IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronnie McClendon, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (Air Liquide America), Respondent	:	No. 1144 C.D. 2010
	:	Submitted: September 3, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: December 1, 2010

Ronnie McClendon (Claimant) appeals from the order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of the Workers' Compensation Judge (WCJ) who dismissed the Petition for Penalties which alleged that Air Liquide America (Employer) violated Section 435 of the Workers' Compensation Act, 77 P.S. §991 (Act),[1] by failing to pay medical expenses in accordance with the Compromise and Release Agreement (C&R Agreement) and Order of the WCJ.

Claimant sustained an injury to his left calf, left elbow, right knee, and lower back on August 20, 2002, while in the course and scope of his employment with Employer. Claimant filed a Claim Petition against Employer[2] and also initiated a personal injury action against an alleged third party tortfeasor.

[1] Act of June 2, 1915, P.L. 736, as amended.

[2] Employer did not acknowledge the work injury.

Claimant had incurred medical bills for surgery and treatment for his lower back injury in the amount of $87,685.00. Those bills were not submitted to Employer, but were submitted by the providers directly to Claimant's private health insurer, Wal-Mart Stores, Inc. Health Associates (Private Health Insurer), which, in turn, paid the bills for Claimant.

Claimant subsequently settled his action against the third party tortfeasor for $850,000.00. The Private Health Insurer, upon learning of the settlement, asserted a subrogation lien and demanded reimbursement of the medical bills it paid.

On February 6, 2006, John Damashek, Esquire, the attorney who represented Claimant in the third party action, paid Benefit Recovery, Inc.[3], the sum of $87,685.00 from the third party settlement to satisfy the subrogation claim for medical expenses paid by Claimant's Private Health Insurer.

Approximately eight months later, Claimant and Employer agreed to settle the workers' compensation claim and entered into a C& R Agreement on October 13, 2006. Employer agreed to pay Claimant a lump sum payment of $15,000.00 in full satisfaction of all claims for indemnity, medical and specific loss benefits relative to the work injury. The C&R Agreement contained the following language regarding Employer's payment of medical expenses:

[3] Benefit Recovery, Inc. provides subrogation recoupment services.

9. **Summarize all of the medical benefits paid, or due or unpaid, to or on behalf of the employee… up to the date of this agreement**. (Emphasis added).

All reasonable and necessary medical expenses related to Claimant's alleged August 20, 2002 injury and properly forwarded to the carrier pursuant to Act 44[4] have been or will be satisfied in accordance with Act 44. **The defendant/employer will pay all reasonable, necessary and causally related medical expenses incurred by Claimant up to October 10, 2006**. Any medical expenses incurred subsequent to October 10, 2006 will be the responsibility of the claimant and not the responsibility of the defendant/ employer or its Workers' Compensation insurance carrier or claims administrator. (Emphasis added).

10. **Summarize all benefits to be paid on and after the date of this stipulation or agreement for reasonable and necessary medical treatment** causally related to the injury and the length of time such payment of benefits is to continue. (Emphasis added).

All reasonable and necessary medical expenses causally related to the claimant's alleged August 20, 2002 injury and properly forwarded to the carrier pursuant to Act 44 of the Pennsylvania Workers' Compensation Act, as amended, up to October 10, 2006. The defendant/ employer will pay all reasonable, necessary and causally related medical expenses incurred by the claimant up to October 10, 2006. Any medical expenses incurred subsequent to October 10, 2006 will be the responsibility of the claimant and not the responsibility of the defendant/employer or its Workers' Compensation insurance carrier or claims administrator. (Emphasis added).

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[4] Act of July 2, 1993, P.L. 190, as amended.

> 15. State the issues in this claim and the reasons why the parties are entering into this agreement.
>
> ….
> The within agreement is specifically designed and **intended to satisfy all past, present, or future claims for indemnity benefits and medical benefits as they relate to the alleged August 20, 2002 work injuries**. **Defendant also agrees to waive its right to recovery of its subrogation lien**. Further, the defendant/employer herein will satisfy all reasonable, necessary and causally related medical expenses through October 10, 2006. After October 10, 2006, any medical expenses incurred will not be the responsibility of the defendant/employer or its insurance carrier or claims administrator. (Emphasis added).

C&R Agreement, October 13, 2006.

On May 22, 2008, Mark Segal, Esquire (Attorney Segal), Claimant's workers' compensation lawyer, sent Employer a letter to request reimbursement for the sums Claimant paid out of his third party settlement to his Private Health Insurer. Attorney Segal also requested that Employer pay a "20% attorney fee." The letter stated:

> **Recently, I have been provided with documentation from my client that the attorney who represented him in the third party action, John Damashek, Esquire, paid to Benefit Recovery, Inc. out of the third party settlement the sum of $87,685 as reimbursement for medical expenses paid by Mr. McClendon's [Claimant's] private health insurance carrier**, Wal-Mart Stores, Inc. Health Associates and Welfare Plan with respect to his work injury. Enclosed please find an itemization of those payments, which were all for services rendered prior to the Compromise and Release,

and therefore **should be reimbursed to Mr. McClendon with a 20% attorney fee**.

