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New Issue, New Guidance

Nealon provides framework for applying Act 6 to future medical expenses awards

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In the absence of concrete guidance from any appellate decisions, Lackawanna County Common Pleas Judge Terrence P. Nealon recently laid down a framework for handling the application of the provisions of Act 6 to future medical expenses in trials of motor vehicle accident cases.

Following a jury verdict awarding a plaintiff $125,000 for future medical expenses, the defense filed a motion seeking to mold that portion of the jury award to a lesser amount on several grounds. First, it was asserted that such award was required to be reduced in accordance with the Act 6 cost containment provisions under 75 Pa.C.S.A. Section 1797(a) and thereafter offset by the plaintiff's remaining first party (PIP) medical benefits under 75 Pa.C.S.A. Sections 1712(1) and 1715(a)(1). The defense also argued that the plaintiff was likewise precluded from recovering any future medical expenses award that may have still been remaining after this initial reduction and application of the offset because such future expenses were "payable" under the plaintiff's private health insurance in any event.

In *Orzel v. Morgan,* (C.P. Lackawanna, Feb. 4, 2008), Nealon, J. (24 pages), the noted trial court judge held that the future medical expenses award could not be reduced to a cost containment figure under Section 1797 as presented in this case and also ruled that since the plaintiff's private health insurance was determined to have been a HMO policy furnished pursuant to an employer self-funded plan, the MVFRL provisions were preempted by federal law.

Nealon did, however, rule that the future medical expenses award was required to be molded to reflect an offset by the $85,422.39 in first party (PIP) benefits the plaintiff had remaining under her own automobile insurance coverage.

I served as defense counsel in the case. Plaintiff's counsel was John Lenahan Jr. of Lenahan & Dempsey in Scranton.

First Party Benefits Offset

At the time of the subject accident, the plaintiff was covered by her own automobile policy which had a first party (PIP) medical benefit limit of $100,000.00 per person. By the time the trial took place, the first party carrier had only paid out $14,577.61 in medical benefits on the plaintiff, leaving $85,422.39 remaining under the policy.

Prior to trial, the plaintiff elicited videotaped deposition testimony from her medical expert on future medical expenses in an amount that was less than the amount of the remaining benefits. As such, the defense filed a motion in limine seeking to preclude the plaintiff from recovering any damages for future medical expenses at trial since she had not exhausted her first party (PIP) medical benefits coverage.

More specifically, the defense argued that, under 75 Pa.C.S.A. Section 1722 of the MVFRL, the plaintiff was barred from recovering any medical expenses that were "paid or payable" under her own automobile insurance policy. It was additionally asserted by the defense that, since 75 Pa.C.S.A. Section 1720 also precluded the plaintiff's first party carrier from asserting a "right of subrogation or reimbursement" from the plaintiff's tort recovery with respect to any medical expenses paid or payable by that carrier. Accordingly, it was the defendant's position that any receipt of damages for future medical expenses at trial would impermissibly allow for a double recovery in contravention to the express provisions of the MVFRL and the legislatively recognized policy of cost containment in automobile insurance matters.

In opposition, the plaintiff argued that her future medical expenses were not currently due and outstanding and, therefore, could no be deemed to be "payable" under Section 1722. The plaintiff also asserted that her future medical bills may not ever be "payable" under her first party benefits coverage since the first party carrier could become bankrupt, could peer review the case and cut off the benefits, or could otherwise found that continuing payment of the benefits was not warranted.

Nealon rejected plaintiff's arguments in this regard in the pre-trial motion in limine proceedings and again when the plaintiff raised the issue again in post-trial proceedings. Relying on several appellate cases that offered similar definitions for the term "payable" as it appeared under Section 1722, Nealon ruled that the term "payable" in this regard refers to a plaintiff's entitlement to future payments and "is generally defined as capable of being paid."

He further held that, under MVFRL if the medical expenses presented at trial did not exceed the available PIP coverage, then those expenses were not recoverable at trial. Accordingly, the judge offset and molded downward the plaintiff's future medical expenses award by the amount of the first party medical benefits remaining.

Act 6 Cost Containment Reduction

Although Nealon ruled that the medical expenses that did not exceed the remaining PIP benefit were not recoverable at trial, he did allow the plaintiff to introduce to the jury all of their alleged past and future medical expenses when it was asserted by the plaintiff that the total or gross amount of medical expenses would exceed the first party benefits limits. This was allowed to permit the plaintiff to seek the recovery of those medical expenses that were allegedly remaining over and above any PIP credit due to the defense.

At the same time of allowing all of this medical expenses evidence in, some of which would obviously not be recoverable, Nealon also fashioned a remedy for the defense by indicating that he would hold a post-verdict molding hearing to address the offset required by the remaining PIP benefit as well as the Act 6 reduction and "paid or payable" issues raised by the defense. The judge likewise advised the defense that, during the post-verdict molding proceedings, the defense would be permitted to present testimony from a representative of the plaintiff's first party carrier regarding the applicable Act 6 reductions for the various future treatment options that served as the basis for the future medical expenses award.

