
In the Matter of the Compensation of
EDGAR M. WOODBURY, II, Claimant
WCB Case No. 07-00007TP
THIRD PARTY DISTRIBUTION ORDER
Swanson Thomas & Coon, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The self-insured employer, Barrett Business Services, Inc., petitions the Board for resolution of a dispute concerning the amount of its recovery from a third party judgment. *See* ORS 656.593(1)(c). Specifically, the dispute pertains to the present value of Barrett's "reasonably to be expected future medical expenditures."

FINDINGS OF FACT

Claimant sustained a compensable injury on August 12, 1996 that was accepted for disabling quadriplegia at C6-7. In September 1999, the Board approved a Claim Disposition Agreement (CDA), in which claimant fully released his rights to benefits under the claim, with the exception of medical services, for the sum of \$404,200. As part of the CDA, the employer retained its right to recover all expenditures in relation to the workers' compensation claim from any third-party recovery. The parties also agreed that, for social security offset purposes, claimant had an additional life expectancy of 52.73 years (to approximately age 80).

Claimant also filed an action against the third party allegedly responsible for his injury. Mr. Dahlberg, the life care planner who testified for claimant at the trial regarding claimant's cause of action, found the present value of his future medical care plan as of June 2, 1998 to be \$4,271,432. The three scenarios for future earning capacity presented at trial made the same assumption for future medical expenditures based on Dahlberg's projection of future medical expenditures (\$4,271,432).

The jury awarded \$6,750,000 in economic damages and \$4,750,000 in noneconomic damages, for a total recovery of \$11,500,000. Following the third party's appeal, the trial court's judgment was ultimately upheld. *Woodbury II v. CH2M Hill, Inc.*, 189 Or App 375 (2003).

From June 1998 to January 10, 2008, claimant has expended \$1,478,818 for medical care. The remaining amount after January 10, 2008 for future medical care under the “Dahlberg” life care plan presented at the third-party trial would be \$2,792,614. Dahlberg did not provide an explicit life expectancy for claimant. However, Dahlberg projected an annual cost for medical expenses of \$111,660. As previously noted, the present (1998) value of all future medical expenses as established at the civil trial was \$4,271,432. This would place claimant’s life expectancy for purposes of the calculations performed at the civil trial at approximately 72.5 to 73 years.

In August 2006, Barrett’s “excess” carrier, CNA, demanded that claimant pay past workers’ compensation expenditures and the present value of anticipated future medical expenses. The cost of an annuity to fund the CNA life care plan was \$1,938,939.18. Claimant orally agreed to the CNA demand, subject to short-term fluctuations in the current cost of the annuity, and requested a draft agreement. The tentative agreement was never finalized, however. The value of the future lien under the CNA demand would be \$1,938,939.18, less \$128,359 expended for medical services since the August 2006 demand, which totals approximately \$1,810,580.

Barrett commissioned a life care plan in 2006 from Ms. Warner, a registered nurse. Using a home care figure of \$85,335 annually and a life expectancy of 62 years, Ms. Warner calculated future medical costs of \$3,300,000, which reduces to \$3,077,925.93 as of April 2008.

Another registered nurse, Ms. Nielsen, provided a life care plan in April 2005 on behalf of Barrett. She calculated claimant’s total life expectancy to be 75.6 years or until about December 2047. The present value of the expected expenditures on the claim under Ms. Nielsen’s plan was \$7,006,000. Subtracting the amount for the years ending April 2006, April 2007 and April 2008, the present value is \$6,364,760.

CONCLUSIONS OF LAW AND OPINION

If a worker sustains a compensable injury due to the negligence or wrong of a third party not in the same employ, the worker shall elect whether to recover damages from the third party. ORS 656.578. The paying agency has a lien against the worker’s cause of action, which is preferred to all claims except the cost of recovering such damages. ORS 656.580(2). This lien attaches to general damages, as well as to special damages. *Kenneth Owens*, 40 Van Natta 1049, 1050-51 (1998).

ORS 656.593(1)(c) provides that the paying agency is entitled to compensation for the “present value of its reasonably to be expected future expenditures for compensation[.]” Thus, to support a lien for anticipated future medical expenses, the paying agency must establish that it is reasonably certain to incur such expenditures. *Antonio Centurion*, 51 Van Natta 2017, 2018 (1997); *Sharon K. Falsetto*, 49 Van Natta 1202, *on recon* 49 Van Natta 1573 (1997); *Mona R. Skelton*, 47 Van Natta 882, 883 (1995); *Cynthia G. Lavelle*, 41 Van Natta 1399, 1400 (1989).

As set forth above, claimant recovered \$11,500,000 in damages against the third party. Barrett, as the paying agency, has a lien against the judgment proceeds, which must be distributed according to the specific statutory formula. The parties, however, cannot agree upon the amount of Barrett’s lien.

