit. It requires that a special form be filled out whenever there is a third-party recovery. Section 121.18 of the Bureau Regulations provides:

(a) If an employee obtains a third-party recovery under section 319 of the act (77 P. S. § 671), a Third Party Settlement Agreement, Form LIBC-380, shall be executed by the parties.

(b) If credit is requested against future compensation payable, a Supplemental Agreement for Compensation for Disability or Permanent Injury, Form LIBC-337, may also be filed with the Bureau, including the amount and periodic method of pro rata reimbursement of attorney fees and expenses.

The LIBC-380 form itself is drafted as a "Third Party Settlement Agreement" and includes detailed calculation fields that capture the gross third-party recovery, litigation costs, attorney fees, the employer/insurer's accrued lien, the employer/insurer's share of costs, the net lien reimbursement, and the claimant's "balance of recovery" which becomes the future credit. The form can be found HERE. Because Pennsylvania's statutory framework treats the employee's net third-party recovery (after appropriate offsets and proration) as the fund to which the employer's future obligation can attach, the value of the credit is only as defensible as the accuracy of that accounting. This is why Pennsylvania's regulation requires execution of the form "by the parties thereon," rather than allowing an insurer to simply assert an internal credit without employee buy-in or Bureau documentation. 34 Pa. Code § 121.18(a).

Pennsylvania also provides a formal state process for reporting the settlement and submitting the LIBC-380 through the Department of Labor & Industry. It allows you to report a Third-Party Settlement online HERE. While the statute itself does not require "approval" of every third-party settlement in the same sense as some jurisdictions, Pennsylvania's administrative framework is clearly aimed at ensuring that settlements affecting Section 319 rights are documented in a standardized, auditable manner. This matters for subrogation practice

because it reduces later disputes over the amount of the credit and creates an administrative record reflecting the distribution and the existence of the credit at the time the third-party case resolves.

Case decisions have confirmed that the LIBC-380 is the mechanism the parties use to memorialize Section 319 distributions and future credit, and that it is tied directly to the Bureau's regulation. In Jeck v. Workers' Compensation Appeal Board, the Commonwealth Court discussed the execution of the Third-Party Settlement Agreement and noted that, "[p]ursuant to Section 121.18(a) of the Department's Regulations, the parties utilized a Department form, LIBC-380, to memorialize the terms of the TPSA" and to calculate distribution in accordance with Section 319. *Jeck v. Workers' Comp. Appeal Bd*., 256 A.3d 506 (Pa. Commw. Ct. 2021).

BURDEN OF PROVING CREDIT EXHAUSTION: Pennsylvania does not have a clean, oft-quoted appellate holding that reads, in so many words, "the claimant bears the burden of proving exhaustion of the third-party credit in order to restart indemnity," at least not in the way some other jurisdictions do. The more accurate way to support that conclusion in Pennsylvania is to point to (1) the statutory structure of Section 319, (2) the Bureau's regulation and the LIBC-380 mechanism, and (3) the way Pennsylvania litigates credit disputes procedurally, which places the party seeking a change in benefit status in the posture of a petitioner who must prove entitlement to relief.

First, Section 319 expressly treats the employee's "balance of recovery" (the amount remaining after satisfaction of the accrued lien and proration of fees/costs) as "an advance payment by the employer on account of future installments of compensation." 77 P.S. § 671. That "advance payment" concept is the statutory foundation for the indemnity credit. The carrier is permitted to treat the employee's net recovery as a substitute fund for future compensation. Once that occurs, the carrier's obligation to pay future indemnity does not reattach until the "advance" is exhausted. Because exhaustion is a factual accounting issue tied to what portion of the net recovery has been consumed by creditable compensation, the only practical way to trigger resumption of wage-loss benefits is for the party seeking reinstatement to affirmatively establish exhaustion.

Second, Pennsylvania's own appellate decisions describe third-party credit disputes as matters raised through petitions that must be proven by the petitioning party. The Commonwealth Court's discussion of Section 413(a) review petitions in third-party settlement agreement cases is illustrative. In the Pennsylvania Commonwealth Court decision at 420 C.D. 2020 (May 14, 2021), the court explains that a workers' compensation judge may "review and modify or set aside" an agreement "upon petition filed by either party… if it be proved that such… agreement was in any material respect incorrect." 77 P.S. § 771. Where the employee seeks to challenge the credit, modify the agreement, or establish that the credit has been exhausted so that benefits must resume, the claimant necessarily proceeds by petition and must prove the facts supporting the requested relief. The same is true when the employer seeks to enforce or expand a credit: the party asking the WCJ to act bears the burden of proof on the petition.

MEDICAL EXPENSE RATE DURING CREDIT: Pennsylvania has a well-developed medical cost containment regime, including a workers' compensation medical fee schedule and regulations governing the amount a provider may charge for treatment rendered for a compensable work injury. See 77 P.S. § 531(3)(i) (authorizing the Department to establish medical fee caps); 34 Pa. Code § 127.102 et seq. (Medical Cost Containment Regulations). However, despite the breadth of that framework, there is no reported Pennsylvania appellate decision or published Bureau authority squarely addressing whether, during a Section 319 future credit "vacation" period, a medical provider may charge the injured employee the full retail (billed) amount of treatment, or whether charges remain limited to the workers' compensation fee schedule amounts the carrier would have paid had it been actively paying benefits. Accordingly, while the fee schedule and cost containment regulations strongly suggest that compensable treatment remains subject to workers' compensation pricing regardless of temporary suspension of payments due to credit, the specific question of whether the employee can be billed at retail during the credit period remains largely undeveloped in reported decisions. In practice, the carrier's best protection is to document in the LIBC-380 and in settlement correspondence that all future "creditable" medical expenditures should be valued at the statutory workers' compensation allowable amounts, not full billed charges, because the credit represents an advance against

"compensation payable" under the Act rather than an advance against retail medical pricing. 77 P.S. § 671; 34 Pa. Code § 121.18(a).

RHODE ISLAND

GENERALLY: The Rhode Island Workers' Compensation Act requires the employee to reimburse the workers' compensation carrier for benefits paid at the time of settlement. However, if the amount of damages recovered by the employee exceeds the compensation paid as of the date of the judgment or settlement, the carrier can suspend indemnity benefit payments owed to the employee—but not medical benefits. R.I.G.L. § 28-35-58; *Ruggiero v. City of Providence*, 893 A.2d 235 (R.I. 2006). R.I.G.L. § 28-35-58(a) provides as follows with regard to a carrier's future credit:

> *An insurer shall be entitled to suspend the payment of compensation benefits payable to the employee when the damages recovered by judgment or settlement from the person so liable to pay damages exceeds the compensation paid as of the date of the judgment or settlement. The suspension paid shall be that number of weeks which are equal to the excess damages paid divided by the employee's weekly compensation rate; however, during the period of suspension the employee shall be entitled to receive the benefit of all medical and hospital payments on his or her behalf. If the employee has been paid compensation under those chapters, the person by whom the compensation was paid shall be entitled to indemnity from the person liable to pay damages, and to the extent of that indemnity shall be subrogated to the rights of the employee to recover those damages.* R.I.G.L. § 28-35-58(a).

