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WHICH WORKERS' COMPENSATION "BENEFITS" CAN BE SUBROGATED?

Recovery of Case Management Costs, Medical Bill Audit fees, Rehabilitation Benefits, Utilization Review Costs, IME's, Nurse Case Worker Fees, Attorneys' Fees, and Other "Allocated" Loss Adjustment Expenses

In addition to paying for medical expenses, death benefits, funeral costs and/or indemnity benefits for lost wages resulting from a compensable injury, workers' compensation insurance carriers also expend considerable dollars for case management costs, medical bill audit fees, independent medical exam (IME) fees, expert fees, functional capacity evaluation charges, rehabilitation benefits, physician advisor fees, behavioral health or social worker support service fees, third-party vendor costs, nurse case management fees, workers' compensation case attorneys' fees, and the like. They pay significant attorney's fees on permanency awards and incur other expenses in conjunction with the handling and adjusting of workers' compensation claims. Which of these benefits are recoverable in workers' compensation subrogation remains a point of considerable confusion and contention, and an article which discusses the nuances of this issue can be viewed HERE. Subrogation professionals, lawyers, judges, and Administrative Judges are all equally confused on the law in this area, and very little clear guidance one way or the other can be found.

This issue has been decided in only a handful of jurisdictions. Judges like things that fit neatly into neat legal categories and clearly established rules. Where such things are not available, the best argument usually wins. For that reason, the chart below provides definitions, explanations, and arguments which can be used when the issue of which "benefits" can be subrogated has not been nearly established already. We must be the ones to establish it. The first place to look is the underlying workers' compensation subrogation statute and its wording. While rarely determinative of the issue, it can frequently provide hand and foot-holds which can enable us to craft persuasive legal and public policy arguments as to why costs other than medical expenses and indemnity benefits should be reimbursable under a state's workers' compensation subrogation law. Take for example **Texas**' statute which reads as follows:

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

The question becomes whether or not such things as case management costs and medical bill audit fees are considered benefits or medical benefits which have been paid "for the compensable injury." Each state should be evaluated and argued differently because each state's statute is different. Another interesting and cogent argument is an analogy to the right to a future credit. When a recovery by an employee is made, the carrier is given a credit toward future "benefit" payments. A close look at this law reveals that "medical-legal" costs should be costs against which a carrier can press a credit, implying that they constitute "compensation" under **California** law and should be recoverable by a workers' compensation carrier. *Adams v. W.C.A.B.,* 18 Cal.3d 226 (1976).

Arguments in each state in which there is no clearly established rule on this issue should be fashioned from the only tools available—statutory language and common sense. In **North Carolina**, for example, the workers' compensation statute provides for reimbursement to the carrier of "all benefits by way of compensation or medical compensation expense paid or to be paid". N.C.G.S.A. § 97-10.2. Further legal archaeology reveals the definition of compensation as follows:

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

North Carolina case law reveals no further clarification on exactly what "medical compensation expenses" refer to, but the door seems open wide enough to include some of the case management costs referenced above, yet not quite wide enough to include interest. *Buckner v. City of Asheville*, 438 S.E.2d 467 (N.C. App. 1994).

A few states have decided the issue, and not always in the subrogation industry's favor. For example, **Illinois** has totally ignored the cost savings to the claimant of such case management fees and expenditures. It has declared such items unrecoverable because such medical rehabilitative services provided by the claim coordinator at the insurance company's direction were presumably provided for the benefit of the carrier and were not reimbursable necessary medical or rehabilitative services. *Cole v. Byrd*, 656 N.E.2d 1068 (Ill. 1995). The particular expense at issue was the medical rehabilitation coordinator services of a licensed professional nurse provided by Professional Rehabilitation Management (PRM).

Official Disability Guidelines (ODG). Another possible argument can be utilized in states which adhere to medical treatment guidelines proposed by an Austin, Texas-based workers' compensation treatment company called "ODG by MCG." ODG offers a subscription program utilized by "healthcare providers and/or case managers." The ODG are evidence-based treatment guidelines BWC and the MCOs have available on their desktops. Because the ODG are in a Web-based tool, BWC and MCO staff can easily search and find pertinent information necessary for everyday issues in claims and medical case management. The Commissions of several states now have mandated compliance with the Medical Treatment Guidelines of ODG by MCG Health ("ODG Guidelines"). MCG Health is part of the Hearst Health network, providing clinical guidance for healthcare organizations in their patient-centered care decisions.

In **Kentucky**, as of January 1, 2016, the Kentucky Workers Compensation Department of Worker Claims (DWC) requires compliance with ODG Guidelines. The guidelines have been adopted by the Kentucky Workers Compensation Department of Worker Claims (DWC) under, KRS § 342.035 (8) (a). The Kentucky DWC website states that the purpose of the treatment guidelines is to facilitate evidence-based, safe, and appropriate medical treatment of work-related injuries and occupational diseases, in order to expedite recovery of health and return to work. The ODG guidelines contain independent, evidence-based, nationally recognized treatment guidelines for the most common work-related injuries and conditions. ODG's treatment guidelines contain a comprehensive list of treatments that may be prescribed for injuries to specific body parts or for general conditions based on diagnosis. Under **Kentucky**

Statutes/Admin. Regs., which require adoption of the OMG Medical Treatment Guidelines, the carrier can take the position it may recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines, that is maintained by the "designated physician" under Title 9803, Ch. 025, Kentucky Regulation 096. That regulation states that the fee for preparation of a "treatment plan" which is "maintained by the designated physician" is considered to be an "integral part of the fee authorized in the medical fee schedule for the underlying services." The Kentucky DWC website states that the ODG Guidelines have been adopted by 11 states' workers' compensation systems including Kentucky. Ten other states have also adopted the ODG guidelines, including **Arizona**, **Indiana**, **Kansas**, **Montana**, **New Mexico**, **North Dakota**, **Ohio**, **Oklahoma**, **Tennessee**, and **Texas**.

In **Oklahoma**, the Court of Appeals has provided us with an excellent example of how to extrapolate recovery of nurse case management fees from the definitions of "benefits" and "compensation found elsewhere in the Workers' Compensation Act. They recently decided the case of *Jones v. Cabler and Hobby Lobby,* 2022 WL 19568938 (Okla. App. 2022). In *Jones*, the employee argued that the carrier was not entitled to be reimbursed for "nurse case manager" costs it had paid, because they were not a "benefit paid" to the employee and therefore not subject to subrogation. The employee's argument was that 85A O.S. §113 indicates that case management costs are to be "borne by the employer or insurance carrier." The court dismissed that argument by indicating that medical expenses and indemnity benefits were also "borne" by the carrier—until such time as there was a third-party recovery, and the carrier was reimbursed. Although nurse case management fees are "initially" borne by the carrier, the statute does not say that the carrier is not entitled to reimbursement under Section 43. The employee also argued that such nurse case management fees were not "compensation" as defined in 85A O.S. §2(10). That section defines compensation as "the money allowance payable to the employee or to his or her dependents and includes the medical services and supplies provided for in Section 50 of this title and funeral expenses." Section 50 in turn provides:

> *…the employer shall promptly provide an injured employee with medical, surgical, hospital, optoetric, podiatric, chiropractice and nursing services, reasonably necessary in connection with the injury received by the employee.*

The **Oklahoma** Court of Appeals disagreed and held that they had no evidence before them as to what services a medical case manager performed. The employee admitted that "a medical case manager facilitates communication between medical service providers and the adjuster" and "is chosen by the claims handler to make his job easier." The court noted that 85A O.S. §2(4) defines a case manager as:

> *4. "Case manager" means a person who is a registered nurse with a current, active unencumbered license from the Oklahoma Board of Nursing, or possesses one or more of the following certifications which indicate the individual has a minimum number of years of case management experience, has passed a national competency test and regularly obtains continuing education hours to maintain certification:*
>
> *a. Certified Disability Management Specialist (CDMS),*
>
> *b. Certified Case Manager (CCM),*
>
> *c. Certified Rehabilitation Registered Nurse (CRRN),*
>
> *d. Case Manager--Certified (CMC),*
>
> *e. Certified Occupational Health Nurse (COHN), or*
>
> *f. Certified Occupational Health Nurse Specialist (COHN-S).*

See Okla. Stat. Ann. tit. 85A, § 2. Because this definition requires very specific and strictly medical qualifications and implies that a medical case manager has a medical role in managing an injured employee's treatment (rather than simply performing administrative functions to assist a claims manager, it is reimbursable to the workers' compensation carrier.

Allocated vs. Unallocated Fees, Costs, and Expenses

Fees and costs for services such as nurse case management, medical bill audits, vocational rehabilitation, utilization reviews (independent review of the medical treatment plan requested by the employee's doctor to determine if the treatment is medically necessary and therefore covered by workers' compensation), are generally referred to as Allocated Loss Adjustment Expenses (ALAE). ALAE are attributed to the handling of a specific workers' compensation claim, as opposed to Unallocated Loss Adjustment Expenses which constitute general overhead of an insurance company, such as claims adjuster salaries and benefits. ALAE, along with unallocated loss adjustment expenses (ULAE), represent a carrier's estimate of the money it will pay out in claims and expenses. Some commercial liability policies contain endorsements, which require the policyholder to reimburse its insurance company for loss adjustment expenses (ALAE or ULAE).

