LUKS SANTANIELLO & PEREZ PETRILLO GOLD JONES

LEGAL UPDATE

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Liability

Limiting Past Medical Billing to Amounts Paid and Not Billed as a Rule of Evidence *by Charles S. Rowley, Jr., Esq.*

Charles S. Rowley

The current state of the law according to Florida Supreme Court, is to allow set-off for past medical bills for the amount paid where Medicaid/Medicare and/or a health insurer has made payments to the healthcare providers. However, courts in the Second District Court of Appeal and the Fourth District Court of Appeal have taken the logical step of further holding that the amount billed to Medicare/Medicaid is irrelevant. That the only relevant amount to go before the jury is that amount of money which was accepted by the healthcare provider as full payment pursuant to the statutory agreement between the healthcare provider and Medicare/Medicaid.

In each case where a public or private entity has paid the medical bills, we recommend a motion in limine be filed early in order to limit the medical bills submitted to the jury to that which was paid rather than what was billed. The difference between the two figures can be a huge amount. In the Florida Supreme Court decided case of Goble v. Frohman, 901 So.2d 830 (Fla. 2005), healthcare providers billed the Plaintiff $574,554.31. However, the Plaintiff was insured and his insurers paid only $145,970.76. The healthcare providers accepted these payments. Based on balanced billing rules for Medicare/Medicaid, the amount discounted cannot be billed to the Plaintiff. Most healthcare insurers contract with their provider. Although Goble was decided as a set-off case, there is certainly an argument that the $574,000 billing was irrelevant. As such, it is our position that the amount billed is not proper evidence for a jury to hear.

Florida Statute §768.76 defines collateral sources as "any payments made to the claimant or made on the claimant's behalf….". The statute further states that if "liability is admitted or it is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of award by the total of all amounts which have been paid for the benefit of the claimant, or otherwise available to the claimant, from all collateral sources." The statute does state that there will not be reduction where subrogation exists. In fact, it is the defense attorney's duties to show that no subrogation lien exists above the amount paid by the insurer to the healthcare providers. In Goble, the court interpreted the statute using its plain meaning and found that contractual discounts negotiated by HMOs fall into the statutory definition of collateral sources subject to set-off. Before this decision by the Supreme Court, there are two cases, Thyssenkrupp Elevator Corp. v. Laskey, a Fourth District Court of Appeal case, and

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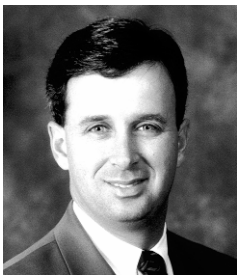
Workers' Compensation

Can Discharged Attorney Assert a Quantum Meruit Lien for Attorney's Fees Under Revised 2003 Statute? *by David S. Gold, WC Practice Partner*


David S. Gold

Rosenthal, Levy & Simon v. Mary Louise Scott - Is a discharged attorney entitled to assert a quantum meruit lien for attorney's fees under the 2003 statute which expressly prohibits the payment of hourly fees?

One of the many unanswered questions about the 2003 revisions to F.S. 440.34(1) was whether a discharged attorney retains the right to claim a lien against the file under the theory of quantum meruit for the time exerted representing the claimant prior to being discharged. Historically, these liens are favored by the courts and are based on the amount of time that was spent in representing the claimant prior to being terminated. However, the 2003 revisions to F.S. 440.34(1) eliminate the jurisdiction of the Judge of Compensation Claims to award such a fee. In this opinion, the First District seeks to reconcile the right of the discharged attorney to assert a lien and the provisions of F.S.440.34(1) that preclude the payment of hourly attorney's fees.

The claimant had been represented by Rosenthal, Levy & Simon from September 2007 to May 2008 for a repetitive trauma claim that the Employer/Carrier had denied. On May 16, 2008 the Employer/Carrier offered the claimant $7,500 to settle the claim. However, rather than accepting the settlement, the claimant terminated the representation of Rosenthal, Levy & Simon and hired a new attorney, Michael Celeste. Two days later, Michael Celeste settled the claim for $10,000. Rosenthal, Levy & Simon asserted a lien under quantum meruit for the value of their services provided to the claimant prior to their termination. At an evidentiary hearing, Judge of Compensation Claims Timothy Basquill held the 2003 revisions to F.S. 440.34(1) specifically prohibits the payment of any hourly fees and limits entitlement to fees to an attorney who secures benefits. Because Rosenthal, Levy & Simon had not secured a benefit for the claimant prior to being terminated, the Judge held that there was no basis to award a fee and as such, no entitlement to a lien. The Judge further reasoned that the 2003 revisions to F.S.440.34(1) served to overrule any earlier case law that allowed for the calculation of a quantum meruit lien for fees based on an attorney's hours.

On appeal, the First District noted that there are several conflicting interests at play in this case. The Court noted that it is in the injured employee's best interests to be able to terminate an attorney in which they have lost confidence without incurring a severe monetary penalty. However, it is also in an attorney's best interests to know they will be paid for the work performed for a client. By enacting the revisions to F.S. 440.34(1), the First District acknowledged that the Legislature specifically intended to limit fees to the value of the benefits that were secured and that this change now meant the total fees awardable are limited to the statutory formula. On appeal Rosenthal, Levy & Simon argued that they should be awarded a statutory fee based on the offer of $7,500 they had secured. The First District rejected this argument and concluded that the only reasonable means of accommodating both principles is to have a Judge of Compensation Claims act as a finder of fact and to take evidence in order to apportion the statutory fee between the former and current attorneys.