The suspension period is the number of weeks which are equal to the excess damages paid divided by the employee's weekly compensation rate. During the suspension period, if the employee is entitled to receive the benefit of medical and hospital payments, the carrier will be entitled to indemnity for those amounts and is again subrogated to the rights of the employee. If the employee receives a specific compensation award after his third-party recovery, there is an automatic set-off resulting in a reduction of the benefit suspension period as a result. *Rison v. Air Filter Sys., Inc*., 707 A.2d 675 (R.I. 1998). In *Rison v. Air Filter,* the Rhode Island Supreme Court used a suspension period formula as follows:

$2,500,000	Third-Party Settlement
– $225,312	Past Worker's Comp Lien
$2,274,688	Net Recovery minus Lien
/ $244	Divided by Employee's "Weekly Comp. Rate"
9,323 Weeks	Equates to a 179-Year Suspension Period in Weeks Before Adjustment Due to Specific-Comp. Award
$216	Week Equivalent of Specific Award = $52,582/244)
9,107	Weeks of Suspension
/ 52	To Convert Weeks to Years
175	Years of Suspension According to *Rison* Case

In addition, an employee who obtains a specific-compensation award before recovering from a third party is obligated to reimburse the employer/carrier out of any subsequent recovery from a third party. *Id.* Section 28-35-58 states that:

> *An insurer shall be entitled to suspend the payments of compensation benefits payable to the employee when the damages recovered by judgment or settlement from the person so liable to pay damages exceeds the compensation paid as part of the judgment or settlement. The suspension paid shall be that number of weeks which are equal to the excess damages paid divided by the employee's weekly compensation rate; however, during the period of suspension the employee shall be entitled to receive the benefits that are medical and hospital payments on his or her behalf.* R.I.G.L. § 28-35-58(a).

The phrase “excess damages” used in the statute above to calculate a workers’ compensation benefits suspension period to account for damages recovered from the responsible third party, means that amount of damages actually received by the injured employee, after reasonable attorney’s fees and litigation costs have been paid. *McCarthy v. Environmental Transp. Serv., Inc*., 865 A.2d 1056 (R.I. 2005). Therefore, the term “actually” refers to the “net recovery” after additional deductions for the attorney’s fees and litigation costs are taken.

PROCEDURE/FILING REQUIREMENTS: In Rhode Island workers' comp, after a third-party settlement, the insurer gets a "future credit" against *future* indemnity payments, not necessarily medicals, requiring documentation to the Rhode Island Department of Labor & Training (DLT) (RI DLT). You'll file forms like a Form 16 (Agreement) or Form 28 (Petition) detailing the settlement, and use specific language for the credit (e.g., "credit for third-party recovery") to get DLT approval, preventing double recovery and ensuring the carrier stops paying once their share of damages is recouped, often using an addendum to explain the settlement.

BURDEN OF PROVING CREDIT EXHAUSTION: When there is a dispute over the ongoing suspension/credit period (i.e., whether the credit has been exhausted and indemnity must resume), the issue is resolved through petition practice and the party seeking relief must prove the factual predicate for relief. That is not the same as an appellate holding expressly saying, “the employee bears the burden,” but it is the strongest form of authority you typically see on this issue, because it ties the resumption of benefits to an evidentiary showing by the party petitioning to change the status quo.

MEDICAL EXPENSE RATE DURING CREDIT: Because Rhode Island does not allow a future credit for medical expenses, the question as to which rate (retail medical expense or discounted/scheduled medical rate) is to be used to calculate exhaustion of the carrier’s future credit is not relevant.

SOUTH CAROLINA

GENERALLY: If the carrier, as an assignee of the right to bring a third-party action recovers an amount in excess of past benefits paid, including reasonable expenses and attorneys’ fees, the excess shall be applied as a credit toward future compensation and distributed as per Subsection (g). S.C. Code Ann. § 42-1-560(c); *Breeden v. TCW, Inc./Tenn. Exp.,* 584 S.E.2d 379 (S.C. 2003) (Future medical expenses are included in the calculation of the value of compensation carrier’s lien for the purpose of establishing a fund from excess third-party settlement proceeds to pay future medical compensation benefits.). Subsection (g) provides that when there is a balance of $5,000 or more of the amount recovered from a third party by the carrier after payment of necessary expenses and satisfaction of the carriers’ lien, the entire balance shall be paid to the carrier by the third party. The present value of all amounts estimated by the Industrial Commission to be thereafter payable as compensation, with the present value to be computed in accordance with the schedule prepared by the Commission, shall be held by the carrier as a fund to pay future compensation as it becomes due, and to pay any sum remaining in excess thereof to the beneficiaries. S.C. Code Ann. § 42-1-560(g). Otherwise, any excess shall be paid directly to the beneficiaries but will still constitute a credit against future compensation benefits. *Id*. The amount paid to the beneficiary will still constitute a credit against future compensation benefits for the same injury or death as to any compensation liability that may exist after the fund has been exhausted.

PROCEDURE/FILING REQUIREMENTS: Settlement of third-party cases and documentation of future credits is pretty straightforward in South Carolina. Administrative Code § 67-805 provides as follows:

> ***67-805. Third-Party Settlements.***
>
> *A. The distribution of third-party settlement proceeds must be approved by the Commission unless otherwise directed by a court of competent jurisdiction.*
>
> *B. To obtain approval, send the settlement papers to the Claims Department.*
>
> *C. Third-party settlements less than two thousand five hundred dollars are deemed approved automatically if the parties agree and do not need to be submitted to the Commission.* S.C. Code of Regulations R. 67-805 (1997).

There is no specific or prescribed form to be used in bringing the settlement or recovery to the attention of the Commission. The Commission has issued guidance emphasizing that third-party tortfeasors and liability insurers are not required to sign third-party settlement distributions submitted for Commission approval; however, if a third-party signature is included, it must be the signature of an attorney. It can be found at https://wcc.sc.gov/sites/wcc/files/Documents/Main/News/Third%20party%20settlments%20Final%206-12-2019.pdf.