The terms "nurse case management" and "utilization review" are often inappropriately conflated. "Nurse case management" is the coordination and organization of medical care in order to expedite the employee's return to work. It is usually the responsibility of the nurse case manager. "Utilization review" on the other hand, is the review of actual medical services being provided to the employee to determine if it is medical necessity and appropriate for the injury. The utilization review is conducted by a nurse who has a utilization review physician available for medical opinions and guidance.

A functional capacity evaluation (FCE) is a series of tests performed by a medical doctor, occupational therapist, or other health professional to determine an injured employee's ability to perform his or her job. It reviews and evaluates how well their health status, bodily functions, and structures of the body compared to the demands of their work. Similar evaluations might also be referred to as a functional capacity assessment (FCA), physical capacity assessment (PCA), or work capacity evaluation (WCE). An appropriate FCE will usually involve a battery of standardized assessments that result in performance-based measures and demonstrates predictive values with regard to an employee's ability to return to work. Pain monitoring is frequently performed during the FCE to document client-reported levels of pain during various activities as well as to manage pain. The FCE may also include evaluation of an individual's hand dexterity, hand coordination, endurance, and other job-specific functions. As you might imagine, there are arguments on both sides of the issue of whether or not such FCE charges are considered "benefits" which must be reimbursed to the workers' compensation carrier once there is a third-party settlement. An employee is usually referred for an FCE by physicians, physician assistants, and nurse practitioners; insurance representatives; case managers; employers, human resources personnel, and risk managers; attorneys (for either the plaintiff or defense); other therapists; or chiropractors. Individuals can also self-refer in states that allow direct access to occupational therapy services, but a referral may be required for reimbursement. It is likely that reimbursement of FCE charges should be treated similarly to occupational therapy. Interestingly, the results of an FCE will often by utilized by the employee's attorney in a third-party action as evidence of the employee's diminished wage-earning capacity or a disability.

Recovery of Case Attorneys' Fees

In addition to the above-referenced allocated fee and costs, workers' compensation carriers also pay significant amounts in attorneys' fees to lawyers representing injured employees when a workers' compensation disability claim is settled or compromised. Such fees are sometimes paid out of the employee's settlement and other times awarded independently and paid by the carrier apart from the settlement amount. Whether such attorneys' fees

can and should be reimbursed to the carrier as part of its workers' compensation subrogation lien when a third-party case settled is equally as confusing and unclear in most states.

The fee paid to an attorney for representing an injured employee in a workers' compensation claim varies by state and is usually governed by state laws or regulations. In most states, the attorney represents the employee on a contingent basis. While not technically "compensation", such fees are often paid directly out of the disability benefits paid to the employee, and in such cases should be considered part of the carrier's subrogation lien. In **New York**, for example, a workers' compensation judge is responsible for establishing the fee to be awarded to the employee's attorney. This fee is deducted from the benefits awarded to the injured employee. Workers' Compensation Law (WCL) § 24, and Title 12 NYCRR 300.17.

In **Texas**, an employee's attorney is paid fees by the carrier out of the income benefits received by the employee. This means out of the benefits the employee received in a settlement or an award after a contested case hearing, not including the value of medical benefits or any undisputed benefits paid without the lawyer's help. The amount of attorney fees must be approved by the Division of Workers' Compensation and are determined by the attorney's time and expenses. Once the Division approves the attorney's fees, the insurance carrier is ordered by the Division to deduct the fee amount from the employee's benefits, up to 25% of the recovery amount. Tex. Labor Code § 408.221(b), 28 Tex. Admin. Code § 152.5 (2019).

When attempting to recover for costs or expenses beyond the basic indemnity and medical benefit payments, a subrogation professional's first strategy should be to look at the law of the particular state involved, determine exactly what the subrogation statute allows the carrier to recover, and craft an argument accordingly. For example, if it allows for recovery of "benefits" or "compensation" paid, then the definitions of those terms in other areas of the workers' compensation law should be determined, and an argument fashioned that those definitions include case management type fees and expenses. If that proves to be a dead end, a logical argument should be made that by discouraging the spending of such amounts, the subrogation lien will actually increase, and the recovery of the injured worker will decrease. Such expenditures actually assist in holding down the cost of workers' compensation insurance premiums, and every incentive to hold down liens and reduce fraud will make workers' compensation systems more cost-effective and affordable for businesses. As a last resort, simply include these reasonable costs in the lien totals provided to plaintiffs' lawyers, putting the burden on them to affirmatively challenge such expenses. A court may be asked to decide, and voilà; we have precedent, good or bad. Where the recovery of such costs is not proscribed, it is reasonable to expect reimbursement of expenses and costs which fall within the definition of the amount recoverable under the applicable workers' compensation subrogation statute or which actually benefit the employee by keeping the benefits total to its absolute minimum. If the totals are not questioned, there is no foul. If they are, remember the words of Mark Twain, "Whatever you say, say it with conviction."

Below is a chart that provides definitions, explanations, and arguments which can be used when the issue of which "benefits" can be subrogated has not been established already.

If you should have any questions regarding this article or workers' compensation subrogation in general, please contact Gary Wickert at gwickert@mwl-law.com.

STATE	SUMMARY
ALABAMA	No precedent or discussion in case law. Section 25-5-11 provides as follows: *To the extent of the recovery of damages against the other party, the employer shall be entitled to reimbursement for the amount of compensation theretofore paid on account of injury or death.* *For purposes of this amendatory act, the employer shall be entitled to subrogation for medical and vocational benefits expended by the employer on behalf of the employee;* Attorney's Fees: The Alabama Workers' Compensation Act sets the amount of fees that attorneys can charge in workers' compensation cases. Section 25-5-90 provides that a 15% attorneys' fee can be paid out of the compensation awarded or paid to the employee, upon application of the employee. The judge fixes the fee amount.
ALASKA	Section 23.30.015 provides that the carrier is entitled to reimbursement of: *(A) the expenses incurred by the employer with respect to the action or compromise, including a reasonable attorney fee determined by the board;* *(B) the cost of all benefits actually furnished by the employer under this chapter;* *(C) all amounts paid as compensation and second-injury fund payments, and if the employer is self-insured or uninsured, all service fees paid under Alaska Stat. § 23.05.067;* Medical care is defined to include physicians' fees, nurses' charges, hospital services, hospital supplies, medical and prosthetic devices, physical rehabilitation, and transportation charges. Alaska Stat. § 23.30.095. However, the Alaska Administrative Code defines a "claim" for workers' compensation "benefits" as follows: *A claim is a written request for benefits, including compensation, attorney's fees, costs, interest, reemployment or rehabilitation benefits, rehabilitation specialist provider fees, or medical benefits under the Act, that meets the requirements of (4) of this subsection. The board has a form that may be used to file a claim. In this chapter, an application is a written claim.* Alaska Admin. Code tit. 8, § 45.050. Arguably, each of those elements could therefore be considered included within the definition of "benefits."
ARIZONA	No statute, regulation or case decision on point. Section 23-1023(D) provides as follows: *…the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from the other person to the extent of such compensation and medical, surgical and hospital benefits paid.* "Compensation" includes both disability and medical benefits. *Bernhart v. Indus. Commn.*, 26 P.3d 1181 (Ariz. App. 2001). As of October 1, 2018, Arizona requires compliance with ODG Guidelines. See the state of Kentucky and the Preamble above for an argument that the subrogated carrier can recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines.
ARKANSAS	No statute, regulation, or case decision on point. Section 11-9-410(a)(B) provides that the carrier is entitled to reimbursement of "the amount paid and to be paid by them as compensation to the injured employee or his or her dependents." "Compensation" means the money allowance payable to the employee or to his or her dependents and includes the allowances provided for in § 11-9-509 and funeral expenses. A.C.A. § 11-9-102(4(F)(5). Section 11-9-5-9 provides for payment of "authorized medical, hospital, and other services and treatment furnished under §§ 11-9-508 -- 11-9-516." Section 11-9-508, in turn provides for the employer to "promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee."