Letter to William McCarthy, Esquire, from Mark B. Segal, Esquire, May 22, 2008, at 1. (Emphasis added).

On April 4, 2008, Claimant filed a Penalty Petition and alleged that Employer failed to pay medical expenses pursuant to the C&R Agreement. Employer filed an answer denying the allegations.

A hearing was held before the WCJ. Claimant presented an itemization of medical expenses that were paid by Claimant from his third party settlement to his Private Health Insurer. The itemization included treatment date, paid date, claim number, "ICD code", "ICD code description", "CPT code", provider name, amount charged and amount paid.[5] Employer presented no evidence.

The WCJ denied Claimant's Penalty Petition and concluded that Claimant failed to establish that Employer violated the Act when it refused to reimburse Claimant. The WCJ, scrutinized the language in Paragraphs 9 and 10 of the C&R Agreement, noted that "Employer agreed to 'pay' and to 'satisfy' all reasonable and necessary medical expense causally related to the claimant's

[5] ICD Codes or International Classification of Diseases codes are medical diagnosis codes. CPT Codes or Current Procedural Terminology codes are numbers assigned to every task and service a medical practitioner may provide to a patient, including medical, surgical and diagnostic services. These codes are then used by insurers to determine the amount of reimbursement that a practitioner will receive by an insurer.

alleged August 20, 2002, injury and **properly forwarded to the carrier pursuant to Act 44**." WCJ Order and Opinion, July 27, 2009, at 3 (Emphasis in original). The WCJ reasoned that since "Act 44 only applies to bills from medical providers, **these paragraphs contemplate payment of outstanding bills, rather than reimbursement of Claimant's out of pocket expenses**." Id. (Emphasis added).

On appeal the Board affirmed. The Board discerned "no error in the [WCJ's] conclusion that Claimant failed to establish that [Employer] was in violation of the Act by not paying for medical bills that had already been paid for by Claimant's health insurance carrier, and which Claimant had then reimbursed out of proceeds from a third-party settlement." Worker's Compensation Appeal Board Opinion, May 25, 2010, at 5.

On appeal[6], Claimant contends that Employer was obligated to reimburse him for medical expenses he paid pursuant to the approved C&R Agreement. He claims that Employer stipulated that it would be responsible for all reasonable, necessary and causally related medical expenses incurred by Claimant up to October 10, 2006, not just bills properly submitted by providers. Claimant asserts that the Board erred when it relieved Employer of its obligations simply because the bills "were not submitted on specific forms." Claimant's Brief at 4. Claimant also asserts that his interpretation of the C&R Agreement is perfectly consistent with the Act and case law because "an employer is required to pay

[6] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

claimant for medical expenses paid by the claimant's health insurance carrier. Frymiare v. Workers' Compensation Appeal Board (D. Pileggi & Sons), 524 A.2d 1016 (Pa. Cmwlth. 1987)." Claimant's Brief at 7.

First, this Court does not agree with Claimant's interpretation of the Board's Order. Contrary to Claimant's position, the Board did not conclude that Employer was relieved of its obligation to pay the $87,685.00 in medical bills *because* those bills were not submitted on the proper forms in accordance with Act 44. Rather, the Board, in interpreting the C&R Agreement, concluded that Employer had only agreed to pay bills that were properly submitted on forms in accordance with Act 44, and that these paragraphs contemplated payment of outstanding bills, rather than reimbursement of Claimant's out-of-pocket expenses.

Turning to the merits, this Court must agree with the Board that Employer did not agree to reimburse Claimant for medical expenses paid by him from his third-party settlement to his Private Health Insurer.

First, the C&R Agreement made no mention of the third-party settlement which had taken place five months earlier. The $87,685.00 in medical bills initially paid by the Private Health Insurer was also not mentioned. Plus, there was absolutely nothing in the WCJ's order approving the C&R Agreement which indicated that the WCJ was aware that Claimant intended that Employer was to reimburse him for the $87,685.00 he paid to his Private Health Insurer.

Moreover, contrary to Claimant's position, an employer is not required to pay a claimant for medical expenses paid by the claimant's health insurance carrier where a third party is responsible for the claimant's injuries. Any reliance on Frymiare is misplaced.