BURDEN OF PROVING CREDIT EXHAUSTION: South Carolina does not appear to have a reported appellate decision that expressly states, in so many words, that "the employee bears the burden of proving exhaustion of the future credit" before indemnity benefits resume. The Workers' Compensation Act does, however, establish the credit mechanism as a reduction in the carrier's future obligation, and South Carolina practice treats resumption of benefits as a change in the status quo that must be requested and supported by proof in the workers' compensation forum. In practical terms, once the carrier has properly asserted its third-party credit under S.C. Code Ann. § 42-1-560 and the Commission has recognized or memorialized the credit through the required third-party settlement filing process (including compliance with S.C. Code Regs. § 67-805), the employee is ordinarily the party who must come forward with a credible accounting to show that the net recovery credited against future compensation has been exhausted and that the carrier's obligation to resume indemnity benefits has been triggered.

MEDICAL EXPENSE RATE DURING CREDIT: South Carolina is one of the many jurisdictions where the "retail versus fee schedule" question during a third-party credit period has not been squarely addressed in reported appellate decisions or a published Commission order that is readily citable as precedent. South Carolina clearly has a medical fee schedule system administered by the Workers' Compensation Commission through its Medical Services Provider Manual, which sets maximum allowable payments for authorized work comp treatment. South Carolina Workers' Compensation There is no authority that explicitly answers the future credit exhaustion question.

SOUTH DAKOTA

GENERALLY: S.D.C.L. § 62-4-40 governs the calculation and operation of the carrier's future credit which results from an excess recovery by the worker, which is discussed in more detail below in §11.42[4]. Section 62-4-40 provides as follows:

> ***§ 62-4-40. Recovery by employer from third party--Excess held for employee.***
>
> *If compensation is awarded under this title, the employer having paid the compensation, or having become liable therefore may collect in his own name or that of the injured employee, or his personal representative, if deceased, from any other person against whom legal liability for damage exists, the amount of such liability and shall hold for the benefit of the injured employee or his personal representative, if deceased, the amount of damages collected in excess of the amount of compensation paid such employee or his representative, less the proportionate necessary and reasonable expense of collecting the same, which expenses may include an attorney's fee not in excess of thirty-five percent of damages so collected, and shall be subject finally to the approval of the department.* S.D.C.L. § 62-4-40 (2001).

The amount of any third-party recovery remaining after following the formula set forth in the preceding section will constitute the carrier's future credit. This amount will be divided by the worker's monthly benefit amount to determine the number of months of future workers' compensation benefits for which the carrier will continue to have a lien – at least with regard to indemnity benefits. During this time, the carrier will cease the monthly payments and, after the number of months of indemnity payments provided for have elapsed, the carrier will again be responsible for making these indemnity payments. If the worker dies before the carrier is required to recommence making payments, the carrier may make a claim against the worker's estate for any excess payment of expenses and attorney's fees made. Likewise, if remarriage cuts short indemnity payments, the carrier will have a similar claim for reimbursement of overpayment of expenses and attorney's fees. *Zoss v.*

Dakota Truck Underwriters, 575 N.W.2d 258 (S.D. 1998). The parties are free to settle otherwise, as they see fit.

South Dakota statutorily requires that third-party settlements under § 62-4-40 be "subject finally to the approval of the department," which means that documentation of the third-party recovery should be submitted to the Department of Labor and Regulation (or the responsible division) when the carrier has pursued the action or when the settlement implicates the statutory excess-hold mechanism. Because South Dakota subrogation and credit rights depend on recovering "like damages," the chapter makes clear that allocation disputes can be material and that a carrier can petition for a judicial determination of which portions of the settlement constitute "like damages" and therefore remain subject to reimbursement and/or credit. The chapter emphasizes that a settlement allocation will be given effect only when the issue is "fully and fairly tried" before an impartial fact finder or when the carrier is invited to participate in settlement negotiations.

PROCEDURE/FILING REQUIREMENTS: While there do not appear to be any administrative code sections or administrative decisions detailing this procedure, the South Dakota Department of Labor has indicated that a future credit is to be shown as a negative balance on Form 107 ("*Monthly Payment Report*") and then decreased as the credit is applied against any future payments that may become due. A copy of this Commission form can be found at https://www.state.sd.us/eforms/secure/eforms/E2208V1-Form_107.pdf.

BURDEN OF PROVING CREDIT EXHAUSTION: The party seeking to reduce the credit and trigger resumption of benefits must come forward with evidence of the qualifying payments and litigate the issue. South Dakota has no clear published decisions expressly allocating the burden of proving exhaustion, but exhaustion disputes are proof-driven and, in practice, the party seeking reinstatement of benefits or reduction of the offset (typically the employee) must present competent evidence of expenditures or other credits that reduce the offset.

MEDICAL EXPENSE RATE DURING CREDIT: There is no authority establishing that medical expenses are valued at discounted workers' compensation medical rates for purposes of exhausting the credit, and there are no reported decisions addressing whether the employee can be billed retail while the carrier is taking the offset. The credit should be reduced only by amounts that constitute "compensation payable" under the Act, which would imply using the workers' compensation allowable medical amounts rather than retail billed charges, but South Dakota does not appear to have a published decision tying the fee schedule concept to credit exhaustion the way Colorado does.

TENNESSEE

GENERALLY: Tennessee has unusually clear statutory credit language, unusually extensive appellate treatment of the subject, and, at the same time, a highly consequential limitation on future medical credits that is largely judge-made and has produced substantial confusion in practice. In Tennessee, the employer is entitled to a credit against future liability for compensation benefits owed to the injured worker to the extent that the worker's net recovery in the third-party action exceeds the amount that the employer has previously paid in workers' compensation benefits. *Hickman v. Continental Baking Co*., 143 S.W.3d 72 (Tenn. 2004). In other words, the carrier receives a full credit, minus the employee's attorney's fees and costs, for any third-party settlement, regardless of whether the employee was made whole. *Graves v. Cocke Cty.*, 24 S.W.3d 285 (Tenn. 2000). T.C.A. § 50-6-112(c)(2) and (3) provides the statutory basis for a future credit.