STATE	SUMMARY
CALIFORNIA	California's workers' compensation subrogation statute reads as follows: *"Any employer who pays, or becomes obligated to pay compensation, or who pays, or becomes obligated to pay salary in lieu of compensation, or who pays or becomes obligated to pay an amount to the Department of Industrial Relations pursuant to Section 4706.5, may likewise make a claim or bring an action against the third person. In the latter event, the employer may recover in the same suit, in addition to the total amount of compensation, damages for which he or she was liable including all salary, wage, pension, or other emolument paid to the employee or to his or her dependents."* Cal. Labor Code § 3852. The workers' compensation carrier is entitled to recover in the same third-party lawsuit with the employee, the total amount of its expenditures for "compensation" and any other special damages, such as salary, wage, pension or other emolument paid to the employee. Cal. Labor Code § 3856(c). California law then defines "compensation" as: *"…compensation under this division and includes every benefit or payment conferred by this division [Division IV] upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence."* Cal. Labor Code § 3207. "Compensation," therefore, includes medical and hospital expenses (Cal. Labor Code §§ 4600-4608), nurse case manager expenses (Cal. Labor Code §§ 4600-4608), medical-legal expenses (Cal. Labor Code §§ 4620-4628), vocational rehabilitation expenses (Cal. Labor Code §§ 4635-4647), disability indemnity payments (Cal. Labor Code §§ 4650-4663), death benefits (Cal. Labor Code §§ 4700-4709), and interest (Cal. Labor Code § 5800). Most penalties are arguably recoverable as mandated by Division IV, and even the cost of utilization review should now arguably be recoverable as the use of such process is now mandated by California law. Cal. Labor Code § 4610. However, the cost of utilization review may not be a "benefit" or "payment conferred on an injured employee". Aside from the logical arguments above, California law apparently does not directly support recovery of these items. But it does require mitigation of damages, and one Court of Appeals decision does allow a plaintiff to recover the cost of mitigation efforts as a recoverable item of damages. *Kleinclause v. Marin Realty Co.,* 94 Cal. App. 2d 773 (1949). Another interesting and cogent argument is an analogy to the right to a future credit. When a recovery by a claimant is made, the carrier is given a credit toward future "benefit" payments. A close look at this law reveals that "medical-legal" costs should be costs against which a carrier can press a credit, implying that they constitute "compensation" under California law and should be recoverable by a workers' compensation carrier. *Adams v. W.C.A.B.,* 18 Cal.3d 226 (1976). In *Patterson v. Oaks Farms*, 79 Cal. Comp. Cases 910 (Cal. W.C.A.B. 2014), the California Workers' Compensation Appeal Board held that held that providing a nurse case manager is form of medical treatment under § 4600 that may be reasonably required of an employer. *Attorneys' Fees*. The carrier is required to reimburse the employee for "medical-legal" expenses reasonably and actually incurred. Cal. Lab. Code § 4621(a). The purpose of allowing reimbursement of medical-legal costs is to allow the employee to secure expert professional services to establish the validity of a disputed claim and to ensure payment for such services—irrespective of the risks of the litigation or the financial condition of the applicant. (*Perrillo v. Picco & Presley* (2007) 157 Cal. App. 4th 914, 931, 70 Cal. Rptr. 3d 29, 41–42, citing *Public Employees' Retirement System v. Workers' Comp. Appeals Bd.*, 87 Cal.App.3d 223 (Cal. App. 1978). Because the carrier is required under statute to pay for the applicant's legal fees, these benefits should be recoverable in a third-party lawsuit seeking subrogation for the benefits provided to the injured employee.

STATE	SUMMARY
COLORADO	No statute, regulation, or case decision on point. Section 8-41-203(b) provides that: *(b) Said insurance carrier shall not be entitled to recover any sum in excess of the amount of compensation for which said carrier is liable under said articles to the injured employee, but to that extent said carrier shall be subrogated to the rights of the injured employee against said third party causing the injury*. Section 8-41-203(c) provides that: *(c) The right of subrogation provided by this section shall apply to and include all compensation and all medical, hospital, dental, funeral, and other benefits and expenses to which the employee …[is]… entitled under the provisions of said articles, including parts 2 and 3 of article 46 of this title, or for which the employee's employer or insurance carrier is liable or has assumed liability*. The employer and carrier are required to offer managed care or medical case management in the areas of major cities and towns, and to offer medical case management throughout the state. C.R.S. § 8-42- 101(3.6)(p). The director establishes fees for which "*all surgical, hospital, dental, nursing, vocational rehabilitation, and medical services, whether related to treatment or not, pertaining to injured employees under this section shall be compensated*." C.R.S. § 8-42- 101(3)(a)(1).
CONNECTICUT	Connecticut's § 31-293 gives us only a "clue" as to which benefits can be recovered: *For the purposes of this section, the claim of the employer shall consist of (1) the amount of any compensation which he has paid on account of the injury which is the subject of the suit and (2) an amount equal to the present worth of any probable future payments which he has by award become obligated to pay on account of the injury. The word "compensation," as used in this section, shall be construed to include incapacity payments to an injured employee, payments to the dependents of a deceased employee, sums paid out for surgical, medical and hospital services to an injured employee, the burial fee provided by subdivision (1) of subsection (a) of section 31-306, payments made under the provisions of sections 31-312 and 31-313, and payments made under the provisions of section 31-284b in the case of an action brought under this section by the employer or an action brought under this section by the employee in which the employee has alleged and been awarded such payments as damages*. Therefore, a carrier can recover the following categories of "compensation" paid to or on behalf of an employee: 1. Any "compensation" paid to the employee; 2. Present value of any probably future payments. In the definitions section of the statute, the term "compensation" is defined in § 31-275 as: *"Compensation" means benefits or payments mandated by the provisions of this chapter, including, but not limited to, indemnity, medical and surgical aid or hospital and nursing service required under section 31-294d and any type of payment for disability, whether for total or partial disability of a permanent or temporary nature, death benefit, funeral expense, payments made under the provisions of section 31-284b, 31-293a or 31-310, or any adjustment in benefits or payments required by this chapter.* Section 31-294d, referenced above, requires payment of "*…any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician or surgeon deems reasonable or necessary*." We can argue that the nurse case management fees are necessary to determine which payments qualify to be paid, and that these nurse case management fees benefit the employee by helping to hold down the lien. If we didn't pay those fees, the lien would be much larger, and the employee would owe us much more out of his third-party recovery. Nonetheless, advocacy will be required to make the case.

STATE	SUMMARY
DELAWARE	No statute, regulation, or case decision on point. Section 2363 somewhat broadly describes the nature of the payments for which the workers' compensation carrier is entitled to reimbursement: "…*any amounts paid or payable under the Workers' Compensation Act*." 19 Del. C. § 2363.
DISTRICT OF COLUMBIA	No statute, regulation, or case decision on point. Section 32-1535(e)(3) provides a description of the payments for which the workers' compensation carrier is entitled to reimbursement: *(e)(1) The employer shall retain an amount equal to:* *(A) The expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the Mayor);* *(B) The cost of all benefits actually furnished by him to the employee under § 32-1507;* *(C) All amounts paid as compensation; and* *(D) The present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Mayor, and the present value of the cost of all benefits thereafter to be furnished under § 32-1507, to be estimated by the Mayor, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and* *(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one fifth of such excess which shall belong to the employer.* Section 32-1507(a) (referenced in statute above) provides that: *(a) The employer shall furnish such medical, surgical, vocational rehabilitation services, including necessary travel expenses and other attendance or treatment, nurse and hospital service, medicine, crutches, false teeth or the repair thereof, eyeglasses or the repair thereof, artificial or any prosthetic appliance for such period as the nature of the injury or the process of recovery may require. The employer shall furnish such additional payment as the Mayor may determine is necessary for the maintenance of an employee undergoing vocational rehabilitation, not to exceed $50 a week.*
FLORIDA	Section 440.39(3)(a) provides that the workers' compensation carrier is entitled to recover "the amount of *compensation benefits* paid or to be paid as provided by subsection 3." Section 440.39 then goes on to state that the lien is upon any judgment or settlement recovered to the extent that the court may determine to be their "pro rata share for *compensation and medical benefits* paid or to be paid under the provisions of this law." "Medical benefits" is not defined in that particular statute, but § 440.027) defines "compensation" as: *(7) "Compensation" means the money allowance payable to an employee or to his or her dependents as provided for in this chapter.* The carrier can require the employee to undergo a reemployment assessment and must hire a qualified rehabilitation provider to provide the assessment. Fla. Stat. § 440.491(4)(a). The carrier's subrogation rights do not extend to payment of vocational benefits, attorney's fees or miscellaneous claims expenses such as investigation or the use of experts. Fla. Stat. §440.39(2),(3)(a) (1997); *Employer's Casualty Insurance Company v. Manfredo*, 542 So.2d 1365 (Fla. App. 1989), aff'd, 560 So.2d 1162 (Fla. 1990). The employee is responsible for his/her own attorneys' fees. Fla. Stat. §440.34.

