BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JANEA RIGHTER,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1461965
	)	
EDS TRANSPORTATION SYSTEMS,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on July 11, 2019, on a motion by EDS Transportation Systems ("Employer") seeking a credit against future benefits based on a recovery achieved by Janea Righter ("Claimant") against a third party, pursuant to title 19, section 2363(e) of the Delaware Code.

Background

Claimant was injured in a compensable work accident on October 27, 2015, when she was working as a driver for Employer. In March of 2018, the parties entered into a "Medical Only" agreement as to compensation in which it was represented that Claimant had injured her right leg. Claimant had transported a patient to Parkview Apartments in Wilmington and, while unloading the patient from the vehicle, Claimant's foot fell through a drainage grating in front of the building.

As noted, the accident occurred on October 27, 2015. By letter dated January 27, 2017, Employer's workers' compensation insurance carrier, Amtrust North America ("Carrier") sent a letter to Claimant's counsel putting him on notice that it had a subrogation lien for any workers' compensation benefits paid on the claim against any third-party recoveries by Claimant. At the time this letter was sent, no benefits had been paid. The letter advised that, as long as the claim

remained open, the amount of the lien could increase and that Claimant should not enter into any settlement or settlement negotiations without Carrier's approval.

On August 28, 2017, Claimant filed an initial Petition to Determine Compensation Due seeking workers' compensation benefits from Employer. Eventually, the parties entered into the March 2018 "Medical Only" agreement. On July 25, 2018, Carrier issued an updated lien notice advising that $6,460.31 in medical benefits had been paid with respect to Claimant's injury and it sought reimbursement of that amount from any third-party settlement. On that same date (July 25, 2018), Claimant's counsel contacted Carrier advising that, back on May 18, 2018, Claimant's third-party claim had settled through mediation in the amount of $12,500.00 (with a net recovery to Claimant of $7,526.71).

Arguments: Claimant's counsel argues that Employer/Carrier's lien is not recoverable. Claimant states that, despite the March 2018 agreement, Employer/Carrier failed in its statutory duty to pay the medical bills within fourteen days of the agreement, *see* DEL. CODE ANN. tit. 19, § 2362(c). Claimant also asserts that, upon information and belief, as of the time of the mediation settlement in May of 2018 the medical bills still remained unpaid and, therefore, the lien at the time of settlement actually was zero. Claimant notes that the second "lien letter" sent by Carrier reflected that the medical bills were not paid until June 13, 2018. As such, Claimant was paid the net amount of the settlement.

Claimant also states that, at least arguably, Claimant might have a PIP claim under the facts of her case. If so, then under section 2363(e) of title 19, Employer/Carrier's reimbursement can only be had from the PIP insurer.

Employer argues that the so-called delay in paying Claimant's medical expenses was because Carrier was waiting to receive a "clean claim" with the required data elements, *see* DEL. CODE ANN. tit. 19, § 2322F. Employer notes that, prior to the mediation settlement, Claimant's counsel was fully aware that the March 2018 agreement to pay medical benefits existed and, therefore, knew that benefits would be paid at the time that the May 2018 settlement was reached in the third-party action. With respect to the PIP argument, Employer observes that it is just a vague assertion.

Employer does note that it is not currently seeking a direct reimbursement from Claimant, but is only seeking a credit against future benefits.

Analysis

Under the Workers' Compensation Act ("the Act"), when an injury for which workers' compensation benefits are payable was caused under circumstances creating legal liability in a third party, acceptance of workers' compensation benefits does not operate as an election of remedies and the injured employee "may also proceed to enforce the liability of such third party for damages." DEL. CODE ANN. tit. 19, § 2363(a). Likewise, proceeding to enforce the legal liability of the third party does not operate as an election of remedies versus the workers' compensation action. DEL. CODE ANN. tit. 19, § 2363(d). However, when there is a recovery from a third party, the Act specifically provides rules for reimbursement to the employer (or its insurance carrier) for workers' compensation benefits paid.

> 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 the Workers' Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee or the employee's

> dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits . . ..

DEL. CODE ANN. tit. 19, § 2363(e). "This provision 'prevent[s] the employee from receiving compensation for wage losses from a third-party tortfeasor when the losses have already been compensated through workers' compensation.'" *Bell Atlantic-Delaware, Inc. v. Saporito*, 875 A.2d 620, 623 (Del. 2005)(quoting *State v. Calhoun*, 634 A.2d 335, 337 (Del. 1993)). An "employer or its insurer who has paid or become liable for workers' compensation benefits becomes subrogated . . . to the right of action against the party liable for the injury and is entitled to reimbursement for the amount it paid to the employee." *Duphily v. Delaware Electric Cooperative, Inc.*, 662 A.2d 821, 834 (Del. 1995).

