Addressing Liens In Workers' Compensation Cases

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Before a workers' compensation claim petition can be finalized, any existing liens must be identified and addressed. These liens can include Medicare, child support, attorney liens and more.

Employees who are injured at work have the right to file a workers' compensation claim petition in workers' compensation court. However, before a workers' compensation claim petition can be finalized, the existence of several liens must be identified and addressed. These liens include Medicare, Medicaid, child support, State of New Jersey temporary disability lien, workers' compensation lien on a third-party lawsuit, health insurance carrier lien and attorney lien.

At the time of settlement of a workers' compensation case, the judge or counsel will ask the injured worker (petitioner) if they receive Medicare or Medicaid benefits. Medicare is a federal health insurance program in the United States. Medicare primarily provides health insurance for Americans 65 and older but also for people determined by the Social Security Administration to be disabled. Medicaid is a joint federal and state program that is administered by the State of New Jersey and helps with medical costs for certain New Jersey residents with limited income and resources. Petitioners are questioned about Medicare and Medicaid because if Medicare or Medicaid paid medical bills for the injured body part or condition claimed by the petitioner in his or her claim petition, the amounts paid by Medicare or Medicaid have to be reimbursed.

The law requires the workers' compensation insurance company to notify Medicare of the petitioner's claim petition and the injuries claimed in the case. Medicare will provide the workers' compensation insurance company, the petitioner and petitioner's attorney if a Proof of Representation is submitted, a

Medicare payment ledger which is presented to the judge at the time of resolution of a workers' compensation claim. Occasionally the Medicare payment ledger contains bills paid by Medicare for treatment unrelated to the petitioner's injuries. The insurance company, petitioner's counsel or a private lien resolution company can review the treatment codes in the Medicare payment ledger to determine if the treatment codes match up to the injured body parts or condition. If the codes do not match, an appeal has to be filed with Medicare, requesting that the unrelated treatment that is part of the lien be removed.

Typically, the petitioner's attorney notifies Medicaid of the existence of a pending workers' compensation case. Medicaid will send the petitioner's attorney a payment ledger. Usually Medicaid provides a payment ledger and checks a box in the line of payments that are related to the claim. Petitioner's attorney should review the checked lines with petitioner to make sure the treatment was related. Any related Medicare or Medicaid lien is presented by petitioner's counsel at the time of settlement or trial of a claim petition and is paid from the settlement or award. It should be noted that many individuals have a Medicare Advantage plan (Medicare Part C). A Medicare Advantage plan is a private insurance company and any payments for medical bills that it pays will be reimbursed by the federal government. Traditional Medicare (Part A and B) is run by the federal government. Because Medicare Advantage plans have the right to assert a lien, petitioner's attorneys should determine from their clients if they have a Medicare Advantage plan.

If someone other than a co-employee or the employer was negligent and that negligence caused the employee's injuries, an injured employee has the right to pursue a personal injury lawsuit in Superior Court. This type of case is referred to as a third-party lawsuit. Under N.J.S.A. 34:15-40 (referred to as a section 40 lien), a lien attaches to any recovery in a third-party lawsuit. Before the workers' compensation case is completed, the workers' compensation attorney for the injured worker has to advise the judge if there has been any type of recovery in the third-party lawsuit. Specifically, N.J.S.A. 34:15-40 provides that the workers' compensation insurance company is entitled to a two-thirds reimbursement of their lien against the third party lawsuit, less $750 for costs. The section 40 lien is comprised of the total of the medical bills, temporary disability and permanent disability payments paid as of the date of any recovery in the third-party lawsuit. The reasoning behind the section 40 lien is that because the workers' compensation insurance company paid for all of the medical and disability benefits, the company or individual at fault (the third party) should be responsible to reimburse the monies the workers' compensation insurance company paid.