STATE	SUMMARY
GEORGIA	No statute, regulation, or case decision on point. Section 34-9-11.1 describes the carrier's subrogation interest as follows: *…the employer or such employer's insurer shall have a subrogation lien, not to exceed the actual amount of compensation paid pursuant to this chapter…* Attorneys' fees are capped at 25% of the claimant's award or 25% of the employee's weekly indemnity benefits. Ga. Code Ann. § 34-9-108. The fee is paid out of the recovery by the employee.
HAWAII	No statute, regulation, or case decision on point. Section 386-8 describes the carrier's subrogation interest as follows: *"…the amount of the employer's expenditure for compensation."* Section 386-1 defines "compensation" as follows: *"Compensation" means all benefits accorded by this chapter to an employee or the employee's dependents on account of a work injury as defined in this section; it includes medical and rehabilitation benefits, income and indemnity benefits in cases of disability or death, and the allowance for funeral and burial expenses."*
IDAHO	No statute, regulation, or case decision on point. Section 386-8 describes the carrier's subrogation interest as follows: *"…the amount of the employer's expenditure for compensation."* Section 386-1 defines "compensation" as follows: *"Compensation" means all benefits accorded by this chapter to an employee or the employee's dependents on account of a work injury as defined in this section; it includes medical and rehabilitation benefits, income and indemnity benefits in cases of disability or death, and the allowance for funeral and burial expenses.*
ILLINOIS	Section 305/5 provides that the employer/carrier is entitled to reimbursement of "*the amount of compensation paid or to be paid by him*." If the carrier prosecutes the third-party action, it must pay to the employee "any amount in excess of the amount of such compensation paid or to be paid under this Act." Illinois has declared items such case management fees and expenditures unrecoverable because such medical rehabilitative services provided by the claims coordinator at the insurance company's direction were presumably provided for the benefit of the carrier and were not reimbursable necessary medical or rehabilitative services. *Cole v. Byrd*, 656 N.E.2d 1068 (Ill. 1995). In *Cole*, the particular expense at issue was the medical rehabilitation coordinator services of a licensed professional nurse provided by Professional Rehabilitation Management (PRM). The court noted that the Illinois Act authorizes reimbursement for necessary medical and rehabilitation services, not for an insurer's expenses, even though the insurer's expenses may in some way provide a benefit to an injured employee. An employer's obligation to provide medical and rehabilitative services has been interpreted broadly. An employer has an obligation to provide such things as assisted home care, nursing care, and remodeling expenses. *Burd v. Industrial Comm'n* 566 N.E.2d 35 (Ill. App. 1991) (fiancée's nursing services to paralyzed employee were necessary medical expense); *Zephyr, Inc. v. Industrial Commission*, 576 N.E.2d 1 (Ill. App. 1991) (modification of home to make it wheelchair accessible to accommodate employee's paralysis was necessary medical expense); But see *Rousey v. Industrial Comm'n,* 587 N.E.2d 26 (Ill. App. 1992) (spouse's housekeeping services and supervision of employee were not necessary medical expense). An argument can be made that an employer's right to reimbursement must be just as broad as the employer's obligation to provide medical care. With regard to recovery by the carrier of attorneys' fees paid to the employee's workers' compensation claim attorney, an unpublished decision appears to include 20% attorneys' fees in the worker's compensation lien even though this was not the issue on appeal. *Sanchez v. Rental Serv. Corp.*, 2013 WL 860039 (Ill. App. 2013).

STATE	SUMMARY
INDIANA	No statute, regulation, or case decision on point. Section 22-3-2-13 describes a workers' compensation carrier's subrogation interest as follows: *…the amount of compensation paid to the employee or dependents, plus the services and products and burial expenses paid by the employer or the employer's compensation insurance carrier…* We are given no more guidance on this point, but most Indiana practitioners believe that nurse case management fees and similar allocated costs incurred by the workers' compensation carriers are not properly included in the lien even though they help keep the cost of the lien down and thereby benefit everybody. A nurse case manager serves as a liaison between the medical provider, the employer and the employee. The nurse case manager is not an indispensable player in the worker's compensation process and is not specifically governed or required by the Workers' Compensation Act. However, the nurse case manager can be an integral part of coordinating medical treatment and the stay-at-work/return-to-work process. As of January 1, 2019, Indiana requires compliance with ODG Guidelines. See the state of Kentucky and the Preamble above for an argument that the subrogated carrier can recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines.
IOWA	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 85.22 describes a workers' compensation carrier's subrogation interest as follows: *…a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable…* The term "compensation" embraces medical expenses permits reimbursement by employer or carrier for medical expenses paid on behalf of employee. *Youngs v. Clinton Foods, Inc*., 188 F. Supp. 15 (S.D. Iowa 1960). Section 85.27 requires the carrier to provide the following services: *…reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services*.
KANSAS	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 342.700 describes a workers' compensation carrier's subrogation interest as follows: *… the employer shall be subrogated to the extent of the compensation and medical aid provided…* Section 44-504(f) defines "compensation and medical aid" as follows: *(f) As used in this section, "compensation and medical aid" includes all payments of medical compensation, disability compensation, death compensation, including payments under K.S.A. 44-570 and amendments thereto, and any other payments made or provided pursuant to the workers compensation act*. As of January 1, 2008, Kansas requires compliance with ODG Guidelines. See the state of Kentucky and the Preamble above for an argument that the subrogated carrier can recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines.

STATE	SUMMARY
KENTUCKY	Section 44-504 describes a workers' compensation carrier's subrogation interest as follows: *… the indemnity and medical expenses paid and payable to or on behalf of the injured employee…* Section 344.0011(f) defines "medical and related benefits" as follows: *(13) "Medical and related benefits" means payments made for medical, hospital, burial, and other services as provided in this chapter, other than income benefits.* The ODG guidelines (see preamble above) contain independent, evidence-based, nationally recognized treatment guidelines for the most common work-related injuries and conditions. ODG's treatment guidelines contain a comprehensive list of treatments that may be prescribed for injuries to specific body parts or for general conditions based on diagnosis. Kentucky has adopted the OMG Medical Treatment Guidelines. Therefore, the carrier can take the position it may recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines, that is maintained by the "designated physician" under Title 9803, Ch. 025, Kentucky Regulation 096. That regulation states that the fee for preparation of a "treatment plan" which is "maintained by the designated physician" is considered to be an "integral part of the fee authorized in the medical fee schedule for the underlying services." Regulation 96 also requires "treatment plans" if the employee requires long term medical care, has undergone more than 60 days of passive modality treatment, undergoes elective surgery or needs work hardening, pain management or medical rehabilitation.
LOUISIANA	There is very little precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Louisiana's workers' compensation subrogation statutes each describe a workers' compensation carrier's subrogation interest in a slightly different way: § 23:1101: (employee can file third-party suit and still obtain comp benefits) "*recover any amount which he has paid or becomes obligated to pay as compensation to such employee*." § 23:1102: (settlement of third-party case) "*the extent of the total amount of compensation benefits and medical benefits previously paid to or on behalf of the employee*." § 23:1103: (3P cases tried to judgment) "*reimburse the employer for the compensation which he has actually paid*." A Court of Appeals decision says that the carrier or employer may recover necessary expenses paid by employer, although the statute does not specifically authorize employer to recover any amounts except compensation payments, attorneys' fees and costs. *Alford v. Louisiana & A. Ry. Co*., 38 So.2d 258 (La. App. 1949). And while it is true that § 23:1101 does not specifically provide for the right of the carrier to recover anything except "compensation" which it has paid or become obligated to pay under the Louisiana Worker's Compensation Law, it is clear that the term "compensation" includes, and the carrier can recover, all payments it is required to make under the Act. *Carlisle v. Employers Mutuals of Wausau*, 220 So.2d 152 (La. App. 1969).
MAINE	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 107 describes a workers' compensation carrier's subrogation interest as follows: *… any employer having paid the compensation or benefits or having become liable for compensation or benefits under any compensation payment scheme has a lien for the value of compensation paid on any damages subsequently recovered against the 3rd person liable for the injury.…* 39-A M.R.S.A. § 107. Section 1 of the General Provisions says, "*Treatment does not include expenses related to managed care services such as utilization review, case management, and bill review or to examinations performed pursuant to 39-A M.R.S.A. §§ 207 and 312*." Code Me. R. tit. 90-351 Ch. 5, § 1.

STATE	SUMMARY
MARYLAND	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 9-902 describes a workers' compensation carrier's subrogation interest as follows: *… compensation paid or awarded and the amount of payments for medical services, funeral expenses, or any other purpose under Subtitle 6 of this title*.… Md. Lab. & Empl. § 9-902(b). Subtitle 6 is entitled "Benefits." Section 9-660 is under Subtitle 6 and is entitled "Provision of medical services and treatment." It lists the medical services required to be paid by the carrier: (1) medical, surgical, or other attendance or treatment; (2) hospital and nursing services; (3) medicine; (4) crutches and other apparatus; and (5) artificial arms, feet, hands, and legs and other prosthetic appliances. This subsection describes the medical bills that can be recovered. It refers generically to "nursing services." Section 9-6A-09 concerns "Rehabilitation Practitioners" and sets forth the qualifications for a "nurse case manager", a "rehabilitation counselor", and a "vocational evaluator."
MASSACHUSETTS	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 15 describes a workers' compensation carrier's subrogation interest as follows: "*…the compensation paid under this chapter."* M.G.L.A. 152 § 15. "Compensation" is not defined in the Act, but at least one decision has said that the word "compensation," as used in the Act, means the money relief afforded an injured employee or his dependents according to the scale established and for the persons designated in the act, and not the compensatory damages recoverable in an action at law for a wrong done or a contract broken. *Devine's Case*, 129 N.E. 414 (Mass. 1921); *Duart v. Simmons,* 121 N.E. 10 (Mass 1918), error dismissed 40 S.Ct. 342, 251 U.S. 547, 64 L.Ed. 408. At least one case seems to suggest that if the lump sum agreement in a workers' compensation claim also indicates that the attorney received attorneys' fees, and that there was a lump sum settlement for permanent disability, those amounts should also be included in the lien. See generally 2A A. Larson, Workmen's Compensation Sections 74.33-74.37 (1993). Also see *Bongiorno v. Liberty Mut. Ins. Co*., 630 N.E.2d 274 (Mass. 1994) (involving subrogation in a legal malpractice case).