In this regard, ORS 656.593(1)(c) provides as follows:

“The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker’s claim under this chapter. Such other costs include expenditures of the department from the Consumer and Business Services Fund, the Self-Insured Employer Adjustment Reserve and the Workers’ Benefit Fund in reimbursement of the costs of the paying agency. Such other costs also include assessments for the Workers’ Benefit Fund, and include any compensation which may become payable under ORS 656.273 or 656.278.”

Barrett has the burden of establishing that it is reasonably certain it will incur the expenses in order to support its lien for anticipated future expenditures. *Sharon K. Falsetto*, 49 Van Natta at 1204; 47 Van Natta at 883. Barrett is reimbursed for its actual expenditures and paid the present value of its expected future expenses pursuant to ORS 656.593(1)(c). Claimant retains any remaining balance. ORS 656.593(1)(d).

To begin, claimant argues that the value of the future lien should be based on CNA's "demand." We disagree with claimant's position. Even though claimant and CNA appeared to be nearing an agreement, it is apparent that they never reached a final agreement. Moreover, Barrett, as the paying agent, was never a party to the alleged agreement and never agreed that CNA could conclude an agreement with claimant. Accordingly, we decline to rely on the CNA "demand" as a basis for resolving the dispute concerning Barrett's lien.

Barrett seeks to recover \$6,364,760 for future medical expenditures (based on a life expectancy for claimant of 75.6 years and the anticipated annual medical expenditures costs set forth in Ms. Nielsen's report).¹ Barrett argues that Ms. Nielsen's estimate of claimant's life expectancy is similar to that to which claimant agreed in the CDA. Barrett asserts that claimant should not be allowed to reduce a social security offset by virtue of a life expectancy in a CDA and then essentially "short-change" the employer by using a much lower life expectancy for its lien for reasonably to be expected future medical costs. For the following reasons, we decline to rely on the Nielsen estimate of claimant's life expectancy or the estimate contained in the CDA.

The provision in the CDA was an agreement between the parties concerning claimant's life expectancy. Nevertheless, it was neither a statutory nor a regulatory requirement and was not a determining factor in the eventual approval of the CDA. It is undisputed that the projection was included for social security offset purposes regarding "non-medical services" benefits under the CDA. The issue resolved in the CDA was not the value of future medical services, but rather the "non-medical service" benefits available for claimant's compensable injury. (Ex. 1-3). *See generally, Christopher L. Phillips, 50 Van Natta 347, 351 (1998)* (federal court's determination concerning the claimant's future medical related expenses had no preclusive effect in workers' compensation proceeding to determine the amount of lien for future expenditures for compensation). In fact, medical services are expressly prohibited from release by a CDA. ORS 656.236(1)(a). Because the life expectancy provision concerned claimant and the federal government, Barrett had no stake in any of the representations in the CDA regarding future life expectancy. Moreover, with the exception of Ms. Nielsen's projection, the life expectancy in the CDA far exceeds the life expectancy projections present in the record.

¹ In its reply brief, Barrett suggests a slightly lower life expectancy (74.2 years) than it did in its initial brief. This calculation was based on the arithmetic mean of the projections of claimant's life expectancy made by Ms. Nielsen, the witnesses in the civil trial, and the United States Life Tables of 1998 and 2004.

Consequently, we decline to rely on the life expectancy agreed to in the CDA or the life expectancy provided by Ms. Nielsen.² Moreover, we reject Barrett's argument that the Nielsen projection provides the most accurate estimate of future medical expenses.

Ms. Nielsen estimated future medical costs of \$12,964,888 with a present value of \$7,006,000. The largest item of future expenses was homecare services, estimated at \$175,968 a year. This in turn suggested \$14,664 worth of home services per month. However, claimant's home care usage in 2005 was a total of \$82,000 or \$6,833 a month. (Ex. 10: pg. 27-31). In 2004, it was \$83,000 or \$6,917 per month. *Id.* Before August 2003, when claimant ceased using home care services of Maximum Health Care Inc., there were some months in which claimant spent approximately \$14,000 for home care, but the total medical expenses for home health care for 2006 and 2007 respectively was \$75,000 and \$88,000. *Id.* at 10-31 to 34.

Under these circumstances, we conclude that the Nielsen plan's estimate of future medical costs was based on projections that are excessive, particularly in the area of future home care costs.

Barrett nevertheless argues that the Nielsen life care plan provides the most persuasive evidence of claimant's future medical expenses. While acknowledging that claimant's medical expenses have declined in recent years, Barrett contends that those expenses could easily rise again to the level of 2001, when total medical expenses amounted to \$286,337.55. For purposes of reasonable certainty, Barrett maintains that past actual expenses are a persuasive indicator of future expenditures for medical expenses. Using those past actual expenses, Barrett expresses concern that, if a low estimate of future expenses is used, it could have to "foot the bill" if claimant reverts to expenses of \$14,000 per month for home medical care.

Barrett's concerns are understandable and legitimate. Nevertheless, we are required to make a determination of reasonably to be expected medical expenses. Given the recent significant decline in claimant's annual medical expenses, we remain persuaded that the Nielsen life care plan relies on an excessive estimate of future medical expenses. *See Sharon K. Falsetto*, 49 Van Natta at 1204 (even

² Although Barrett has suggested a slightly lower life expectancy (74.2 years) than that contained in the Nielsen plan, we likewise reject that figure for the reasons expressed above.

though a physician reported that the claimant's compensable injury put her at risk for reinjury and exacerbation, the potential for future injury or further cervical disc degeneration was insufficient to satisfy the "reasonably certain" standard), *citing Cynthia G. Lavelle*, 41 Van Natta at 1400 (where future problems are possible but not necessarily expected, future expenditures are not reasonably certain).

We likewise do not rely on the Warner life care plan. That plan used a home care figure of \$85,335 annually and life expectancy of 62 years. Ms. Warner estimated future medical costs of \$3,300,000, which is reduced to \$3,077,925.93 as of April 2008. This plan, however, includes expenditures that would be incurred at or after age 65. For example, Warner included two powered wheelchairs after age 65 at a cost of \$32,000. (Ex. 6-25). Warner also included two passenger motor vehicles after age 65 (\$17,000) and a gym membership to age 65. (Ex. 6-18). The gym membership is also speculative because claimant receives similar services for free because he volunteers at a physical therapy clinic.

Based on the aforementioned deficiencies, we find that the Warner plan is not a reasonably certain estimate of future medical expenses. We, therefore, decline to rely on it.

Having rejected the above methods for determining the present value of anticipated future medical expenses, we turn to the final projection, which is that based on Mr. Dahlberg's testimony at the civil trial. For the following reasons, we conclude that it provides the most appropriate basis for resolving this dispute.

Mr. Dahlberg found that the present value of his future medical life care plan as of June 2, 1998 was \$4,271,432. The jury in the civil trial awarded \$6,750,000 in economic damages and \$4,750,000 in noneconomic damages. The award for future medical expenditures from June 2, 1998 could not have been more than \$4,271,432 because all future earning capacity scenarios presented at trial used the above estimate for future medical costs. Thus, the Dahlberg estimate appeared to be a component of the jury award.

From June 1998 to January 10, 2008, claimant expended \$1,478,818. (Ex. 10). The remaining amount under the Dahlberg plan after January 10, 2008 for future medical care would be \$2,792,614. Using the 72.5 to 73 year life expectancy apparently relied on by Dahlberg, claimant could expect another 37 years of life. Also using the \$111,660 annual cost for medical expenses computed by Dahlberg and assuming a net discount rate of one percent, the present value of that annual cost over the next 37 years is \$4,271,432.

We conclude that this is the most reasonable projection of anticipated future medical costs. Dahlberg testified at trial and his estimate was a component of the jury award. His plan also does not suffer from the flaws that characterize the Warner and Nielsen projections. His estimate of future annual medical costs (\$111,660) is more in line with the trend of annual medical expenses that claimant has actually incurred since 2004.³

In conclusion, based on the total projected annual cost for medical expenses set forth in Mr. Dahlberg's testimony (\$111,660), a life expectancy for claimant of 72.5 to 73 years (an additional 37 years per Ms. Warner's estimate), and Mr. Dahlberg's calculations of present value, we conclude that the total present value of claimant's reasonably to be expected future medical costs as of June 1998 is \$4,271,432.⁴ Accordingly, claimant is directed to pay Barrett this amount out of the proceeds of the third party judgment.⁵

IT IS SO ORDERED.

Entered at Salem, Oregon on August 19, 2008

³ Claimant's actual medical expenses have been \$115,547, \$109,223, \$91,120 and \$99,185 in the years from 2004 to 2007 respectively.

⁴ We recognize that this sum is based on the amount claimant recovered in 1998 and does not reflect the present value in 2008 dollars. However, under the circumstances of this case, we conclude that June 1998 is an appropriate date for determining the present value of the reasonably to be expected future medical costs. In reaching this conclusion, we note that June 1998 is consistent with the date of the trial court's verdict in the third party litigation.

We further note that Barrett agrees that claimant has already reimbursed it for actual expenses paid through January 9, 2008 in the sum of \$162,682.56. Thus, claimant may reduce the \$4,271,432 reimbursement due under this order by this previously paid sum.

⁵ Barrett requests an accounting of the amount recovered from the third party judgment, of the distributions made, and of the remainder of the recovery. The Board's authority, however, is to resolve a dispute regarding Barrett's lien for actual and future claims costs. ORS 656.593(1)(c). We have done so. Because our authority does not extend to the actions Barrett proposes, the request is denied. CNA also asserts that it and Barrett are entitled to interest on unreimbursed claim-related expenses. We decline to order payment of interest because a carrier is not entitled to interest under workers' compensation law, but rather to recovery of its lien from a third-party judgment for actual/future claim costs.