One important caveat should be noted, however, in that the "credit on the employer's future liability" as used in § 50-6-112(c)(2) and (3) might not encompass future medical payments when the parties have settled the case for a lump sum award. This construction of the statute recognizes the importance of finality in lump sum cases and avoids the other problems noted above. The court in *Graves* offered two lines of reasoning for its decision. First, the court focused on the uneasy situation in which employees would be placed if the court allowed subrogation for future medical payments. The court reasoned that 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. Moreover, the court noted that if an "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." *Id*. The Court characterized the above scenario as "an untenable one that should be avoided". The Supreme Court later extended this rule against taking a credit against future medical benefits when there is a lump sump settlement of a workers' compensation claim. The Supreme Court has said that a carrier's credit against future liability does not apply to any benefits which are unknown and incalculable at the time of the settlement – *i.e*., future medical expenses – even when there isn't a lump sum settlement. *Hickman,* supra*.*

Tennessee workers' compensation is unusual in that contested workers' compensation claims are litigated through the court system rather than in a separate workers' compensation agency. By statute, attorneys' fees in workers' compensation cases are limited to 20% of the permanent partial or permanent total disability benefits. All third-party settlement agreements should be reduced to writing, including documentation of the future credit, which must be approved by the court or by the Department of Labor. There are no specific forms with which to do this.

PROCEDURE/FILING REQUIREMENTS: Tennessee does not require a special bureau form akin to Pennsylvania's LIBC-380, but it does require subrogation counsel to treat the credit as an asset that must be affirmatively protected. The statute grants the carrier a subrogation lien against "any recovery" and authorizes intervention to protect and enforce the lien, but it does not require the employee to obtain carrier consent before settling, which creates a real risk of lien and credit impairment if the carrier remains passive.

Tennessee courts have noted that the employee's attorney is obligated to protect the employer's interest, but the "primary responsibility to protect and assert the lien belongs to the carrier," which is why Tennessee practice demands early intervention and aggressive monitoring of settlement discussions.

Tennessee requires prompt intervention into the third-party case. It also requires written notice to plaintiff's counsel asserting the lien and future credit; a demand for settlement/distribution documentation reflecting gross recovery, fees/costs, amounts paid, and calculation of "net recovery."

BURDEN OF PROVING CREDIT EXHAUSTION: The employee must demonstrate exhaustion in order to restart indemnity benefits, although the courts generally discuss the point in terms of how the credit operates rather than by using explicit "burden of proof" language. The Tennessee Supreme Court credit decision, *Reece v. York,* 288 S.W.2d 448 (Tenn. 1956), held that when the employee's net third-party recovery exceeds compensation paid, the employer's future installment payments are deferred until the credit is consumed, and the obligation recommences only after the net credit has been exhausted through the passage of time and accrued weekly benefits. Later cases reaffirm that the credit "negates an employer's responsibility to pay additional workers' compensation benefits until the employee's net recovery from the third party is exhausted." In practical litigation terms, once the carrier asserts the statutory credit and stops payments, an employee seeking reinstatement necessarily must come forward with a credible accounting showing that the net recovery has been consumed by the creditable benefits that would have accrued during the suspension period. Because Tennessee workers' compensation disputes proceed through court adjudication and motion practice, the party seeking the change in benefit status must establish the factual basis for that change.

MEDICAL EXPENSE RATE DURING CREDIT: This issue is unsettled in Tennessee, and it also intersects with Tennessee's unique limitation on future medical credits. Tennessee Supreme Court decisions beginning with *Graves v. Cocke County* and *Hickman v. Continental Baking Co.,* 143 S.W.3d 72 (Tenn. 2004), and culminating in *Cooper v. Logistics Insight Corp.,* 395 S.W.3d 632 (Tenn. 2013) have held that the statutory credit does not encompass future medical expenses when the employer and employee settle the compensation claim for a lump sum award and, more broadly, that the employer is not entitled to a credit against future medical expenses that are "unknown or incalculable" at the time of the workers' compensation trial.

Therefore, Tennessee is not a clean "medical and indemnity vacation" jurisdiction in the way many carriers assume; the carrier's future credit is dependable for indemnity but is substantially impaired for future medical in many cases, especially where the comp claim is settled or future medical is not measurable.

Justice Koch's dissent in *Cooper* makes the most logical and carrier-protective argument: that the credit under § 50-6-112(c)(2)–(3) should apply to future medical as well as indemnity, that the employee should pay for

necessary and reasonable future medical care from the net recovery until exhaustion, and that the reduced workers' compensation fee schedule should be used for those medical payments during the credit period because the services are still being provided pursuant to a workers' compensation claim. While that reasoning is not the controlling majority rule on future medical credits in Tennessee, it is an important "best available" judicial discussion of this issue. Tennessee's restrictive holdings on future medical credits prevent the dispute from ripening into a clean "retail v. schedule" exhaustion question.

TEXAS

GENERALLY: Any amount recovered in the third-party action (regardless of whether the third-party action is initiated by the carrier or the employee) which exceeds the amount of the subrogation interest reimbursed to the carrier, is to be treated as an advance against future benefits. V.T.C.A. Labor Code § 417.002(b) (1993). The carrier's future credit should be "net" of any attorney's fees and costs. *Ins. Co. of North Am. v. Wright*, 886 S.W.2d 337 (Tex. Civ. App. – Houston 1994, *writ denied*); *Bridges v. Texas A&M Univ. Sys*., 790 S.W.2d 831 (Tex. Civ. App. – Houston 1990, *no writ*).

PROCEDURE/FILING REQUIREMENTS: In claiming its statutory credit, the workers' compensation carrier must send to the employee and file with the Division of Workers' Compensation a Form PLN-9 ("*Notification of Suspension of Indemnity Benefit Payment*"), writing in claim specific and plain language, the reason for the suspension of benefits. That form can be found at http://www.tdi.texas.gov/forms/form20plain.html. For years, this requirement has been set forth under Board Rule 124.4. On August 29, 1999, that Board Rule was repealed and subsumed within amended Board Rule 124.2. Texas Workers' Comp. Comm'n Rules, Chapter 124 (1999). Board Rule 124.2 is entitled *Carrier Reporting Notification Requirements*. In Subsection (e)(3), it is required that the carrier notify the Commission and the claimant of any change in the benefit payments which are caused as the result of a change in the employee's post-injury earnings, including advances, contribution and subrogation, within 10 days of the change. According to the DWC claim's information representative, B.J. Webb, it is not possible for a compensation carrier to claim a statutory credit with an electronic filing. According to her, this is because an A-49 electronic submission contains no code for a statutory credit. The code S-7 has been used for notifying DWC electronically of any suspension of benefits once benefits are "exhausted". The only means of filing notice of and documenting your statutory credit, therefore, is to file a Form PLN09, and fill in with claim specific and plain language, the reason for suspension of benefits. Under Texas Administrative Code Title 28 Part 2 Chapter 124 Rule § 124.2(e)(6), a carrier shall notify the Commission and the claimant of termination or suspension of income or death benefits within 10 days of making the last payment for the benefits. This is done using a PLN09 form, available on the Texas Department of Insurance website. A revised form, available on the same site, should be used starting March 1, 2018. Nonetheless, when the carrier implements the future credit/advance by suspending indemnity benefits, the carrier should issue a PLN-9 to the injured employee (and representative, if applicable) stating the effective date of the suspension and providing a complete explanation that the suspension is based on the third-party recovery advance/credit. When the carrier implements the future credit/advance by suspending indemnity benefits, the carrier should issue a PLN-9 to the injured employee (and representative, if applicable) stating the effective date of the suspension and providing a complete explanation that the suspension is based on the third-party recovery advance/credit under Tex. Lab. Code § 417.002, including the calculation of the net advance and how it is being applied to future benefits. In addition, the carrier must file the appropriate Electronic Data Interchange (EDI) transaction with DWC, and the notice itself is not sent to DWC.