The clear intent of Section 2363(e) is to prevent a "double recovery by the employee for any one industrial injury." *Moore v. General Foods*, 459 A.2d 126, 127-28 (Del. 1983). *See also Duphily*, 662 A.2d at 834 ("...the law prevents a double recovery by the employee and permits the employer or its insurer to recoup its compensation payments."); *Guy J. Johnson Transportation Co. v. Dunkle*, 541 A.2d 551, 553 (Del. 1988)("While the Act contemplates full compensation, it is not intended to permit more than one recovery for a single loss.").

> It is equally elementary that the claimant should not be allowed to keep the entire amount both of his or her compensation award and of the common-law damage recovery. The obvious disposition of the matter is to give the employer so much of the negligence recovery as is necessary to reimburse it for its compensation outlay, and to give the employee the excess. This is fair to everyone concerned: the employer, who, in a fault sense, is neutral, comes out even; the third person pays exactly the damages he or she would normally pay, which is correct, since to reduce the third party's burden because of the relation between the employer and the employee would be a windfall which the third party has done nothing to deserve; and the employee gets a fuller reimbursement for actual damages sustained than is possible under the compensation system alone.

3 Lex K. Larson, *Larson's Workers' Compensation, Desk Edition*, § 110.02, at 110-3 to 110-5 (Matthew Bender, Rev. Ed.) (hereinafter "*Larson*").

In the present matter, Claimant has received a recovery from a third party for damages. Employer/Carrier has also paid benefits to Claimant under the Workers' Compensation Act. As such, section 2363(e) would seem to apply.

Claimant raises a couple of arguments for why the clear statutory language should not be followed. One argument is that, at the time of settlement, Employer/Carrier's lien was zero because no benefits had, as yet, been paid by Carrier. This argument fails by the very language of section 2363(e). The section discusses two ways that a lien operates. The first is as a reimbursement for benefits paid but, if there is anything left of the recovery, the remainder is "treated as an advance payment by the employer on account of any future payment of compensation benefits." DEL. CODE ANN. tit. 19, § 2363(e). Obviously, if the 2363(e) lien operates as a future credit against benefits which have not yet been paid, there is no requirement that the full amount of any workers' compensation lien be in existence at the time of settlement.[1] Thus, the fact that Carrier had not paid any medical bills at the time of the settlement of the third-party claim is irrelevant. Recovery is still permitted under the plain wording of the section.

Claimant argues that denial of the workers' compensation lien should be done on equitable grounds because Employer/Carrier failed in its statutory duty of paying the medical bills on a

[1] The Board observes that Section 2363 does not even expressly mandate that the employer or carrier give notice of the potential lien. In this case, though, it is not denied that Claimant was put on notice of the potential lien. It is possible, for an employer or carrier to waive its Section 2363 rights if it knowingly engages in conduct inconsistent with its continued assertion of those rights, such as actively working against the claimant achieving a third-party recovery. *See Baio v. Commercial Union Insurance Co.*, 410 A.2d 502, 507-08 & n. 5 (Del. 1979). There are no such extenuating circumstances in the present case from which to imply such a waiver.

timely basis. Claimant notes that the Medical Only agreement was entered into in March of 2018, but the medical bills were not actually paid until June of 2018.

There are a couple problems with this argument. First, the dates referenced by Claimant do not by themselves establish that Employer violated the prompt payment provisions of the Act. As Employer points out, medical bills are only due to be paid once Employer/Carrier is provided with a "clean claim" containing the necessary "data elements" required by the Act. *See Evick v. Cutting Edge Lawn Care Service*, Del. IAB, Hearing No. 1386464, at 3-4 (October 17, 2014)(ORDER). As such, there is insufficient evidence presented for the Board to conclude that Employer/Carrier has violated the prompt payment requirements of the Act. Without evidence that Carrier received a clean claim with all the required data elements and then delayed payment, the Board cannot conclude that any violation of the Act occurred.