The defense did later not present any such testimony at the post-verdict hearing as it appeared questionable as to whether the very specific Act 6 formula for reducing medical expenses could be applied in general fashion to future medical treatment that had not yet actually taken place.

Instead, while conceding that there was no appellate precedent on point on the issue of the application of the Act 6 reduction to a future medical expenses award, the defense asserted that the reasoning in *Pittsburgh Neurosurgery Associates Inc. v. Danner*, 733 A.2d 1279 (Pa. Super. 1999) *appeal denied* 751 A.2d 192 (2000) dictated that such a reduction be applied.

Along this line of argument, the defense requested the court to take judicial notice of the well-known fact that the generally accepted insurance industry-wide reduction of medical bills under Section 1797 was approximately 35-40 percent, which the trial court refused to do. The trial court also rejected the defense alternative suggestion that the catch-all provision of Section 1797 be applied, which would have resulted in a 20 percent reduction of the medical expenses awarded.

The plaintiff countered by pointing out that, under Section 1797(a), bill-by-bill reductions were required and across the board reductions were not appropriate under the statute. It was also asserted by the plaintiff that the defense had failed to present any testimony from any first party claims representative on the issue.

Nealon began his decision on this issue by noting that neither the court nor the litigants had been able to cite "any published appellate precedent which has decided the narrow issue of whether an award for future medical expenses must be reduced or molded to reflect the applicable cost contained charges under Section 1979." The judge found that neither the *Danner* decision cited by the defense or the case of *Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786 (Pa. 2001), cited by the plaintiff were directly applicable. He

also noted that the plaintiff's submission of the unpublished memorandum opinion in *DeOrio v. Juliano*, No. 530 WDA 2006 (Pa. Super. Oct. 5, 2007) could not be considered precedential as a matter of law.

Nealon ruled that he was unable to take judicial notice of an allegedly generally accepted notion that Act 6 reduction amounted. He also noted that the defense had declined to present any evidence from any first party claim representative. The judge further noted that he could not apply the 20 percent catch-all provision as that reduction was only applicable if a Medicare charge has not been calculated for a particular service, and the record before the trial court did not reflect the complete absence of any pertinent charges or DRG payments under the Medicare program.

Thus, based upon the record before the trial court, Nealon found that there was no competent evidentiary basis upon which to adjust the future medical expenses award to somehow reflect an accurate, cost contained amount under 75 Pa.C.S.A. Section 1797.

For future reference, the judge did note that, although there is no decisional requirement that the trial court mold future medical expenses by way of an Act 6 reduction after a verdict, where plaintiff introduced evidence of a total or gross amount of future medical expenses during the course of a trial, the defense "could have cross-examined [the plaintiff's] treating physicians concerning the statutory requirement that healthcare providers accept a reduced sum as full payment under the Section 1797 of MVFRL."

In the alternative, to avoid the issue, the plaintiff could also have his or her expert attempt the calculations and testify on direct examination that his estimate of the costs of future medical treatment was reduced in accordance with the cost containment provisions of Act 6. *See Mulholland v. Hoffer,* 2007 WL 1276915, * 9 (E.D.Pa. 2007).

"Paid or Payable" Preclusion of Recovery

In a continuing effort to reduce the plaintiff's future medical expenses award in accordance with the MVFRL, the defense also argued in the post-verdict molding proceedings that the plaintiff was precluded from recovering any medical expenses remaining after the application of the offset in the amount of the remaining PIP benefits and the application of an Act 6 reduction, as those remaining expenses remained paid or payable under the plaintiff's own health insurance policy over and above any PIP medical benefit available under her auto policy.

More specifically, citing *Grant v. Baggott*, 36 Pa.D.&C.4<>th 298 (C.P. Delaware 1997) *aff'd.* 723 A.2d 240 (Pa. Super. 1998) *appeal denied* 734 A.2d 394 (Pa. 1998), the defense argued that the plaintiff had the burden of proving that any future medical expenses that may have still existed would not be paid or payable under any applicable health insurance policy.

Reviewing the materials submitted by the plaintiff, the trial court determined that not only had the plaintiff established that her health insurance policy was an HMO plan but it was also a self-funded employee benefit plan regulated by ERISA, all of which allowed the health insurer to exercise its right of subrogation. Since the health insurer was entitled to exercise its right of subrogation, the plaintiff would not receive a windfall from any such recovery. As such, Nealon found that the plaintiff was properly allowed to recover damages for her medical expenses at the trial.

The *Orzel* decision was recently settled during the post-trial proceedings and prior to any appeal being filed. As such, in the absence of any appellate decisions on point with the various future medical expenses issues raised, Nealon's opinion may serve as persuasive authority to guide litigants in future matters. •