STATE	SUMMARY
MICHIGAN	The Michigan Workers' Compensation Appellate Commission has specifically held that nurse case management fees can be reimbursable – depending on circumstances. In *Ziebell v. Wal-Mart,* 2001 WL 566162 (Mich. Work. Comp. App. Com. 2001), the TPA hired a nurse case manager and then fired him when he recommended the claimant have an independent medical evaluation. The nurse case manager stayed on working for the plaintiff (non-cat injuries) and the Magistrate later ordered the carrier to pay his $7,713.10 in nurse case management fees. The Appellate Commission reversed because the plaintiff and the nurse case manager did not provide proof that the services were "reasonable", but specifically stated: *Although the Act makes no specific reference to 'case management services,' we believe that those services, if reasonable and needed, are contemplated in the types of services provided for under section 315(1).* Unlike "case management services," there is at least a provision in the Act that contemplates payment of nursing care services, §§ 418.315(1) and 17.237(315)(1). A condition precedent to an award of nursing care or attendant services, however, is a determination that such services are "needed", not merely desired. Section 418.315(1) provides in pertinent part: *The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed.* However, it remains the burden of the carrier seeking to subrogate for such services that they were reasonable and necessary. In *Andrew Lefko v. Walter Toebe Construction Company and Maryland Casualty Company*, 2008 WL 5122473 (Mich. Work. Comp. App. Comm. (2008), a 19-year-old employee was rendered a spastic quadriplegic as the result of a work-related accident. Liberty Mutual provided workers' compensation benefits including nurse case managers. The Commission stated that case management fees are routinely paid in appropriate cases and constitute a "benefit" under Michigan law.
MINNESOTA	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 176.061 describes a workers' compensation carrier's subrogation interest as follows: "*…all benefits paid under this chapter to or on behalf of the employee or the employee's dependents by the employer*." M.S.A. § 176.061(6)(c). A *Naig* settlement does not affect the carrier's subrogation rights against the "subrogable" elements of damages. *Ruddy v. Ford Motor Co.*, 399 N.W.2d 634 (Minn. App. 1987). Damages in the form of past and future medical expenses, past and future wage loss, and loss of future earning capacity are considered to be duplicative of workers' compensation benefits and, therefore, constitute the carrier's claim. Damages in the form of pain, suffering, disfigurement, general disability, embarrassment, mental anguish and loss of services or consortium are not duplicative of the workers' compensation claim and are, therefore, part of the employee's claim. With regard to allocation of third-party recoveries in *Naig* settlements, there is some dispute about how to categorize other workers' compensation benefits, such as permanent partial disability, vocational or physical rehabilitation expenses, nurse case management costs, and the like, which truly do not match up well with traditional elements of civil damages. For example, whether permanent partial disability constitutes "general disability" which could arguably constitute part of the employee's claim is settled out in a *Naig* settlement has not been definitively resolved. Likewise, vocational and physical rehabilitation appears related to the element of civil damages known as future earning capacity and some argue it is left over after a *Naig* settlement for the employer to subrogate. *Tyroll v. Private Label Chemicals, Inc*., 505 N.W.2d 54 (Minn. 1993).
MISSISSIPPI	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 71-3-71 describes a workers' compensation carrier's subrogation interest as follows: *… the amount paid by them as compensation and medical expenses.…* M.C.A. § 71-3-71. (recovery made by employee). *… the amount that the employer and insurer shall have paid or are liable for in compensation or other benefits…* (recovery made by carrier). "Compensation" means "the money allowance payable to an injured worker or his dependents as provided in this chapter, and includes funeral benefits provided therein." M.C.A. § 71-3-3.

STATE	SUMMARY
MISSOURI	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 287.150 describes a workers' compensation carrier's subrogation interest as follows: *When a third person is liable for the death of an employee and compensation is paid or payable under this chapter, and recovery is had by a dependent under this chapter either by judgment or settlement for the wrongful death of the employee, the employer shall have a subrogation lien on any recovery.* Mo. Rev. Stat. § 287.150.
MONTANA	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 39-71-414 describes a workers' compensation carrier's subrogation interest as follows: *…the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act*. Mont. Stat. § 39-71-414. As of April 1, 2019, Montana requires compliance with ODG Guidelines. See the state of Kentucky and the Preamble above for an argument that the subrogated carrier can recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines.
NEBRASKA	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 48-118 describes a workers' compensation carrier's subrogation interest as follows: *… the amount payable as compensation to such employee or dependents.* Neb. Rev. Stat. § 48-118.
NEVADA	There is little precedent or discussion in Nevada law specifically regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 616C.215 describes a workers' compensation carrier's subrogation lien as follows: *(6) The lien provided for pursuant to subsection 1 or 5 includes the total compensation expenditure incurred by the insurer, the uninsured employers' claim account or a subsequent injury account for the injured employee and his dependents.* N.R.S. § 616C.215(6). For the purposes of workers' compensation insurance, however, "compensation" means the money which is payable to an employee or to the dependents of the employee as provided for in chapters 616A to 616D, inclusive, of NRS, and includes benefits for funerals, accident benefits and money for rehabilitative services." NRS 616A.090. Accident benefits include "medical, surgical, hospital or other treatments, nursing, medicine, medical and surgical supplies, crutches and apparatuses, including prosthetic devices." N.R.S. § 616A.035(1). Accident benefits do not include exercise equipment, gym memberships, or in most cases, motor vehicle expenses. N.R.S. § 616A.035(3). Medical benefits are defined virtually identically to accident benefits. *Poremba v. S. Nevada Paving*, 388 P.3d 232, 236–37 (Nev. 2017).
NEW HAMPSHIRE	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 281-A:13 describes a workers' compensation carrier's subrogation lien extending as follows: *…the extent of the compensation, medical, hospital, or other remedial care already paid or agreed or awarded to be paid by the employer, or the employer's insurance carrier, under this chapter.…* N.H. Rev. Stat. Ann. § 281-A:13(I)(b).

STATE	SUMMARY
NEW JERSEY	In New Jersey, a § 40 lien includes payments made for temporary disability, permanent disability, and all medical expenses and treatment. The workers' compensation lien does *not* include the carrier's portion of a claimant's attorney and expert fees, an employer or insurer's expenses for a defense medical examination, nurse case management fees, or rehabilitative nursing services unless such nursing services primarily benefitted claimant and were reasonably necessary to claimant's recovery. *Kuhnel v. CNA Ins. Companies*, 731 A.2d 564 (N.J. Super. 1999). Any expenses incurred by a workers' compensation carrier for services of a rehabilitative nurse are recoverable as medical expenses under the workers' compensation lien statute only if the carrier demonstrates that such expenses are necessary to provide medical and other treatment as shall be necessary to cure and relieve claimant of the effects of the injury. *Raso v. Ross Steel Erectors, Inc.*, 725 A.2d 690 (N.J. Super. 1999). *Attorneys' Fees*. As for attorneys' fees paid in connection with the workers' compensation claim, they can be included in the § 40 subrogation lien. In *Panckeri v. Allentown Police Department*, 2021 WL 795251 (N.J. Super. 2021), an employee's third-party case settled for $99,000 and the lien was $53,717.28, including $20,883.10 in permanency benefits of which $2,368 was paid to the employee's workers' compensation attorney as a fee. The employee argued that the § 40 lien should not include these attorneys' fees, because his share of fees and costs were not "recoverable monies" per the statute. The carrier disputed that statutory interpretation and noted the "longstanding practice" of having the lien contain the gross amount of the award, including attorneys' fees. The workers' compensation judge ruled in favor of the carrier, noting that that the employer's subrogation rights are "statutorily created and generally attaches to 'any sum' recovered…" *Lambert v. Travelers Indem. Co. of Am*., 447 N.J. Super 61 (App. Div. 2016) (citing *Primus v. Alfred Sanzari Enters*., 372 N.J. Super. 392 (App. Div. 2004)). The judge found that the term "benefit" under § 40 equated to "overall recovery." He also noted that § 34:15-40(e) specifically carves out an exception for the amount of fees and costs that could be deducted from a civil action, but was silent for fees in a workers' compensation case. He therefore declined to draw additional inferences from the plain language of the statute, noting that the Legislature would amend the statute if it believed a court misconstrued its intent. Finally, based on the fact that the Legislature only increased the deductible amount under § 40 in its 2007 amendment, the judge reasoned that it concurred with the Division's practice of including attorneys' fees and costs. The petitioner filed a motion for reconsideration, which the judge denied. the petitioner challenged a § 40 lien against the full $20,883.10 in permanency benefits, arguing the lien should not include the $2,368 in attorney's fees and costs the petitioner had to pay out of his award for litigation of his workers' compensation claims, as those fees and costs were not part of the compensation payments paid to him under § 40. The judge disagreed and indicated that the reimbursement requirement of § 40 calculated the employer's right to reimbursement on the entirety of the recovery, without regard to the fees and costs encountered in the workers' compensation award. The judge further noted that, although the Legislature had most recently amended Section 40 in 2007, and "specifically 'examined exemptible fees and costs,'" it had declined to alter the language in Section 40. The appellate division affirmed. On August 19, 2022, the N.J. Appellate Division granted the employee's request for certification and remanded the case for reconsideration following the decision in *Richter v. Oakland Board of Education*, 252 A.3d 161 (N.J. Sup. 2021). In that case, the court emphasized the purpose of § 40—to prevent a double recovery. The employee argued that similarly to the *Richter* case, the attorneys' fees and costs in his workers' compensation claim should be excluded from the § 40 lien. *Panckeri v. Allentown Police Dept*., 277 A.3d 451 (N.J. 2022). It remains to be seen how the court will handle this on remand. It is MWL's position that the gross award paid to the petitioner is all "benefits" that should be included in the § 40 lien. The fact that employees pay their share of fees and costs out of that award should have no bearing since the employer must pay that amount and to discount same would allow the double recovery § 40 was enacted to remedy.