In any third-party case where the worker does not recover as much as he might feel he is entitled to, it is always possible that the credit received by the carrier could be exhausted and the carrier would have to kick in again with payment of indemnity and medical benefits. It is advisable, in such situations, for the carrier to document their statutory credit appropriately when a worker receives a third-party recovery. If not, a worker in a pinch might ask their attorney to try and overcome such a credit if it hasn't been appropriately documented. For more specific questions on your credit, please contact the Division of Workers' Compensation at (512) 804-4000.

The effect of an employer's negligence on the right of a carrier to claim a future credit is also not settled in Texas. However, § 417.002(b) - the statute providing the carrier a credit against future benefits by virtue of the employee's third-party recovery - clearly does not specify any reduction of the carrier's credit based upon the contributory negligence of the employer.

BURDEN OF PROVING CREDIT EXHAUSTION: While Texas may not have a clean appellate holding allocating burden, the regulatory framework makes clear that when benefits are suspended, the carrier must be able to articulate and support the basis for the suspension in writing. That effectively requires the carrier to maintain a defensible credit ledger, because if the employee disputes the suspension and requests a Benefit Review Conference, the carrier will be expected to produce the calculations establishing (1) the amount of the advance and (2) the remaining balance. At the same time, once the credit is properly asserted and documented, the party seeking to restart payments will typically have to demonstrate that the advance has been exhausted or that the carrier's accounting is wrong. This fits neatly into the chart's theme: the burden question is often "undeveloped" in reported cases because it is resolved through administrative dispute processes driven by proof and accounting.

MEDICAL EXPENSE RATE DURING CREDIT: Because the PLN-9 form itself states that stopping indemnity benefits "will not change the medical benefits you get because of your injury," and because Texas medical benefits are governed by fee guidelines and billing rules, Texas expects medical benefits administration to remain within the workers' compensation system even while indemnity is suspended. This supports the argument that medical expenses should be valued at amounts "payable" under the Act and its fee guidelines, not retail billed charges, for purposes of depleting the § 417.002 advance. That argument remains largely unsettled in case law, but the administrative structure supports it conceptually.

UTAH

GENERALLY: The balance of any third-party recovery remaining after payment of expenses and reimbursement of the carrier's lien is considered a credit to the carrier for future obligations of workers' compensation benefits. U.C.A. § 34A-2-106(5)(c)(2008). The credit is automatic by statute. However, the carrier must protect it through notice, participation, and careful documentation of the statutory distribution (fees/costs; reimbursement; balance/credit), and the carrier must secure Commission consent if it is settling as trustee. Subsection 5(c) indicates that this balance is to be applied to reduce or satisfy in full "any obligation" thereafter accruing against the carrier. The term "any obligation" has been held to include medical expenses. *Taylor v. Industrial Comm'n*, 743 P.2d 1183 (Utah 1987). The balance represented by Subsection 5(c) must be used as an offset for future liability of sums owed by the carrier. *Esquivel v. Labor Comm'n of Utah*, 7 P.3d 777 (Utah 2000). U.C.A. § 34A-2-106(5)(c) provides that the balance shall be paid to the worker and is to be applied to reduce or satisfy in full any obligation thereafter accruing against the carrier for benefits owed. *Id*.

Therefore, the balance left from the third-party recovery after the worker pays all of expenses, plus the proportionate share of expenses and attorneys' fees owed by the carrier, should be paid to the worker. However, because a double recovery is not permitted, the worker must apply this total balance to reduce or satisfy the carrier's future obligation. *Id*. Therefore, if the balance of the third-party recovery is greater than the carrier's discounted future liability, then the carrier's discounted future liability is totally off-set and the carrier has no further obligation to the worker in terms of compensation benefits. *Id*. However, if the total balance is not greater than the carrier's future discounted future liability, the carrier must resume payments once the amount of the total balance has been off-set and then continue until such time as the last benefit payment would be made. *Id*.

PROCEDURE/FILING REQUIREMENTS: The Labor Commission's Workers' Compensation Rule R612-1-3(G) requires Form 142 ("*Statement of Insurance Carrier or Self Insurer with Respect to Discontinuance of Benefits")* to be mailed to the employee and filed with the Labor Commission five days before the date compensation stops. This form is at https://laborcommission.utah.gov/wp-content/uploads/2019/11/Form-142-Revised-2-2019.pdf.

Utah has two distinct but related "approval" concepts that are often confused. First, if the carrier is prosecuting the third-party action as "trustee" of the cause of action, the carrier may not settle and release the third party without the consent of the Commission. Utah Code § 34A-2-106(2)(b).

Second, separate from third-party settlements, Utah generally requires Commission approval for workers' compensation settlement agreements (compromise or commutation) under the Commission's settlement approval rules and procedures. Utah Labor Commission guidance confirms that workers' compensation settlement agreements require Commission approval, and Utah Admin. Code R602-6 outlines approval procedures under statutory authority requiring review of settlements or commutations of workers' compensation claims. Utah Labor Commission, Workers' Compensation Settlement Agreements; Utah Admin. Code R602-6. In addition, the employee must give written notice of intent to bring a third-party action to the carrier and any other party obligated for compensation and must also notify the carrier of any known attempt to attribute fault to the employer or a co-employee, which is particularly important in Utah because allocation of fault to immune persons can reduce the carrier's reimbursement if immune fault is 40% or more. Utah Code § 34A-2-106(3) and (5)(b).