While the First District did not put forward a formula to be used, the Court specifically warned any attorney that accepts a Workers' Compensation case to first review the efforts of any prior attorney so as to avoid any duplication of effort. Taken in another way, the First District was warning attorney's to be aware that the majority of a fee made be awarded to the former attorney if

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Workers' Compensation cont.

their efforts were primarily responsible for the securing of the fee.

The ruling in this case is somewhat fact specific given that Michael Celeste only represented the claimant for two days prior to securing the settlement. However, given the limited nature of attorney's fees under the statutory formula, this ruling could cause a fair amount of litigation as each attorney argues they spent more effort in the case and so are entitled to a larger a portion of the statutory fee. This will be especially true in those cases where the claimant has hired multiple attorneys in the past as the Judge will need to take evidence as to each of the prior attorney's role in securing benefits.

Liability cont.

Cooperative Leasing, Inc. v. Johnson, a Second District Court of Appeal case. Both cases found that only those amounts that had been paid by Medicare/Medicaid were admissible evidence. These cases were discussed in the Goble case in Justice Bell's concurring opinion. They were not discussed in the majority opinion. Therefore, both cases stand as law in their districts. Argument can and should be made in the other district court's jurisdictions that these two cases are good law and are persuasive authority. However, these decisions were limited to Medicare/Medicaid.

Nevertheless, argument will be made that the Plaintiff's medical expenses for the amounts billed is inadmissible when the Plaintiff has no legal responsibility to pay those medical bills. They cannot be "balance billed". Allowing the full amounts of what the courts have called "phantom damages", even with the post-trial set-off, might persuade a jury to extend those large amounts to future medical expenses, over-inflating the amount that the Plaintiff will claim they will ultimately have to pay. Some Judges are reluctant to rule the amount billed is excluded as a matter of evidence in cases with private insurance. However, many Judges are ruling in such a manner, and we believe that pressure by way of the motion in limine may turn the course. As the Second District of Appeal wrote in the lower court's Gobel v. Frohman opinion, which was approved by the Florida Supreme Court, "'awarding an injured party damages that include a contractual discount … results in a windfall to the injured party for damages that have not been incurred,' undermining the purpose of the collateral source statute."

It is our opinion that the set-off is not sufficient and that as a rule of evidence those amounts are irrelevant and should be excluded from the jury. Further, the relevant evidence of bills that will never be paid, and, reality shows were never meant to be paid, will prejudice the Defendant because a jury may increase the amount of future medical damages as well as bloating the pain and suffering award. It is the intent of this firm to actively move the trial courts towards denying the plaintiffs such artificially increased damages.

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Jack Luks and Anthony Petrillo discuss Negligent Security issues related to terrorists attacks in shopping centers in the A.M. Best Insurance Law Pod Cast Episode 34. To listen to the pod cast or subscribe to A.M. Best Company Insurance Law Pod Cast, visit: http://feeds.feedburner.com/InsuranceLaw.

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TRUCKING GROSS NEGLIGENCE

HOLDEN V. SONY ELECTRONICS

DANIEL SANTANIELLO, MANAGING PARTNER AND SHERRI BAUER, ASSOCIATE

$2M demand at trial, case settled for fraction of demand, **$30K.** Plaintiff trucker assisted in load by our insureds. The equipment loaded dislodged from the dolly, fell over and drove Plaintiff trucker's head and left shoulder into the sidewall of trailer. Plaintiff required full back fusion surgery. Social Security awarded permanent total disability. Defense showed Defendant insured was not the cause of incident and injuries were pre-existing.

PREMISES LIABILITY

DART INDUSTRIES V. DAVID ACOR AND UNITED INVENTORY SERVICE

PAUL JONES, ORLANDO PARTNER AND THOMAS FARRELL, ASSOCIATE

Landlord/Plaintiff alleged **$11M property damage** claim (in spite of the fact that the property was offered for sale for $3M and they collected $4M from their carriers). Our client/Defendant had approximately 12 million pounds of plastic and paper products to be recycled being stored in a 500,000 sq. ft. building that was formerly Plaintiff's manufacturing plant. A bus bar exploded, raining molten aluminum and sparks onto the plastic and paper products causing a large fire. The building did not have an operational fire suppression system and the building was a total loss. Plaintiff filed 9 count complaint alleging breach of contract, negligent and fraudulent misrepresentation, waste, violation of Florida Deceptive and Unfair Trade Practices Act, breach of covenant of good faith and fair dealing, and trespass. Summary judgment was granted as to all counts except the waste count. Trial court entered a directed verdict for the Defendant on the waste count after all evidence.

SLIP AND FALL

BRADSHAW & BRADSHAW V. MALL

JACK LUKS, PARTNER AND ZEB GOLDSTEIN, ASSOCIATE

Defense verdict Palm Beach County (6/10/09) for slip and fall (water spill) incident that occurred on "Black Friday", November 28, 2003 in the food court of Defendant Mall. Plaintiff requested **$1.2M** during closing arguments, representing compensation for wage losses, medical bills, future medical treatment and pain and suffering. The case, originally tried in January 2009, resulted in a mistrial. Following the first trial, the Defendant filed a Proposal for Settlement to Plaintiffs, which was rejected by virtue of Plaintiffs' failure to accept same within 30 days of service. Plaintiff's injury was limited to her right knee, including ACL and MCL tears which eventually resulted in surgery in September 2007.

Plaintiff's liability argument focused on several issues which they contended were proof of unreasonable maintenance of the food court. Defense contended that Plaintiff's own testimony demonstrated that the water spill in question could not have been on the floor for any appreciable amount of time, given the mall traffic on this day and the minimal size of the spill itself.

The Luks, Santaniello, Perez, Petrillo, Gold & Jones

LEGAL UPDATE

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