In Frymiare, Harry Frymiare (Frymiare) was injured at work. There was no third-party tortfeasor responsible for his injuries. His medical bills were paid under a medical plan provided by his wife's private health insurer. The private health insurer did not seek subrogation from the employer. However, Frymiare sought to recover from his employer the amount of the medical bills paid by the private health insurer. The worker's compensation judge denied Frymiare's request. On appeal, this Court held that employer had to pay Frymiare even though the private health insurer had failed to assert subrogation. This was because the employer, as the party at fault, was responsible for the medical bills under the Act. The employer was not entitled to benefit from Frymiare's private health insurance policy, because his wife had paid deductibles and premiums, and avoid its obligations under the Act.

In the present controversy, unlike in Frymiare, Employer denied liability and it was determined that **a third party was liable** for Claimant's injuries. Because Employer denied liability, Claimant's medical providers submitted their bills to Claimant's Private Health Insurer which, under its contractual insurance agreement with Claimant, paid the providers directly.

According to the record, Claimant's insurance contract with his Private Health Insurer contained a subrogation clause which obligated Claimant to reimburse the Private Health Insurer from any settlement or judgment he received from any responsible party. Therefore, **contractually**, Claimant was compelled to "protect" the Private Health Insurer's lien and collect from the responsible third-party tortfeasor and pay the Private Health Insurer, which he did.

Claimant insists that Employer is now required to reimburse *him*, and that this result would comply with the Act.

Contrary to Claimant's position, there is nothing in the Act or any statute which requires an employer to reimburse a claimant when it is not responsible for the injury. In fact, Claimant's position is inconsistent with the Act, which protects the employer by giving *it* the right to subrogation when the injuries are caused by a third party. Section 319 of the Act 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 employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employe, his personal representative, his estate or his dependents. The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable at the time of recovery or settlement bears to the total recovery or settlement.

77 P.S. §671. (Emphasis added).

Ordinarily, under Section 319 of the Act where a third party is responsible for the injuries and the employer pays claimant's medical bills, the claimant is required to protect the employer's lien. The claimant must reimburse from those proceeds any monies employer paid for medical bills, less an attorney fee. Because the employer is entitled to recoup the monies it paid, the claimant includes the amount of the lien in his itemization of damages submitted in the third party action, and earmarks those monies to repay the employer. Further, under Section 319 of the Act, the employer is required to pay claimant's attorney a *pro rata* share of the attorney fee for the efforts the attorney made for "looking out" for the employer's interest and collecting from the responsible third-party tortfeasor any monies to which the employer is owed.

There is no incongruity in the Court's disposition. The party who was responsible for the injuries paid the medical bills in the end. Those funds were collected in the third party settlement as items of economic damages and earmarked to be contractually repaid to the Private Health Insurer.

Accordingly, based on the facts presented in this case, considering the fact that neither the WCJ nor Employer were apprized of the third-party settlement before the C&R Agreement was signed, or that Claimant sought to have Employer reimburse him for the monies paid to his Private Health Insurer under his contractual agreement, Claimant was not entitled to collect from Employer the equivalent of the amount he was obligated to pay his Private Health Insurer

pursuant to the subrogation clause of his insurance contract. Penalties were not warranted.[7]

On a final note, Claimant's counsel's demand that Employer pay him a 20% attorney's fee was also misplaced. As pointed out, under Section 319 of the Act, an employer is liable to pay a *pro rata* share of reasonable counsel fees and expenses whenever the employer receives a benefit from a third-party settlement or award brought about by employee's counsel. Where the entity to be reimbursed receives a pecuniary benefit as a result of the injured worker's successful litigation of a worker's compensation claim, the employee's counsel has earned a fee from the subrogated party out of the subrogated fund. Donegal School District v. Workers' Compensation Appeal Board (Haggerty), 798 A.2d 857 (Pa. Cmwlth. 2002). Here, Employer received no benefit from the attorney's services. Employer was not required to pay him an attorney's fee.

In conclusion, this Court agrees that under the plain language of the C&R Agreement, Employer did not expressly agree to reimburse Claimant for his contractual obligation to reimburse his private health insurer from funds he received in a third-party settlement. Employer agreed only to pay bills directly submitted by Claimant's providers. There were no outstanding bills submitted by any provider under Act 44 which Employer refused to pay.

[7] The fact that the Employer "waived" its right to subrogation in the C&R Agreement in no way alters this Court's conclusion and does not reflect that Employer agreed to assume responsibility for all medical bills incurred by Claimant. A waiver only barred the Employer's worker's compensation insurer from initiating a subrogation action and/or from enforcing its lien on a third-party claim.

The Order of the Board is affirmed.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 1st day of December, 2010, the Order of the Workers' Compensation Appeal Board in the above captioned matter is hereby affirmed.

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BERNARD L. McGINLEY, Judge