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

Reviewing Panel: Members Lowell and Biehl.

On September 11, 2008, we abated our August 19, 2008 Third Party Distribution Order that determined the total present value of claimant's reasonably to be expected future medical costs from a third party recovery. *See* ORS 656.593(1)(c). We took this action to consider the parties' requests for reconsideration. Having received further responses from the parties, we proceed with our reconsideration.

In our prior order, we reasoned that Mr. Dahlberg, a life care planner who testified at claimant's trial in 1998 regarding his third party cause of action, provided the most reasonable projection of anticipated future medical costs. 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, and Mr. Dahlberg's calculations of present value, we concluded that the total present value of claimant's reasonably to be expected future medical costs as of June 1998 was \$4,271,432. Accordingly, we directed claimant to pay Barrett this amount out of the proceeds of the third party judgment.

In doing so, we recognized that this sum was based on the amount claimant recovered in 1998 and did not reflect the present value in 2008 dollars. However, under the circumstances of this case, we concluded that June 1998 was an appropriate date for determining the present value of the reasonably to be expected future medical costs. We noted that June 1998 was consistent with the date of the trial court's verdict in the third party litigation, which was ultimately upheld in *Woodbury II v. CH2M, Inc.*, 189 Or App 375 (2003). We further noted that Barrett agreed that claimant had already reimbursed it for actual expenses paid through January 9, 2008 in the sum of \$162,682.56. Thus, we determined that claimant could reduce the \$4,271,432 reimbursement due under the order by this previously paid sum.

Claimant argues that we should correct our prior order to reflect that he has reimbursed Barrett in an amount (\$1,969,758.33) even greater than that acknowledged in our prior order and that Barrett's lien for future medical expenses should be reduced by that amount. Barrett contends that we should have determined the reasonably to be expected future medical expenses from 2008 forward, rather than from 1998. It contends that our calculation deprived it of the benefits of compound interest, but still burdened it with the effects of inflation. Barrett asserts that our determination will result in insufficient funds to cover future expenses in the claim. CNA argues that we should recalculate reasonably expected future medical expenses as of the date of Barrett's petition for relief (December 21, 2007). For the following reasons, we decline to depart from our prior order that determined reasonably to be expected future medical expenses as of June 1998.

In *Kelly A. Nielson, DCD*, 49 Van Natta 1087 (1997), the parties agreed to settle a third party negligence action for \$2,200,000. The carrier approved the settlement and agreed to accept \$1,000,000 as satisfaction for its lien. The carrier also approved the claimant's receipt of \$500,000 as settlement for her individual loss of consortium claim against the third party. The claimant died approximately two and one-half years after the settlement. Thereafter, the surviving spouse requested an accounting of the carrier's expenditures on the decedent's claim. Eventually, the surviving spouse demanded that the carrier refund the unused balance of its share of the third party lien recovery. When the carrier declined to do so, a petition for Board relief was filed.

The surviving spouse asserted that, pursuant to ORS 656.593(1)(c), she was entitled to recover the unexpended balance of the \$1,000,000 paid to the carrier in satisfaction of its lien. Specifically, she argued that the carrier had no legal basis to retain the unused claim reserves. We disagreed.

We reasoned that nothing in ORS 656.593(1)(c) required the return of unexpended claim reserves to the worker's estate. Rather, we reasoned that the statute requires that the paying agency "be paid and retain" the balance of the recovery to the extent it is compensated for expenditures incurred at the time of the third party recovery "and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim." In other words, we determined that the statute contemplates a payment to the paying agency *at the time of the third party recovery* based on a reasonable estimate of future expenses. We concluded that the statute did not contemplate any "after the fact" correction or adjustment of the agency's recovery should the estimation of future costs turn out to be inaccurate. 49 Van Natta at 1090.

As in *Nielson*, we likewise find here that the time of third party recovery, rather than the time of the employer's petition, is the date on which the reasonable estimate of future expenses under ORS656.593(1)(c) should be based. As we previously found, Mr. