

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JUSTIN RUMBAUGH)	
Claimant)	
VS.)	
)	
DIRECTV, INC.)	AP-00-0462-579
Respondent)	CS-00-0154-263
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

The respondent and its insurance carrier (respondent), through James Nelson, requested review of the Post-Award Medical Award issued by Administrative Law Judge (ALJ) Bruce Moore dated November 24, 2021. Bruce Brumley appeared for the claimant. The case was placed on the summary docket for disposition without oral argument.

RECORD

The Board considered the same record as the ALJ, consisting of the: (1) preliminary post award hearing transcript dated August 24, 2021, with attached exhibits; (2) evidentiary deposition of Justin Rumbaugh dated September 3, 2021; (3) evidentiary deposition of Gregory Diehl dated September 23, 2021, with attached exhibits; and (4) documents of record filed with the Division.

ISSUES

1. Is the respondent responsible for paying the claimant's medical bills based on the current record?
2. Did the respondent waive the K.S.A. 44-504 subrogation credit due to accord and satisfaction?
3. Should the respondent remain responsible for ongoing medical care related to the claimant's back, without regard to a K.S.A. 44-504 subrogation credit?

FINDINGS OF FACT

The claimant sustained a compensable back injury on April 30, 2014, resulting in a two-level disc herniation while working for the respondent. On October 27, 2014, he underwent a left L3-4 and left L4-5 hemilaminotomy and microdiscectomy.

On October 2, 2016, the claimant presented to Geary Community Hospital's emergency room. While exhibiting symptoms of cauda equina syndrome, including urinary retention, constipation, severe pain, leg pain, tingling in the legs, and a history of disc herniations, he was not diagnosed or treated for cauda equina syndrome. The claimant was seen again in the emergency room on or about October 4, 2016, diagnosed with cauda equina syndrome and referred to a neurosurgeon. On October 6, 2016, the claimant underwent an L3-4 and L4-5 total decompressive laminectomy, medial facetectomy, bilateral foraminotomies and resection of a large calcified L3-4 disc.

On April 17, 2018, the claimant settled his workers compensation claim, leaving future medical treatment open, with the respondent reserving the right to obtain and fund a Medicare/CMS approved Medicare Set-Aside Trust and close future medical upon doing so.

On or about September 18, 2018, the claimant filed a medical negligence claim against Geary Community Hospital, the emergency room doctors and others. He contended the failure to timely diagnose and treat the cauda equina syndrome worsened his already-present urological problems. The third-party negligence claim was settled in mediation for \$800,000. After attorneys' fees and expenses, the claimant received a little more than half of the settlement amount. The district court made no determination any part of the recovery was for loss of consortium or loss of services, or any allocation for future medical expenses.

Gregory Diehl was one of the attorneys who represented the claimant in the medical negligence claim. He testified he attempted to have a representative from the workers compensation insurance carrier appear at mediation without success. After the claim was settled, he itemized expenses paid by the respondent for urological problems caused by the delay in treatment for the cauda equina syndrome, including temporary total disability benefits. Mr. Diehl deducted attorneys' fees and expenses in accordance with the contingency fee contract for the third party claim and sent a letter to the respondent's attorney documenting how he arrived at the final lien number. When Mr. Diehl did not receive a response, he attempted to call the respondent's attorney without success.

On or about April 27, 2020, Mr. Diehl sent a check in the amount of \$37,129.23 bearing the notation "Subrogation Reimbursement" to the respondent's attorney. The check was accompanied by a letter stating:

This check is meant to serve as a full accord and satisfaction as to any subrogation interests, future setoffs/credits, and/or lien interests American Zurich Insurance Company and/or Gallagher Bassett have or claim to have in Mr. Rumbaugh's third-party liability settlement.¹

Mr. Diehl testified the check was deposited and when he did not hear anything within the requisite 30 days, he considered the matter closed.

The ALJ stated:

Here, there is no dispute that the settlement proceeds of the medical malpractice claim represent a "recovery" from a third party, giving rise to DirecTV's subrogation claim, and that DirecTV would have "a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse." There was no determination by a court that any portion of the \$800,000.00 settlement was for loss of consortium or services to a spouse, so the subrogation lien attached to the entire settlement.

Given the apparent agreement between Rumbaugh and the malpractice defendants that the third-party settlement proceeds were intended to cover medical expenses related to urological problems, and not the underlying back injury, an appropriate resolution would be to have DirecTV continue to pay for treatment of the back, while costs associated with urological issues would be borne by Rumbaugh.

The court does not yet have the benefit of any medical testimony to distinguish between medical expenses incurred for the treatment of the low back condition and those incurred for treatment of unspecified urological problems. Future proceedings may well focus on that issue.

A W A R D

WHEREFORE, Rumbaugh's application for post-Award medical, as it relates to unspecified unpaid medical bills, is **CONSIDERED** but **DENIED**. Rumbaugh has failed to introduce the bills, provide foundation for those bills, and establish that those bills arose from authorized medical treatment. DirecTV remains responsible for ongoing medical care related to Rumbaugh's back injury, but is not responsible for treating Rumbaugh's urological complaints until Rumbaugh exhausts his portion of the malpractice recovery for treatment of those complaints. (Emphasis in original).²

¹ Diehl Depo., Ex. 1.

² PAM Award at 8.

The respondent argues it is entitled to a subrogation credit against all future compensation or medical payments pursuant to K.S.A. 44-504(b), and there is no statutory authority to demarcate what is not subject to the subrogation credit. The respondent contends it was not a party to the third-party medical negligence claim and should not be bound by the intent of the claimant and the third-party defendants. The claimant argues the respondent waived or satisfied any subrogation credit by accepting the check from the claimant's third-party attorneys in full accord and satisfaction.

ANALYSIS AND CONCLUSIONS OF LAW

Given the claimant did not introduce the medical bills, provide foundation for those bills, or establish those bills arose from authorized medical treatment, it was premature for the ALJ to rule bills associated with the claimant's back should not be subject to subrogation, but bills associated with the claimant's urological issues should be the claimant's responsibility until the subrogation credit is exhausted. It was also premature to rule on accord and satisfaction until the nature of the bills is established.

The only dispute before the ALJ was payment of certain medical bills. The claimant failed to present evidence of unpaid bills to support an award. Hypothetically addressing which party should be responsible for bills relating to the claimant's back, as opposed to his urological issues, while argued by the parties, is premature until the nature of the disputed bills is ascertained. The Board need not address what to do "if" certain bills pertain to specific conditions. Also, until the nature of the bills is determined to be due to the claimant's accidental work injury, addressing accord and satisfaction is premature.

The Board vacates the portion of the ALJ's order which holds the respondent responsible for the claimant's medical bills associated with his back, but not responsible for bills associated with the claimant's urological issues until the subrogation credit is exhausted. Similarly, the Board vacates the portion of the ALJ's decision concerning accord and satisfaction.

AWARD

WHEREFORE, it is the decision the Post-Award Medical Award dated November 24, 2021, is affirmed in part as to the claimant not proving entitlement to having the medical bills paid. The Post-Award Medical Award is vacated as to the applicability of accord and satisfaction and with respect to the ALJ bifurcating which medical bills are subject to the subrogation credit.

IT IS SO ORDERED.

JUSTIN RUMBAUGH

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Dated this _____ day of January, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (via OSCAR)
Bruce Brumley
James Nelson
ALJ Bruce Moore