BURDEN OF PROVING CREDIT EXHAUSTION: Utah does not appear to have a clean reported appellate holding that expressly assigns the burden to the employee (or the carrier) in the way some jurisdictions do. What Utah does have is a well-developed credit mechanism that makes exhaustion an accounting question. The balance of the third-party recovery, together with the carrier's proportionate share of litigation expenses (which the statute treats as a credit back to the employee), is applied against the carrier's future obligation; if the credit exceeds the present value of future liability, the carrier's obligation can be eliminated, and if not, the carrier resumes paying once the credited amount is exhausted.

Utah's leading case discussion (*Esquivel v. Labor Comm'n of Utah*, 7 P.3d 777 (Utah 200l), underscores that the credit is administered through a statutory calculation and that disputes often arise from improper calculations, including double subtraction of fees and costs, and the claimant's entitlement to reimbursement for the carrier's share of expenses. *Esquivel v. Labor Comm'n of Utah* is therefore the best support for the proposition that exhaustion disputes are proof-driven and require a defensible credit ledger and allocation methodology. In practical terms, the party seeking a change in payment status will need to present competent evidence of the credit balance and what has been charged against it, which means a claimant seeking reinstatement typically must demonstrate exhaustion, while the carrier must be prepared to prove the existence and remaining balance of the credit if challenged.

MEDICAL EXPENSE RATE DURING CREDIT: Utah is strong on the concept that the credit applies to medical because the statute applies the balance to "any obligation," and Utah authority recognizes that medical is included. But Utah appears to be one of the many jurisdictions that has not squarely decided, in reported appellate authority, whether the credit should be depleted by the full retail billed charges incurred by the employee during the credit period or by the schedule rates/discounted amounts that would have been payable under the workers' compensation payment limits had the carrier been paying. There is no clear published authority addressing whether exhaustion of the credit is measured by retail medical charges or by the workers' compensation allowable amounts, and practitioners should anticipate this as a potential dispute point and attempt to address it in settlement documentation and credit administration.

VERMONT

GENERALLY: If a third-party recovery exceeds the amount of workers' compensation benefits paid, then the excess amount paid to the employee is treated as an advanced payment by the employer on the account of any future payment of compensation benefits. Vt. Stat. Ann. Tit. 21, § 624(e) (2001). The amount of the recovery and recovery expenses for the injured worker and his family, for purposes of applying the future credit, should be determined by the court on the date of judgment or recovery. Vermont is a strong "first dollar" reimbursement and future credit jurisdiction. After deducting "expenses of recovery," any third-party recovery "shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable … to date of recovery," and the "balance … shall be treated as an advance payment by the employer on account of any future payment of compensation benefits." 21 V.S.A. § 624(e)(1)(A).

PROCEDURE/FILING REQUIREMENTS: One means by which a carrier can document a future credit after settlement of a third-party action by the worker is the filing of Vermont Department of Labor Form 27 ("*Employer's Notice of Intention to Discontinue Payments"*), found HERE.

BURDEN OF PROVING CREDIT EXHAUSTION: No reported appellate guidance; treat exhaustion as a fact issue and be prepared to prove with a settlement distribution sheet and post-settlement benefit ledger.

MEDICAL EXPENSE RATE DURING CREDIT: No reported authority squarely addressing retail vs. fee schedule during the credit period.

VIRGINIA

GENERALLY: The credit/advance which a carrier receives in the event of a third-party recovery is governed by Va. Stat. § 65.2-313. Once the employee's net third-party recovery is determined (money in pocket of injured employee), the employee will be entitled to no further compensation or medical benefits subsequent to the date fixed in the suspension of compensation order, until the employee can establish that further benefit entitlements exceed the net amount recovered by an employee from the third-party recovery. *Henrico Cty School Bd. v. Bohle*, 421 S.E.2d 8 (Va. App. 1992), *rev'd other grounds*, 431 S.E.2d 36 (Va. 1993). Whenever a credit is utilized, meaning that the carrier is relieved from paying a medical expense or an indemnity payment, a percentage of that payment may be due to the employee as an attorneys' fee if, as, and when future payments would have been made. *Id*. Section 65.2-313 provides as follows:

> ***§ 65.2-313. Method of determining employer's offset in event of recovery under § 65.2-309 or § 65.2-310.***
>
> *In any action or claim for damages by an employee, his personal representative or other person against any person other than the employer under § 65.2-310, or in any action brought, or claim asserted, by the employer under his right of subrogation provided for in § 65.2-309, if a recovery is effected, the employer shall pay to the employee a percentage of each further entitlement as it is submitted equal to the ratio the total attorney's fees and costs bear to the total third-party recovery until such time as the accrued post-recovery entitlement equals that sum which is the difference between the gross recovery and the employer's compensation lien. In ordering payments under this section, the Commission shall take into account any apportionment made pursuant to § 65.2-311.*
>
> *For the purposes of this section, "entitlement" means compensation and expenses for medical, surgical and hospital attention and funeral expenses to which the claimant is entitled under the provisions of this title, which entitlements are related to the injury for which the third-party recovery was affected.* Va. St. § 65.2-313 (1994).

In the case of a work-related death with multiple beneficiaries, and the estate's beneficiaries have received their third-party recovery, the workers' compensation carrier's right to subrogation operates in relation to each beneficiary in an individual manner. *Liberty Mut. Ins. Co. v. Fisher*, 557 S.E.2d 209 (Va. 2002). The carrier may assert its subrogation right on behalf of each individual only to the extent that an individual has recovered money in a third-party settlement. When a beneficiary has received less under the settlement than he is

entitled to receive under the Workers' Compensation Act, the employer may assert its subrogation rights up to the amount of money received from the beneficiary in the settlement. *Id*.

In summary, after the employer is reimbursed, money paid as compensation benefits in the past, the carrier is excused from making future payments during the suspension period to the extent the employee would otherwise be entitled to continued medical or compensation benefits. With each payment saved, the employee should be reimbursed for expenses in connection with the third-party recovery in proportion to the benefit the employer receives. The future credit is the "net recovery" by the employee, not the gross recovery.

PROCEDURE/FILING REQUIREMENTS: The modification of a workers' compensation award to reflect a recovery from third party is reasonably classified by the Virginia Workers' Compensation Commission as a change of condition to be determined under 16 VAC 30-50-20 without argument or receipt of evidence, rather than permitting post hearing written statements under 16 VAC 30-50-40. *Eghbal v. Boston Coach Corp.*, 478 S.E.2d 732 (Va. App. 1996). The employer/carrier should perfect and protect its lien before settlement or verdict by timely filing the appropriate petition or motion in the third-party court under Va. Code Ann. § 65.2-310. For this reason, active participation by subrogation counsel is required. When the employer/carrier pursues recovery directly, it may settle only with the approval of the Commission and the injured worker. Va. Code Ann. § 65.2-309(C). Virginia also allows limited "special arbitration" related to the lien, but it is restricted to the amount and validity of the lien and requires pre-arbitration itemization and objection procedures. Va. Code Ann. § 65.2-309(E). If the employer/carrier refuses to consent to an employee's third-party settlement, the employee can petition the circuit court for approval under § 8.01-424.1 and, upon approval, consent is deemed; however, the court cannot reduce the carrier's lien. Va. Code Ann. § 8.01-424.1.