STATE	SUMMARY
NEW MEXICO	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 52-5-17 describes a workers' compensation carrier's subrogation lien as follows: *… to the extent of payment by the employer to or on behalf of the worker for compensation or any other benefits to which the worker was entitled under the Workers' Compensation Act…* N.M.S.A. § 52-5-17. As of July 1, 2013, New Mexico requires compliance with ODG Guidelines. See the state of Kentucky and the Preamble above for an argument that the subrogated carrier can recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines.
NEW YORK	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 29 describes a workers' compensation carrier's subrogation lien as follows: *… the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it…* N.Y. Work. Comp. § 29.
NORTH CAROLINA	In North Carolina, the workers' compensation statute provides for reimbursement to the carrier of "all benefits by way of compensation or medical compensation expense paid or to be paid". N.C.G.S.A. § 97-10.2. Further legal archaeology reveals the definition of compensation as follows: *"The term 'compensation' means the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided therein."* N.C.G.S.A. § 97-2. North Carolina case law reveals no further clarification on exactly what "medical compensation expenses" refer to, but the door seems open wide enough to include some of the case management costs referenced above, yet not quite wide enough to include interest. *Buckner v. City of Asheville*, 438 S.E.2d 467 (N.C. App. 1994). In North Carolina, however, there is also the possible appeal to the Industrial Commission to have something declared as a "benefit" recoverable in subrogation. Before the Commission can declare that a carrier is entitled to a particular expense, it must make a factual determination that the services were rehabilitative in nature and reasonably "required to effect a cure of give relief" to the claimant. *Walker v. Penn Nat'l Security Ins. Co.,* 608 S.E.2d 107 (N.C. App. 2005). This state has a higher burden to meet in order to recover something as a "benefit" in subrogation. A workers' compensation carrier is not entitled to prejudgment interest on its lien. Workers' compensation case attorneys' fees are deducted from an award of compensation. N.C.G.S.A. § 97-90(c). Such an award of attorney fees in worker's compensation cases is within discretion of the Industrial Commission. N.C.G.S.A. §§ 97–88, 97–88.1.
NORTH DAKOTA	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 65-01-09 describes a workers' compensation carrier's subrogation lien as follows: *… the total amount the organization has paid or would otherwise pay in the future in compensation and benefits for the injured employee.* N.D.C.C. § 65-01-09. North Dakota is one of four remaining monopolistic states in the country. In North Dakota, a state organization known as Workforce Safety and Insurance ("WSI" – formerly known as North Dakota Workers' Compensation but referred to simply as the "Organization") manages and regulates an exclusive employer-financed, no-fault insurance system covering workplace injuries. WSI is the sole provider and administrator of the workers' compensation system in North Dakota. The North Dakota Workers' Compensation Act defines "medical services" as: *…a medical, surgical, chiropractic, psychological, dental, hospital, nursing, ambulance, and other related or ancillary service, including physical and occupational therapy and drugs, medicine, crutches, a prosthetic appliance, braces, and supports, and physical restoration and diagnostic services...* As of 2005, North Dakota requires compliance with ODG Guidelines. See the state of Kentucky and the Preamble above for an argument that the subrogated carrier can recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines.

STATE	SUMMARY
OHIO	Section 4123.931 provides as follows: *(D) "Subrogation interest" includes past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee pursuant to this chapter or Chapter 4121., 4127., or 4131. of the Revised Code.* Ohio Rev. Code Ann. § 4123.93(D). In *Thomas v. Logue*, 234 N.E.3d 380 (Ohio 2023), the Ohio Supreme Court weighed in on independent medical reviews (IME). In that case, the BRC ruled that "The cost of an independent medical review, which the [BWC] pays in order to complete the record, is a cost paid 'on behalf of the claimant' and thus subject to subrogation. On appeal, the court was asked to determine if administrative costs (including the cost of a medical record review and independent medical report necessitated by the employee's request for additional benefits) was properly included in the workers' compensation lien. The carrier argued that report should be included in its subrogation interest because it was a cost or expense paid "on behalf of" the employee as that term is used in R.C. 4123.93(D). The trial court ruled that "the costs and expenses incurred by BWC in connection with an injured worker's medical review *are* included within the statutory definition of 'subrogation interest' under R.C. 4123.93(D) because it is an expenditure paid by BWC on the part of a claimant." On appeal, the Court of Appeals reversed, holding that the cost of having a physician review the employee's medical records was part of its ministerial purpose of administering workers' compensation system, and the carrier (BWC) was required to bear this cost. The court concluded, "administrative costs include those costs and expenses that are incident to the discharge of its duties and performances of its activities. BWC, along with subject employers, is required to bear the burden of paying for such administrative costs and is prohibited from passing such costs on to claimants." The Supreme Court affirmed, but a dissent by Justice Kennedy argued that under the plain language of § 4123.93(D), the costs incurred by the compensation carrier for an independent medical review to evaluate a claimant's entitlement to additional workers' compensation benefits are paid "on behalf of the claimant." The dissent noted that the phrase "on behalf of" is not defined by § 4123.93. "When a term is undefined, we give the term its 'plain and ordinary meaning'." *Great Lakes Bar Control, Inc. v. Testa*, 124 N.E.3d 803 (Ohio 2018). The plain and ordinary meaning of "on behalf of" is "in the interest of: as the representative of: for the benefit of." Webster's Third New International Dictionary 198 (1993). The BWC was unwilling to allow the employee's additional workers' compensation claim, notwithstanding his attending physician's opinion that the workplace injury aggravated a preexisting condition. But rather than deny the employee's additional claim outright, the BWC spent money on an independent medical review. By having his medical file reviewed by an independent physician, the employee received a second chance to persuade the BWC that the workplace injury did in fact aggravate his preexisting condition and support his claim for additional compensation. Because the BWC was unwilling to grant the employee additional benefits without the independent medical review, that review could only benefit him. The dissent conduced that the BWC's payment for the independent medical review was therefore for the employee's benefit and in his interest, and for this reason, that cost was paid "on behalf of" the employee. Also, as of 2003, Ohio requires compliance with ODG Guidelines. See the state of Kentucky and the Preamble above for an argument that the subrogated carrier can recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines. However, such an argument might not prevail following the *Thomas v. Logue* decision described above.