If there has been no recovery in the third-party lawsuit, then there is no lien that applies if the workers' compensation case is ready to be settled. If, however, the third-party lawsuit has been settled or there has been a recovery from a defendant, section 40 lien credits apply and have to be calculated before the workers' compensation case can be completed. By way of an example, assume that the third-party case settles before the workers' compensation case is finished for $150,000, and the section 40 lien held by the workers' compensation insurance company is $30,000. From the third-party settlement $19,250 (two-thirds of $30,000, less $750 in costs) is reimbursed to the workers' compensation insurance company. If the petitioner is awarded $75,000 in permanent disability benefits in his workers' compensation case, section 40 lien rights apply up to two-thirds of the third-party settlement, less $750 in costs. In the example, two-thirds of $150,000 is $100,000, less $750, or $99,250, which is the maximum amount of third-party lien credits that the workers' compensation insurance company can recover. There remains $80,000 ($99,250 minus $19,250 reimbursed from the third-party settlement) in third-party lien credits that the workers' compensation insurance company is entitled to in the workers' compensation case. Therefore, from the workers' compensation award of $75,000, petitioner will receive a gross award of $25,000 which is one-third of the $75,000 award.

Health care insurance companies sometimes assert liens in workers' compensation cases. Typically, these liens occur in cases where an employee files an occupational exposure claim in workers' compensation court. An example of an occupational claim is an employee who uses a computer keyboard all day and develops hand/wrist problems due to the nature of his or her occupation. Because those claims are generally denied by the workers' compensation insurance company, the injured worker sometimes uses their health insurance for treatment. The health insurance company may use a subrogation company to investigate whether the employee's treatment was due to a work injury or due to the nature of the employee's work. If the treatment is claimed to be from a work injury or condition, the subrogation company then will submit a lien for the bills paid for the treatment for the occupational injury.

The workers' compensation attorney has to determine or ask for proof that the health insurance plan is private or is an Employee Retirement Income Security Act (ERISA) plan. A private plan will not assert a lien for bills paid because of the New Jersey Collateral Source law, N.J.S.A. 2A:15-97. However, ERISA plans are governed by federal law. There are two types of ERISA plans—self-funded or insured. A plan is self-funded when the employer pays to be part of an insurance group like Aetna or Blue Cross Blue Shield, and payments to medical providers are made directly from an employers' fund in which premiums are collected through payroll and placed in a fund that is used to pay medical expenses. If the ERISA plan is an insured plan, premiums are collected by the employer and passed to the health insurance company and the insurance company pays the medical providers directly. If the ERISA plan is self-funded, courts have held that federal law preempts state law, and any lien from the self-funded plan has to be reimbursed at the time of a workers' compensation settlement. See *FMC Corp v. Holliday*, 498 U.S. 52 (1990). If the ERISA plan is an insured plan, state law is not preempted under *Perreira v. Rediger*, 169 N.J. 399 (2001), and the lien cannot be asserted because of the collateral source law. Petitioner's attorney should request proof of the ERISA lien and ERISA plan documents. Most subrogation companies for self-funded ERISA plans are willing to compromise their lien. The workers' compensation attorney must include any agreed upon lien in the final order in the compensation case.

Three liens—child support, state temporary disability, and attorney—are entered into the workers' compensation computer system, COURTS online. If an injured worker has child support arrears, the arrears are entered into the COURTS online system. At the time of settlement or trial in the workers' compensation case, the judge will sign an order for child support to be deducted from the settlement or trial if the net monies owed to the client after deducting attorney fees and medical report costs are greater than $2000. Assume a petitioner owes $5000 in child support, and petitioner's workers' compensation case settles for a lump sum of $6000. After a 20% attorney fee of $1200 and $600 for the exam and report of a medical doctor there is a balance due of $4200. Because petitioner is entitled to receive a minimum of $2000, the workers' compensation judge will sign an order that $2200 from the $6000 settlement will be deducted for child support.

State temporary disability liens are entered in COURTS online when the state pays temporary disability, and a treating doctor checks on the disability application that the condition that caused temporary disability was the result of a work accident or resulted from the nature of the work. Sometimes these liens occur if an injured worker treats with an unauthorized medical doctor because the worker is not aware of workers' compensation treatment laws, or occur when a claim is denied by the workers' compensation insurance company. The state will not compromise a disability lien. The lien must be reimbursed at the conclusion of a workers' compensation case. Occasionally a state disability lien is ruled out by a workers' compensation judge if the judge makes a finding that the medical condition that forms the basis of the lien is not related to the injured workers' claim.

An attorney lien is entered into the computer system if the injured worker changes attorneys and the original attorney asserts a lien on a Substitution of Attorney form that is filed in workers' compensation court. There has to be an attorney fee split agreement before the case can be concluded.

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