Sarah Mariani v. Kindred Nursing Home (November 2, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

Sarah Mariani

v.

Kindred Nursing Home

Opinion No. 34-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. X-51262

RULING ON DEFENDANT'S MOTION TO DETERMINE FUTURE CREDIT

By Motion dated June 21, 2011 Defendant seeks an Order determining the amount of the workers' compensation "holiday" to which it is entitled on account of Claimant's third-party settlement, in accordance with 21 V.S.A. §§624(e) and (f).

STIPULATED FACTS:

1. Claimant was involved in a work-related accident on August 10, 2005. Her claim was accepted as compensable by Defendant's worker's compensation insurance carrier, Travelers Insurance Company ("Travelers"), which paid workers' compensation benefits to Claimant and on her behalf.

2. Claimant also pursued a third-party claim arising out of this accident. That claim resulted in a settlement totaling $675,000.00.

3. Travelers paid a total of $148,542.31 in workers' compensation benefits to Claimant and/or on her behalf. After deducting non-recoverable expenses, namely independent medical examination fees and mileage charges, the total amount of recoverable workers' compensation benefits that Travelers paid is $146,616.00. The parties previously have stipulated and agreed that $146,616.00 represents the gross amount of Travelers' lien against Claimant's third-party recovery.

4. From her third-party settlement, Claimant paid a total of $225,000.00 (one-third of the recovery) to her attorney as attorney fees. In addition, Claimant's attorney incurred litigation expenses totaling $44,189.05. Thus, the total amount of fees and expenses referable to the third-party recovery is $269,189.05.[1]

[1] In her initial response to the pending Motion, Claimant disputed this amount. She sought to increase it by $1,750.00, representing two additional litigation expense bills that were submitted to her attorney for payment some time after the case was settled and all settlement monies were disbursed. Defendant objected on waiver grounds. In her sur-rebuttal, Claimant declined to dispute the issue further.

5. Pursuant to 21 V.S.A. §624(f) and *Barney v. Paper Corporation of America*, 1988 WL221243 (D.Vt.), Travelers' total recoverable lien represents 21.72 percent of the third-party recovery ($146,616.00 divided by $675,000.00 = .2172).

6. Applying this multiplier (.2172) to the total of attorney fees and litigation expenses incurred in conjunction with the third-party recovery ($269,189.05), Travelers' *pro rata* share of attorney fees and expenses is $58,467.86.[2] As of the date of the third-party settlement, therefore, Travelers' recoverable lien totaled $88,149.00, calculated as follows: $146,616.00 (total of recoverable workers' compensation benefits paid to Claimant and/or on her behalf), minus $58,467.00 (Travelers' *pro rata* share of third-party attorney fees and litigation expenses).

7. Pursuant to these calculations, Claimant's counsel already has delivered a check to Travelers in the amount of $88,149.00, the receipt of which is duly acknowledged.

8. Meanwhile, after all deductions Claimant's net recovery from the third-party settlement was $318,853.61.[3] This effectively resolved liability for the past lien.

9. Defendant's counsel has forwarded a proposed "Workers' Compensation Lien and Future Credit Stipulation and Agreement" to Claimant's counsel, asking the latter to stipulate and agree that Travelers has a "holiday" or future credit against further and additional workers' compensation benefits in the amount of $318,853.61. Claimant has declined to do so.

DISCUSSION:

1. Defendant's motion seeks a determination as to the extent of the credit to which it is entitled as a consequence of Claimant's third-party settlement. The parties agree that the credit currently stands at $318,853.61, the amount of Claimant's net recovery from the third-party proceeds. They dispute the extent, if any, to which Defendant should continue to pay towards the expenses referable to that recovery as the credit is spent down. Resolving the dispute requires an analysis of Vermont's workers' compensation subrogation statute, 21 V.S.A. §624.