The second problem with Claimant's argument is that, even if Carrier had wrongfully delayed payment of the medical bills, the Act itself already specifies the proper penalty to be assessed. Section 2322F(g) provides for a fine payable to the Workers' Compensation Fund and, under section 2322F(h), a medical provider can charge interest of 1% per month on an unpaid invoice. There is no provision that states that the workers' compensation lien should be affected. Workers' compensation benefits are purely a creature of statute. An employee has no rights to workers' compensation except for those granted by the Act. *See Ruddy v. I.D. Griffith & Co.*, 237 A.2d 700, 705 (Del. 1968). The General Assembly has already put in the penalty to be imposed for noncompliance with the prompt payment provisions. When the Act expressly sets for the appropriate penalty to a carrier for untimely payment, it would be improper for the Board to create an additional penalty beyond that contained within the provisions of the Act.

Finally, Claimant argues that Carrier's only resource should be against the PIP carrier because, possibly, having one's foot fall through a drainage grating in front of a building could potentially be a PIP claim because there was a vehicle in the vicinity. The Board declines to follow such speculation. Claimant's third-party recovery was not from a PIP carrier nor is there any evidence that Claimant or anybody has even tried to file a PIP claim.

Accordingly, the Board finds that Employer/Carrier is entitled to assert its workers' compensation lien against Claimant's third-party recovery. However, Employer/Carrier seeks a credit for the full amount of benefits it paid. This is improper. In *Keeler v. Harford Mutual Insurance Co.*, 672 A.2d 1012 (Del. 1996), the Supreme Court decided that, as a matter of equity and in accordance with the statutory language, an employer seeking reimbursement of benefits under Section 2363 must bear a *pro rata* share of the cost of the third-party tort litigation. *Keeler*, 672 A.2d at 1014-15. This is particularly true when the employer made no contribution to the effort or cost of achieving the third-party recovery. *Keeler*, 672 A.2d at 1017 ("For Harford to step in after recovery and demand satisfaction of its lien without contributing to the effort or cost of recovery is patently unfair and at clear variance with the statutory mandate of apportionment."). As such, if a claimant's award was reduced by one-third to pay his or her attorney, the employer's reimbursement should also be reduced to achieve an equitable result. *Id.* Such an equitable result would be devised so "that neither party achieve an advantage not attributable to that party's effort in bringing about the result." *Id.* Because it is an equitable issue, the Court has refused to formulate "a cumbersome standard for evaluating apportionment issues." *Roadway Express v. Folk*, 817 A.2d 772, 776 (Del. 2003).

To demonstrate the workings of a proper "*Keeler* calculation," it is best to give a simple example. Suppose a claimant achieves a $15,000 third-party recovery, and there is a one-third

attorney fee (with no other costs). Suppose, also, that the workers' compensation carrier had paid a total of $7,500 in workers' compensation benefits. The carrier's lien of $7,500 is half of the amount of the recovery ($15,000). Under *Keeler*, the carrier should, as a matter of equity, also assume half the cost of the attorney's fee to achieve the recovery. The one-third fee would be $5,000, so the carrier must pay half of this ($2,500). The total reimbursement to the carrier in satisfaction of its lien would then be $5,000 (being the $7,500 lien less its $2,500 share of the attorney's fee). The end result would be that, out of the $15,000 recovery, the attorney gets paid $5,000 (per the fee agreement), the carrier gets reimbursed $5,000 in satisfaction of its lien and the claimant recovers $5,000.

In the present case, Claimant's settlement recovery was $12,500.00. The attorney's fees and costs came to $4,973.29 (being $4,750 fees and $223.29 costs). Employer/Carrier paid $6,460.31, which is the amount of its lien. That lien comes to about 51.68% of the full recovery of $12,500.00. In accordance with *Keeler*, then, Employer/Carrier should bear that percentage of Claimant's attorney's fees and costs in achieving the settlement recovery. Accordingly, Employer/Carrier's *pro rata* share of $4,973.29 is $2,570.20. Deducting that amount from the lien amount of $6,460.31 leaves $3,890.11. This is the amount that Employer/Carrier is entitled to be reimbursed from Claimant's settlement recovery.

Employer/Carrier has agreed to accept the amount as a credit against future benefits rather than a direct repayment and the Board agrees that, under the facts of this case, that is appropriate so as to reduce any potential hardship on Claimant. Accordingly, the Board awards to Employer/Carrier a credit against future benefits of $3,890.11 in satisfaction of its workers' compensation lien to date.

IT IS SO ORDERED this 17th day of September, 2019.

INDUSTRIAL ACCIDENT BOARD

MARK MUROWANY

for Robert Mitchell
VINCENT D'ANNA

Mailed Date: 9/19/19

TP
OWC Staff

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