COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 045935-05**

Ann Dominguez	Employee
Rainbow New England Corporation	Employer
Wholesale Retail Suppliers SIG	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Benoit.

APPEARANCES
James N. Ellis, Sr., Esq., on brief, for the employee
Rickie T. Weiner, Esq., at hearing, for the employee
Christopher L. Maclachlan, Esq., on brief, for the insurer
Thomas F. Finn, Esq., at hearing, for the insurer

FABRICANT, J. The parties cross-appeal from a decision denying and dismissing the employee's claim for reimbursement of §§ 13 and 30 medical benefits, paid by MassHealth and/or Medicare for medical treatment after January 31, 2007, due to her lack of standing. Despite the dismissal of the employee's claim, the judge also found that claims for reimbursement of the benefits in question were not foreclosed by the terms of the parties' lump sum settlement agreement, approved on February 9, 2009. We reverse the order of dismissal due to lack of standing, and recommit for further findings on causal relationship.

On February 9, 2009, the employee settled her case for an accepted right shoulder injury that occurred on December 19, 2005. (Ex. 5.) The parties agree that, to date, all medical bills have been paid, and the employee has not personally made any payments.[1] (Dec. 3.)

[1] The lump sum settlement contains the following language:

On appeal, the employee contends that, although she has not suffered any financial burden, the insurer has been unjustly enriched because MassHealth and/or Medicare have paid her medical bills.[2] Relying on Estey v. Burns International Security, 17 Mass. Workers' Comp. Rep. 53 (2003), the employee argues the workers' compensation carrier should not be allowed to benefit from payments made by a third party health insurer. (Employee br. 9.) The insurer argues the employee does not have standing to raise this claim, as there is no issue in controversy between her and the insurer.[3]

In Estey, MassHealth paid a portion of the employee's prescriptions, requiring the employee to pay the remainder out of pocket and then seek reimbursement from the insurer. The insurer argues the instant case is distinguishable because the injured employee has not been required to make any payments or await reimbursement. As a result, the insurer concludes that there is no matter in dispute between the employee and the insurer. (Ins. br. 7, 8.) However, the reviewing board's decision in Estey looks well beyond the disputed co-payments, ultimately finding the insurer responsible for paying 100% of the employee's reasonable, necessary and causally related medical benefits, and

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> Liability has been established . . .and this settlement shall not redeem liability for the payment of medical benefits . . .for Shoulder up until the date of second surgery on 1/3/07." (sic)

(Dec. 2.) As of the date of the settlement approval, approximately two years after the second surgery, there were no outstanding unpaid medical bills. All bills for medical treatment at issue occurred after January 31, 2007, and were paid in full by MassHealth and/or Medicare. At hearing, the parties stipulated that all medical bills have been paid, and "the Employee has a zero balance." (Dec. 2.)

[2] The employee testified that MassHealth and Medicare paid her bills. (Tr. 37.) The judge identified the "Payer" as "Medicare, or MassHealth." (Dec. 4.)

[3] The judge bifurcated the hearing to first determine whether the employee has standing to litigate this claim. (Dec. 2.)

specifically pointing out MassHealth's potential lien against the employee's workers' compensation case pursuant to G. L. c. 152, § 46A.[4] Id. at 62.

The judge here correctly notes that "a third party that had provided medical care or paid the medical bills would have standing to bring a claim to this Department for reimbursement from the workers' compensation insurer. Harlow v. Johansen, 19 Workers' Comp. Rep. 39 (2005)."[5] However, he then proceeds to make the erroneous finding that "[t]he Employee will not receive any benefit of a favorable decision as to a claim for reimbursement." (Dec. 4.) To the contrary, an outstanding lien and the continued involvement of MassHealth and/or Medicare have a direct impact on both the employee's future medical treatment and the third-party claim which was contemplated in the lump sum agreement.[6] The recovery of medical expenses from a third party such as MassHealth or Medicare has been held to be neither compensation nor a benefit paid by the employer's insurer, and therefore cannot be considered in determining whether the employee's statutory excess is reduced pro tanto. Pina's Case, 40 Mass. App. Ct. 388 (1996). Further, we have consistently held that the insurer is required to pay all reasonable and related medical expenses. See Estey, supra. See also, DeOliveira v. Calumet Constr. Corp., 29 Mass. Workers' Comp. Rep. ___ (2015); and Dixon v. Urban League of Eastern Massachusetts, 28 Mass. Workers' Comp. Rep. 219 (2014).

In addition, the employee is well within her rights to raise issues of causal relationship pertaining to injuries that are the subject of a prior lump sum agreement. The insurer disagrees with the judge's application of the lump sum

[4] In Estey, we specifically note that the resultant § 46A lien, "at a minimum, could prove a hindrance to a future settlement of [the employee's] claim." Id. at 62.

[5] In Harlow, the reviewing board found that a lump sum settlement agreement between the employee and the insurer, where liability has not been established, approved without the participation of the Veteran's Administration, would not extinguish the VA's subsequent claim for reimbursement for medical care it provided against the insurer.

[6] Although not claimed here, an employee could also be entitled to reimbursement for other necessary incidental expenses pursuant to § 30.

language, and argues that the lump sum agreement relieves it of any responsibility for all treatment to the shoulder after the date of second surgery on January 3, 2007. However, § 48(2) is very clear on this issue, mandating that when liability has been accepted, as is the case here, the "agreement shall not redeem liability for the payment of medical benefits or vocational rehabilitation benefits with respect to such injury." Where the agreement contains language that may impermissibly limit the insurer's liability for an accepted injury, a determination on that issue may be made as a matter of law. The judge found that only the stated surgery was excluded from liability. (Dec. 4.) The suggestion by the insurer that a reformation of the agreement is required for the consideration of causal relationship issues is incorrect. (Ins. br. 8.) The employee always retains the right to litigate causal relationship issues regarding accepted claims. Laverde v. Hobart Sales and Service, 18 Mass. Workers' Comp. Rep. 214 (2004).

We therefore reverse the order of dismissal due to lack of standing, and recommit for further findings consistent with this decision.[7] The insurer is to pay the employee's counsel a fee of $1,618.19 pursuant to § 13A(6).

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

[7] Although the parties in Estey conceded liability, causal relationship and the reasonableness and necessity of medical treatment, the insurer in the instant case does not concede the medical bills in question are causally related. (Dec. 3.) While the judge has made findings on some issues of liability in his decision, there have been no findings regarding the causal relationship, reasonableness and adequacy of the subject medical treatment.

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Carol Calliotte
Administrative Law Judge

Filed: **December 8, 2015**