2. As a preliminary matter, both parties acknowledge the Commissioner's jurisdiction to determine the amount of Defendant's future credit. That jurisdiction derives generally from 21 V.S.A. §606, which grants authority to the commissioner to hear and decide disputes that arise in the context of administering the Workers' Compensation Act. *Travelers Indemnity Co. v. Wallis*, 2003 VT 103; *DeGray v. Miller Brothers Construction Co.*, 106 Vt. 259 (1934); *see also, Griggs v. New Generation Communication,* Opinion No. 30-10WC (October 1, 2010); *LaBrie v. LBJ's Grocery*, Opinion No. 29-02WC (July 10, 2002).

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[2] Claimant initially sought to increase this amount by $380.10, representing Defendant's *pro rata* share of the additional litigation expense bills referred to in footnote 1, *supra*. She now declines to dispute that issue, and therefore stipulates to the amount stated.

[3] Claimant now stipulates to the amount stated. *See* footnotes 1 and 2, *supra.*

3. Where a work-related injury is caused under circumstances creating a legal liability in some third party, Vermont's workers' compensation law provides a framework for determining both the employee's and the employer's rights of recovery. The employee has a right to recover tort damages from the responsible third party. 21 V.S.A. §624(a). To prevent double recovery, however, from the proceeds of any such recovery the employee must repay the employer, or more typically its workers' compensation insurance carrier, for any workers' compensation benefits it has become obligated to pay on account of the injury's work-related nature. Specifically, §624(e) provides:

> Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery, and the balance shall forthwith be paid to the employee . . . and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits.

4. To aid in determining the extent to which the expenses of recovery should be shared, §624(f) provides:

> Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effecting the recovery. . . . The expenses of recovery above mentioned shall be apportioned by the court between the parties as their interests appear at the time of recovery.

5. In *Barney v. Paper Corporation of America*, 1988 WL221243 (D.Vt.), the U.S. District Court had occasion to interpret the provisions of Vermont's workers' compensation law so as to apportion appropriately the expenses of a third-party recovery between the injured worker and his employer. The court first described the three-step statutory scheme mandated by 21 V.S.A. §624(e):

- First, the expenses of recovery are deducted from the amount of recovery;
- Second, the employer is reimbursed for any benefits paid or payable to the date of recovery; and
- Third, the balance is paid to the employee, with the employer receiving credit (the so-called "holiday") towards any future workers' compensation benefits the employer otherwise would be obligated to pay.

Id. at *2.

6. Next the court considered how best to allocate the expenses of recovery in accordance with 21 V.S.A. §624(f). It did so on a straight *pro rata* basis, with each party bearing the same share of the third-party litigation expenses as its share of the third-party recovery represented in relation to the whole. Thus, the employer in *Barney*, whose reimbursement for the workers' compensation benefits it already had paid amounted to 15% of the total recovered from the third party, was obligated initially to pay 15% of the expenses. *Id.* at *6.

7. The court recognized, however, that the employer's *pro rata* interest in the employee's third-party recovery encompassed not only the workers' compensation benefits it already had paid, but also those that it would not have to pay in the future. As those benefits came due, the court reasoned, the employer's *pro rata* interest in the third-party recovery would increase accordingly. In keeping with the statutory mandate, so would its share of the expenses. *Id.* at *3.

8. Using the three-step process mandated by §624(e), the parties here already have determined the amount of Defendant's future credit – $318,853.61. And in keeping with the *Barney* court's interpretation of §624(f), this amount included Defendant's share of the expenses of recovery – 21.72 percent, representing the proportion that its workers' compensation lien ($146,616.00) bore to the whole ($675,000.00) at the time the third-party action was resolved.

9. Defendant argues, and I agree, that it is speculative at this point to calculate the extent, if any, to which it will be excused from paying additional workers' compensation benefits to Claimant in the future on account of its §624(e) "holiday." I disagree, however, that this means that Defendant should never again be assessed any additional expenses of recovery.