BURDEN OF PROVING CREDIT EXHAUSTION: Virginia's credit mechanics are statutory and order-driven. After a third-party recovery, the Commission may enter an order suspending benefits and requiring the claimant to demonstrate that post-recovery "entitlements" exceed the credited recovery before benefits resume, and the cases describe the employee as needing to "show" that further benefits exceed the credited amount to restart payments.

While Virginia decisions do not consistently use the phrase "burden of proof," the operational structure of Va. Code Ann. § 65.2-313 (offset method) and Commission suspension orders makes resumption of benefits a claimant-driven proof issue: once a credit is established, the employee must submit evidence that accrued post-recovery entitlements (medical and/or indemnity) exceed the applicable credit balance before the carrier is required to resume payments. Va. Code Ann. § 65.2-313.

MEDICAL EXPENSE RATE DURING CREDIT: Virginia's "entitlement" definition in Va. Code Ann. § 65.2-313 expressly includes both compensation and "expenses for medical, surgical and hospital attention," making clear that the credit/offset applies to medical as those medical entitlements accrue. Va. Code Ann. § 65.2-313. Virginia authority is largely undeveloped on the narrow question regarding whether medical expenses incurred during the credit period deplete the credit at retail billed charges or at the amounts payable under Virginia workers' compensation medical cost containment rules. No reported Virginia appellate decision squarely holds that a provider may bill the employee retail during the credit period, nor is there a decision expressly holding that only the workers' compensation fee schedule/allowable amounts may be charged against the credit. Virginia has not clearly resolved, in reported decisions, whether the operative depletion amount is retail billing or the reduced amounts payable under the Act. Va. Code Ann. § 65.2-313.

WASHINGTON

GENERALLY: No payment shall be made to or on behalf of the worker or beneficiary by the Department and/or self-insurer for an injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the Department's and self-insurer's proportionate share of the costs and reasonable attorneys' fees in regard to the remaining balance. This proportionate share is determined by dividing the gross recovery fees incurred by the worker. R.C.W.A. § 51.24.060(e) (2001).

In summary, where the worker elects not to proceed against the third party and the cause of action is assigned to the Department or self-insurer, a credit is given to the Department and/or self-insurer in the amount of any

remaining balance paid to the injured worker under R.C.W.A. § 51.24.050(4)(d). On the other hand, if the injured worker elects to recover damages from the third party, the Department and/or self-insurer receives a credit in the amount of the remaining balance paid to the injured worker as set forth in § 51.24.060(1)(d), less the Department's and/or self-insurer's proportionate share of costs and reasonable attorneys' fees in regard to the remaining balance. The Department's and/or self-insurer's proportionate share of attorneys' fees of the remaining balance is determined by dividing the gross recovery amount into the remaining balance amount and multiplying this percentage times the cost and reasonable attorneys' fees incurred by the worker or beneficiary; R.C.W.A. § 51.24.060(1)(e) (2001). The Department is not required to deduct its proportionate share of attorneys' fees and costs related to the workers' pre-settlement benefits from the remaining balance before it determines the amount subject to set-off. *Wash. State Dep't of Labor & Indus. v. Mullins*, 912 P.2d 1098 (Wash. App. 1996), *amended and superceded*, 922 P.2d 141. The third-party recovery worksheet is invaluable in calculating distribution of third-party proceeds, including the credit owed to the Department and/or self-insurer.

PROCEDURE/FILING REQUIREMENTS: Washington is unusually procedure-driven. An employee must elect to pursue the third-party claim by completing the Third-Party Election form and forwarding it to the Department, and the worker must give notice to the Department/self-insurer when the third-party action is filed; the Department/self-insurer may then file a notice of statutory interest in recovery and may intervene. RCW § 51.24.030(2). The party receiving the third-party recovery before distribution has a statutory duty to advise the Department/self-insurer of the recovery amount, costs, and attorney's fees, and to distribute the recovery in compliance with the statute. RCW § 51.24.060(5). Washington practice also requires that distribution of the recovery be confirmed by a Department order served by registered or certified mail, and if the settlement would result in less than the benefits already paid plus estimated future benefits, Department approval is required or the settlement may be void.

The Department provides a Third Party Recovery Worksheet (see HERE) and requires submission of key documentation such as the signed settlement agreement/court order, total attorney's fees and costs, and total benefits paid (including time-loss, PPD, and medical, excluding IME payments). Importantly, Washington's administrative enforcement tools are robust: once the distribution order becomes final, the Department can file a warrant that becomes a judgment lien, and it can serve notices on entities holding settlement proceeds to withhold and deliver proceeds to satisfy the lien.

BURDEN OF PROVING CREDIT EXHAUSTION: Washington's statutory scheme effectively places the burden on the worker (or the party seeking resumption of benefits) to show that the future credit has been exhausted, because RCW § 51.24.060(1)(e) provides that "no payment shall be made" until "the amount of any further compensation and benefits shall equal" the remaining balance (less the Department/self-insurer's proportionate share of fees and costs attributable to that remaining balance). RCW § 51.24.060(1)(e). That structure makes resumption a mathematical and evidentiary issue: once a distribution order establishes the remaining balance and the Department/self-insurer ceases paying, the party demanding reinstatement must demonstrate that post-recovery entitlements have accrued in an amount sufficient to consume the remaining balance credit. At the same time, because the Department/self-insurer must issue and enforce a distribution order and may be required to justify its calculations, the Department/self-insurer must maintain a defensible accounting of benefits charged against the remaining balance and be prepared to support it administratively.

MEDICAL EXPENSE RATE DURING CREDIT: Washington's § 51.24.060(1)(e) defines the future credit in terms of "compensation and benefits" for the injury, and it applies to all further payments by the Department/self-insurer, which includes medical benefits because Washington's system is a comprehensive industrial insurance program administered by the Department. RCW.