STATE	SUMMARY
OKLAHOMA	Section 348 describes a workers' compensation carrier's subrogation lien as follows: … *the compensation provided or estimated by the Workers' Compensation Code for such case*. Okla. Stat. Ann. Tit. 85, § 348(A). On July 29, 2022, the Oklahoma Court of Appeals decided the case of *Jones v. Cabler and Hobby Lobby*. *Jones v. Cabler and Hobby Lobby,* 2022 WL 19568938 (Okla. App. 2022). In *Jones*, the employee argued that the carrier was not entitled to be reimbursed for "nurse case manager" costs it had paid, because they were not a "benefit paid" to the employee and therefore not subject to subrogation. The employee's argument was that 85A O.S. §113 indicates that case management costs are to be "borne by the employer or insurance carrier." The court dismissed that argument by indicating that medical expenses and indemnity benefits were also "borne" by the carrier—until such time as there was a third-party recovery and the carrier was reimbursed. Although nurse case management fees are "initially" borne by the carrier, the statute does not say that the carrier is not entitled to reimbursement under Section 43. The employee also argued that such nurse case management fees were not "compensation" as defined in 85A O.S. §2(10). That section defines "compensation as "the money allowance payable to the employee or to his or her dependents and includes the medical services and supplies provided for in Section 50 of this title and funeral expenses." Section 50 in turn provides: *…the employer shall promptly provide an injured employee with medical, surgical, hospital, optoetric, podiatric, chiropractice and nursing services, reasonably necessary in connection with the injury received by the employee.* The Court of Appeals disagreed and held that they had no evidence before them as to what services a medical case manager performed. The employee admitted that "a medical case manager facilitates communication between medical service providers and the adjuster" and "is chosen by the claims handler to make his job easier." The court noted that 85A O.S. §2(4) defines a case manager as: *4. "Case manager" means a person who is a registered nurse with a current, active unencumbered license from the Oklahoma Board of Nursing, or possesses one or more of the following certifications which indicate the individual has a minimum number of years of case management experience, has passed a national competency test and regularly obtains continuing education hours to maintain certification:* *a. Certified Disability Management Specialist (CDMS),* *b. Certified Case Manager (CCM),* *c. Certified Rehabilitation Registered Nurse (CRRN),* *d. Case Manager--Certified (CMC),* *e. Certified Occupational Health Nurse (COHN), or* *f. Certified Occupational Health Nurse Specialist (COHN-S);* Because this definition requires very specific and strictly medical qualifications and implies that a medical case manager has a medical role in managing an injured employee's treatment (rather than simply performing administrative functions to assist a claims manager, the court held it was reimbursable to the workers' compensation carrier. As of 2012, Oklahoma requires compliance with ODG Guidelines. See the state of Kentucky and the Preamble above for an argument that the subrogated carrier can recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines.
OREGON	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 656.593 describes a workers' compensation carrier's subrogation lien as follows: *… expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim under this chapter.* O.R.S. § 656.593.

STATE	SUMMARY
PENNSYLVANIA	There is very little authority or precedent in Pennsylvania describing which types of "benefits" or payments are recoverable by the workers' compensation carrier. Section 319 provides: *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...against such third party to the extent of the compensation payable under this article by the employer.* 77 P.S. § 671. The word "compensation," as used in the above statute, includes sums expended for medical and hospital bills. *Haley, to Use of Martin v. Matthews*, 158 A. 645 (Pa. Super. 1932). In fact, one court has said: *The Legislature, evidently intended that, where a third person is responsible for an injury to the employee the employer, who has been subrogated to the employee's right, is substituted, not to a portion of, but to all his rights, until he is reimbursed for whatever sums he was required to pay the employee under the Compensation Act. There appears to be no sound reason why an employer should be obliged to pay medical and hospital expenses, when he is in no way responsible for the injury, and the wrongdoer escape the liability therefor. The wrongdoer would thus profit at the expense of the employer. In an action at law, the wrongdoer would undoubtedly be liable for medical and hospital expenses—they are proper elements of damages. We are dealing with an equitable doctrine. It rests on the principle that, if one is compelled to pay money through another's neglect, a recovery may be had. Haley, to Use of Martin v. Matthews*, 158 A. 645 (Pa. Super. 1932). The above case law suggests that the carrier should be reimbursed for any sums paid "to the employee under the Compensation Act." However, the *Haley* court stated: *We are dealing with an equitable doctrine. It rests on the principle that, if one is compelled to pay money through another's neglect, a recovery may be had*.

STATE	SUMMARY
RHODE ISLAND	Section 28-35-58 requires the employee to "*reimburse the person by whom the compensation was paid to the extent of the compensation paid…*" Section 38-35-32 provides that the Court shall order the insurance company to pay an attorney's fee to an attorney who has successfully represented an injured worker before the Court. In *Rison v. Air Filter Sys., Inc*., 707 A.2d 675 (R.I. 1998), the Supreme Court interpreted "compensation" in § 28-35-58 in a broad fashion although it did not specifically address attorneys' fees awarded in the WCA petition. The most relevant portions of the opinion are: *Rather we conclude that the unqualified term "compensation" as employed by the General Assembly in § 28-35-58 includes all types of compensation available under the WCA-except medical benefits, which are expressly exempted.* *Thus, when a recovery can be obtained against a responsible third party (who usually cannot be held liable or amenable to a substantial settlement without some degree of culpability), the third party is made to bear the cost of those injuries while the employer whose liability arises solely through the WCA's no-fault liability provisions is reimbursed or credited pro tanto for its past and continuing WCA obligations. It is critical to recognize that under the WCA the employer serves as a vanguard for the employee's welfare, standing ready to advance benefits to the employee without delay and without determination of fault until the employee obtains a recovery from any settling third-party tortfeasor or tort-judgment debtor. If the employee does obtain a third-party recovery, the employer's WCA obligations are then credited or reimbursed only to the extent that any recovery from the third party equals or exceeds the employer's WCA obligations. But the employee is never required to reimburse the employer or its insurer out of his or her own pocket.* This language should provide support to the contention that a carrier's "past and continuing WCA obligations" includes the attorneys' fees that were included in the workers' compensation claim settlement because the Act permitted the employee to recover those fees from the carrier. On the other side of the coin, it should be noted that given the WCA's remedial nature, any ambiguities in the statute generally "must be construed liberally in favor of the employee." *Rison,* supra. Furthermore, it could be argued that § 28-35-32 itself indicates that costs/attorneys' fees and "compensation" are two different things: *In proceedings under this chapter, and in proceedings under chapter 37 of this title, costs shall be awarded, including counsel fees and fees for medical and other expert witnesses, including interpreters, to employees who successfully prosecute petitions for compensation; petitions for medical expenses; petitions to amend a preliminary order or memorandum of agreement; and all other employee petitions, except petitions for lump-sum commutation; and to employees who successfully defend, in whole or in part, proceedings seeking to reduce or terminate any and all workers' compensation benefits;…*
SOUTH CAROLINA	South Carolina law does not directly address the ability of the carrier to include items such as nurse case management and other fees and expenses in its subrogation lien. However, an argument can be made that such benefits should be recoverable, because § 42-1-560(b) provides that "the carrier shall have a lien on the proceeds of any recovery … to the extent of the total amount of compensation, including medical *and other expenses, paid, or to be paid by such carrier … to the extent the recovery shall be deemed to be for the benefit of the carrier*." Nurse case management fees would arguably fall under "other expenses."
SOUTH DAKOTA	South Dakota has not directly addressed the issue. However, § 42-1-560 describes the workers' compensation carrier's subrogation interest as "*…compensation and other benefits under this Title*." S.D.C.L. § 58-20-24 mandates that all worker's compensation policies contain provisions to provide medical services and health care to injured workers for compensable injuries and diseases under a case management plan. The Department of Labor has issued administrative rules governing case management plans which address medical referrals and review of treatment. A.R.S.D. § 47:03.

STATE	SUMMARY
TENNESSEE	"Employers may, at their own expense, utilize case management, and if utilized, the employee shall cooperate with the case management[.]" T.C.A. § 50-6-123. Courts have disagreed with the position that case management services are primarily for the benefit of employees such as Ms. Watson. The case management system discussed by statute is clearly contemplated as a cost-control measure for the benefit of the employer. *Memphis Light Gas & Water Division v. Watson,* 584 S.W.3d 863 (Tenn. App. 2019). In 2004, the Tennessee Supreme Court considered an employer's subrogation interest under § 50-6-112(c). At that time case management services were required by law given the amount of medical costs involved, and yet, notably, there is no mention of the employer's subrogation interest extending to any such services. *Hickman v. Continental Baking Co*., 143 S.W.3d 72 (Tenn. 2004). Whether or not nurse case management fees could be recovered by a subrogated workers' compensation carrier was addressed for the first time in *Memphis Light Gas & Water Division v. Watson,* 584 S.W.3d 863 (Tenn. App. 2019). That court held that an employer's workers' compensation subrogation lien, codified at §50-6-112(c)(1), does not include recovery of nurse case management fees, even though such expenses are required by law and constitute a clear benefit to the employee. The court noted that the use of management services is a discretionary matter. Some have argued that the Commissioner of the Department of Labor retained a requirement for case management after it reached an appropriate threshold. Although this precise statement may have been true at one time following the 2004 statutory amendment pertaining to case management, in 2007 this regulation—which had at one time required case management in certain cases—was itself amended to state: *An employer or insurer is encouraged, but not required, to provide case management services*. Tenn. Comp. R. & Regs. 0800-2-7-.03(1) (2007). Because providing case management is not required under the statutory and regulatory framework the court held a subrogated carrier cannot recovery such fees and costs. As of January 1, 2016, Tennessee requires compliance with ODG Guidelines. See the state of Kentucky and the Preamble above for an argument that the subrogated carrier can recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines. With regard to reimbursement of workers' compensation case attorneys' fees, the fees a workers' compensation attorney in Tennessee receives are actually a percentage of his/her client's recovery. Tennessee workers' compensation law establishes 20% as what is allowable. In *Rushing v. Crockett,* 2005 WL 415177 (Tenn. App. 2005), the attorney (Rassas) tried the work comp case and obtained a disability award of $23,126.40. The court allowed a 20% fee ($4,625.28) "out of" that recovery to be paid to Rassas. Attorney Rassas then filed a third-party action and the employer (Montgomery County) intervened and participated, asserting a lien for the entire $23,126.40 plus medical expenses, for a total lien of $43,487.40. The trial court apportioned 90% of the 1/3 fee between Rassas and the attorney for the employer. The trial court also deducted the $4,625.28 (20% fee for trying the comp claim) from the 90% portion of the fee awarded to Rassas, because the trial court felt "that Mr. Rassas has already been paid the sum of $4,625.28 as a fee in the worker's compensation matter and that this amount should be deducted so as to avoid dual fee recovery." On appeal, the Court of Appeals said the deduction of the workers' compensation case fee ($4,625.28) was inappropriate. Although the court doesn't come out and address our issue, the holding implies that the $4,625.28 fee was included in the $43,487.40 lien.