10. As the *Barney* court stated, there is no rational distinction to be made between the benefit that an employer enjoys from being repaid for a past liability and the one it will enjoy if and when a future obligation is extinguished. *Id.* at *3. Admittedly, one benefit is already accrued, while the other is still contingent. Nevertheless, both are encompassed by the statutory language of §624(f), which mandates that the expenses of recovery be apportioned between the parties "as their interests appear at the time of recovery." *Franges v. General Motors Corp.*, 274 N.W.2d 392 (Mich. 1979) (interpreting identical language). As the contingent interest accrues, fairness requires that the expenses of recovery be reallocated accordingly. *See, e.g., Burns v. Varriale*, 34 A.D.3d 59, 65 n.2 and 3 (N.Y. 2006), *aff'd* 879 N.E.2d 140 (N.Y. 2007); *Franges, supra; see generally*, 6 Lex K. Larson, *Larson's Workers' Compensation* §117.02[1][e] (Matthew Bender, Rev. Ed.) (stating majority view as requiring that employer's equitable share of recovery expenses should be calculated on its total potential liability rather than solely on past benefits actually paid).

11. The *Barney* court suggested the following ratio to derive the employer's proportionate share of a claimant's third-party recovery expenses:

$$\frac{\text{Employer's share of third-party proceeds}}{\text{Gross third-party proceeds}}$$

This ratio is easily applied to benefits that already have accrued as of the time of the third-party settlement. It is unwieldy when applied to contingent future benefits, however. *See, e.g., Construction Services Workers' Compensation Group Self Insurance Trust v. Stevens*, 8 A.3d 688 (Me. 2010). With each new medical bill or indemnity benefit that the employer is excused from paying, the numerator increases and consequently the expense ratio changes. The result is, as Defendant aptly describes it, a moving target. It makes calculating the employer's share of the expenses of recovery, and thereby the extent to which its holiday has been "spent down," an unduly complicated process.

12. There is a better way to calculate an employer's share of the third-party recovery expenses, one that yields a constant ratio, as follows:

$$\frac{\text{Third-party recovery expenses}}{\text{Gross third-party proceeds}}$$

With this formula, the ratio of expenses incurred to proceeds recovered is fixed at the time of the recovery. Going forward, as the claimant incurs medical expenses or foregoes indemnity benefits that the employer otherwise would have to pay, the employer's "holiday" is reduced accordingly. As with the *Barney* formula, concurrent with this reduction the employer is assessed an additional share of the expenses of recovery, but always according to the same expense ratio. *See, e.g., Burns, supra*; *Franges, supra*.

13. Here, the third-party recovery expenses totaled $269,189.00. Dividing that sum into the gross third-party proceeds ($675,000.00) yields a ratio of .3987. For every dollar of credit, whether past or future, from which Defendant benefits as a result of the third-party settlement, under this formula it must pay 39.87 percent as its equitable share of the recovery expenses.

14. With the recovery expense ratio thus set and constant, the task of determining and tracking Defendant's "holiday" becomes a simple two-step process – one step subtraction, one step multiplication. For example, should Claimant incur $100,000 in additional medical expenses necessitated by her work injury and for which Defendant otherwise would be liable, Defendant's "holiday" will be reduced accordingly – from $318,853.00 to $218,853.00. At the same time, however, Defendant will have to reimburse Claimant in the amount of $39,870.00 ($100,000.00 x .3987), representing its additional share of expenses that previously were charged to Claimant.

15. I acknowledge that this methodology is slightly different from the one employed in *Barney* and endorsed by the commissioner in *Griggs*. Its philosophical underpinnings are the same, however – that an employer who benefits from a claimant's third-party settlement, either as to past payments and/or as to future credits, should pay its fair share of the expenses of recovery. And because the recovery expense ratio, once calculated, remains constant, it offers greater certainty to the parties. For this reason, I consider it to be the better approach.

ORDER:

Defendant's Motion to Determine Future Credit is hereby **GRANTED**. The future credit is determined to be $318,853.61. This credit shall be "spent down" on a dollar-for-dollar basis as Claimant incurs additional expenses and/or becomes entitled to additional indemnity benefits that Defendant otherwise would be obligated to pay. Concurrently, Defendant shall reimburse Claimant for her expenses of recovery at the rate of 39.87 percent for each such "spent-down" dollar.

DATED at Montpelier, Vermont this 2nd day of November 2011.

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Anne M. Noonan
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.