Washington law does not appear to have a reported appellate decision squarely addressing whether the credit should be depleted by retail billed medical charges if the worker self-pays during the credit period, or whether the credit is reduced only by the amounts payable under Washington medical aid rules and fee schedules. Practically, the better carrier argument in Washington is that the credit should be reduced only by "compensation and benefits" that the Department/self-insurer would have paid under the Act, which would

imply medical valued under the Department's medical aid rules rather than at full retail charges. However, because Washington's administration of medical is tightly controlled by the Department and providers generally bill under medical aid rules, the issue is less likely to generate reported "retail billing" decisions, and the chart should candidly note that controlling authority on the precise depletion-rate question is not well developed.

WEST VIRGINIA

GENERALLY: W. Va. Code § 23-2A-1 makes no reference to any credit or advance owing to the Commissioner or self-insured employers upon settlement of a workers' compensation third-party action. No future credit is available or allowed.

WISCONSIN

GENERALLY: Wisconsin recognizes and enforces an employer/carrier's right of reimbursement and future credit in third-party cases by statute, and it applies a mandatory statutory distribution formula unless the parties agree otherwise. Under Wis. Stat. § 102.29, the carrier may either prosecute the third-party claim itself or allow the employee to do so, but whichever party files suit must provide "reasonable notice" to the other, typically by naming and serving the other as an involuntary plaintiff. Anderson v. Garber, 466 N.W.2d 721 (Wis. App. 1991); Wis. Stat. §§ 102.29, 803.03. Once there is a recovery, Wisconsin generally follows a structured allocation: attorney's fees are taken first, the employee then receives one-third of the remainder, and the employer/carrier is reimbursed out of the remaining two-thirds, with any balance thereafter treated as a credit against future workers' compensation benefits. Wis. Stat. § 102.29(1) of the Wisconsin statutes provides in part as follows:

> *"The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall have the same right [as the employee] to make claim or maintain an action in tort against any other party for such injury or death. However, [the employer or compensation insurer, or the employee making a claim] shall give to the other reasonable notice and opportunity to join in the making of such claim or to join in the making of such claim or instituting of an action and to be represented by counsel...if notice is given as provided in this subsection, the liability of the tortfeasor shall be determined as to all parties having a right to make claim, and irrespective of whether or not all parties join in prosecuting such claim."*

In reviewing this language, the Wisconsin Supreme Court in *Threshermens Mutual Ins. Co. v. Page*, 577 N.W.2d 335 (Wis. 1998), held that a workers' compensation carrier may seek recovery of an injured employee's claims even if the employee declines to participate in a third-party action. The Court held that a workers' comp carrier is entitled to present evidence of all damages to which an injured worker is entitled and is allowed to recover "all payments made by it, or which it may be obligated to make in the future" out of any third-party recovery. The court noted that although there may be some inexactitude in awarding damages for future medical expenses, they held that if competent medical evidence is presented to demonstrate the employer will incur future medical expenses, then the carrier must be allowed to recover these damages in order to off-set future medical expenses which it will owe. Therefore, if an injured employee declines to actively participate in a third-party action, the carrier is now entitled to recover as damages monies above and beyond those actually paid to the worker, including any amounts it is obligated to in the future.

PROCEDURE/FILING REQUIREMENTS: Any Wisconsin Circuit court or the Department of Workforce Development can approve a third-party settlement. However, if approval is sought from the Department, the carrier must file Form WKC-170-E ("*Third-Party Proceeds Distribution Agreement"*), a copy of which can be found at https://dwd.wisconsin. gov/dwd/forms/wkc/pdf/wkc-170-e.pdf. Wisconsin's "documentation" component is driven less by a specialized board form and more by compliance with the statutory notice/joinder requirement and the distribution mechanics that follow a recovery. The most important practical step for preserving and later enforcing the credit is ensuring the carrier is timely notified and formally included in the third-party action so that the distribution can be administered under Wis. Stat. § 102.29, and the lien and future credit are clearly established as part of the recovery paperwork and disbursement.

Anderson v. Garber, 466 N.W.2d 721 (Wis. App. 1991); *Employers Mut. Liability Ins. Co. of Wis. v. City of Cedarburg*, 388 N.W.2d 658 (Wis. App. 1986); Wis. Stat. §§ 102.29, 803.03.

BURDEN OF PROVING CREDIT EXHAUSTION: Wisconsin appellate decisions tend to focus on the statutory distribution and the carrier's entitlement to reimbursement/credit, rather than explicitly articulating a burden-allocation rule for the later "restart" point. In practice, because the employee is the party seeking resumption of indemnity or medical payments after the carrier has asserted and applied a properly calculated § 102.29 credit, the employee typically must come forward with competent documentation showing that the credit has been reduced to zero (through compensable benefit payments that would otherwise have been payable). However, there does not appear to be a clearly stated, reported Wisconsin appellate or administrative rule expressly assigning the burden of proof on exhaustion, and that the issue is often resolved through accounting evidence and agreement rather than litigated burden-shifting. Wis. Stat. § 102.29; *Nelson v. Rothering*, 496 N.W.2d 87 (Wis. 1993).

MEDICAL EXPENSE RATE DURING CREDIT: Wisconsin does not appear to squarely address the specific operational question of whether, during a future credit "vacation," medical charges that deplete the credit are measured at full billed (retail) charges or at the reduced statutory/fee schedule amounts payable under workers' compensation. This leaves carriers and practitioners to handle it by agreement, administrative practice, or case-specific adjudication if challenged. Wis. Stat. § 102.29.

WYOMING

GENERALLY: Wyoming is a monopolistic state fund jurisdiction and subrogation/credit rights belong to the State. If the employee recovers from a third party "in any manner including judgment, compromise, settlement or release," the State is entitled to reimbursement for "all payments made, or to be made," but "not to exceed one-third (1/3) of the total proceeds of the recovery," "without regard to the types of damages alleged," meaning the State's lien reaches non-economic damages as well. Wyo. Stat. § 27-14-105(a). Although the Wyoming statute makes no provision for a future credit or advance, it clearly gives the State the right to recover, and/or to a lien on any third-party settlement for all "current and future benefits" paid or to be paid. Wyo. Stat. § 27-14-105(b) (1995). No forms or administrative code sections appear to be applicable.

Wyoming does not operate a conventional employee "vacation/credit" system like many states; rather than a defined future credit that suspends benefits until exhaustion, the statute creates a continuing lien in favor of the State for the State's claim for reimbursement and "for all current and future benefits" under the Act. Wyo. Stat. § 27-14-105(b). Because the statute does not create a typical calculable advance credited against weekly benefits, there is no developed burden-of-proof case law regarding "credit exhaustion" in the manner seen in other jurisdictions; instead, disputes are framed as enforcement and satisfaction of the State's continuing lien.