STATE	SUMMARY
TEXAS	Section 417.002(a) requires that a carrier be reimbursed out of any third-party recovery for all benefits paid for an injury. "….the net amount recovered by a claimant in a third-party action shall be used to reimburse the carrier for benefits, including medical benefits that have been paid for the compensable injury." V.T.C.A. Labor Code § 417.002. The Texas Department of Insurance – Workers' Compensation Division actually requires these services and expenses. Therefore, the carrier should be able to recover them. The Texas Administrative Code provides as follows: *(f) Fair and reasonable reimbursement shall:* *(1) be consistent with the criteria of* Labor Code § 413.011*;* *(2) ensure that similar procedures provided in similar circumstances receive similar reimbursement; and* *(3) be based on nationally recognized published studies, published Division medical dispute decisions, and/or values assigned for services involving similar work and resource commitments, if available*. Tex. Admin. Code Tit. 28, § §(f). In addition, the Labor Code provides in part as follows: *(b) In determining the appropriate fees, the commissioner shall also develop one or more conversion factors or other payment adjustment factors taking into account economic indicators in health care and the requirements of Subsection (d). The commissioner shall also provide for reasonable fees for the evaluation and management of care as required by Section 408.025(c)and commissioner rules.* V.T.C.A. Labor Code § 413.011(b). While this statute doesn't specifically require case management fees be recoverable by the carrier, it does show that the Commission sets the fees for case management. "Case management" is a collaborative process of a medical assessment, planning, facilitation and advocacy for options and services to meet an injured worker's health needs through communication and available resources in order to promote quality and cost-effective recoveries and outcomes. It is an essential element of efforts to improve the quality of care delivered to people with complex health needs. Fee audits ensure compliance with state fee guidelines, prevent fraud, and keep liens to an absolute minimum. These efforts hold down costs of workers' compensation for employers and ensure that the smallest lien possible is taken from an injured worker's third-party recovery. The Texas Supreme Court said that subrogation is not limited only to those benefits that are reasonable and necessary. Because the injured worker receives the benefit of all amounts paid, the carrier is entitled to reimbursement without proving that the amounts paid to or for the worker were reasonable and necessary medical expenses. The assumption is that if it was paid, it should be reimbursed. The Court essentially gave broad definitions to the terms "medical benefit" and "healthcare". The court allowed recover if they were paid in accordance with Commission guidelines. *Texas Workers' Comp. Ins. Fund v. Serrano*, 962 S.W.2d 536 (Tex. 1998). In Texas, an employee's attorney is paid fees by the carrier out of the income benefits received by the employee. This means out of the benefits the employee received in a settlement or an award after a contested case hearing, not including the value of medical benefits or any undisputed benefits paid without the lawyer's help. The amount of attorney fees must be approved by the Division of Workers' Compensation and are determined by the attorney's time and expenses. Once the Division approves the attorney's fees, the insurance carrier is ordered by the Division to deduct the fee amount from the employee's benefits, up to 25% of the recovery amount. Tex. Labor Code § 408.221(b), 28 Tex. Admin. Code § 152.5 (2019). As of May 1, 2007, Texas requires compliance with ODG Guidelines. See the state of Kentucky and the Preamble above for an argument that the subrogated carrier can recover the "case manager's" fee for development of a "treatment plan," utilizing the ODG guidelines.

STATE	SUMMARY
UTAH	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 34A-2-106 describes a workers' compensation carrier's subrogation lien as follows: … *the amount of payments made*. U.C.A. § 34A-2-106.
VERMONT	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Title 21, § 624 describes a workers' compensation carrier's subrogation lien as follows: … *for benefits paid.* Vt. Stat. Ann. Tit. 21, § 624.
VIRGINIA	Nurse case manager charges, case management services, IME expenses, vocational rehabilitation charges, attorney's fees, cost containment, record reviews, copying charges, and private investigators' charges cannot be included in a subrogation lien under § 65.2-309. *Charles E. Washington, Claimant*, 68 O.I.C. 250 (Va. Workers' Comp. Comm. 1989); *John Neal Lockwood, Claimant*, 63 O.I.C. 219 (Va. Workers' Comp. Comm. 1984). Many trial lawyers believe that the employer and carrier do not have a right of subrogation for certain expenses, including bill review fees, nurse case manager fees, and vocational rehabilitation counselors. Thus, those expenses need to be deducted from the total lien, before calculating the gross lien. https://fordrichardsonlaw.com/explaining-employer-lien-recovery-in-virginia/
WASHINGTON	Cost of independent medical examinations, not requested by employee, was an administrative expense and not reimbursable because benefit to employee was incidental. *Ziegler v. Dept. of Lab. and Industries*, 708 P.2d 1212 (Wash. App. 1985). Section 51.24.030 describes a workers' compensation carrier's subrogation lien as follows: *… for benefits paid.* R.C.W.A. § 51.24.030.
WEST VIRGINIA	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 51.24.030 describes a workers' compensation carrier's subrogation lien as follows: *… indemnity and medical benefits paid as of the date of the recovery.* W. Va. Code § 23-2A-1.

STATE	SUMMARY
WISCONSIN	In addition to medical expenses, death benefits, funeral costs and/or indemnity benefits for lost wages and loss of earning capacity resulting from a compensable injury, workers' compensation insurance carriers also expend considerable dollars for case management costs, medical bill audit fees, rehabilitation benefits, nurse case worker fees, and the like. They pay significant attorney's fees on permanency awards and incur other expenses in conjunction with the handling and adjusting of workers' compensation claims. Which of these benefits are recoverable in workers' compensation subrogation remains a point of contention between trial lawyers and subrogation professionals. One Wisconsin Circuit court opinion with little precedential value has indicated that the litmus test ought to be whether the payment benefited the employee or the carrier. *Witt v. West Bend Mut. Ins. Co*., 2005 WL 3388157 (Wis. Cir. Ct. 2005). Wisconsin's workers' compensation subrogation statute is found at § 102.29(b)(2) provides as follows: *2. Out of the balance remaining after the deduction and payment specified in subd. 1., the employer, the insurance carrier, or, if applicable, the uninsured employers fund or the work injury supplemental benefit fund shall be reimbursed for all payments made by the employer, insurance carrier, or department, or which the employer, insurance carrier, or department may be obligated to make in the future, under this chapter, except that the employer, insurance carrier, or department shall not be reimbursed for any payments made or to be made under s. 102.18(1)(b)3. or (bp), 102.22, 102.35(3), 102.57, or 102.60.* Payments made by the employer or its insurance carrier for penalties under §§ 102.81(1)(bp) (bad faith), 102.22 (delay), 102.35(3) (refusal to rehire), 102.57 (safety violation), and 102.60 (illegal employment of a minor) are not recoverable from third-party proceeds. But exactly what is recoverable remains unclear. It should be remembered that the Wisconsin formula may only be deviated from with the unanimous agreement of all parties. *Skirowski v. Employers Mut. Cas. Co.,* 462 N.W.2d 245 (Wis. 1990), *rev. denied*, 465 N.W.2d 656. In addition, any settlement of the third-party claim is void under the statute unless the settlement and distribution of the proceeds is approved by the court before which the action is pending, or if no action is pending, then by a court of record or the department. With regard to reimbursement of workers' compensation case attorneys' fees, § 102.29 states that the worker's compensation carrier "*shall be reimbursed for all payments made by the employer, insurance carrier, or department, or which the employer, insurance carrier, or department may be obligated to make in the future under this chapter*…" If $20,000 is paid to an employee as a disability/indemnity benefit, the fact that the employee hired an attorney to recover that amount as opposed to not hiring an attorney, was the employee's choice and it shouldn't affect the carrier's lien or what the carrier is entitled to recover in the third-party liability action. Since attorney fees are paid "under this chapter", those payments arguably should be included in the subrogation claim.
WYOMING	There is no precedent or discussion in case law regarding whether nurse case management fees or other allocated costs which may benefit the employer and/or employee can be recovered in subrogation. Section 27-14-105 describes a workers' compensation carrier's subrogation lien as follows: *… the total amount of the state's claim for reimbursement under this section and for all current and future benefits under this act.* Wyo. Stat. § 27-14-105.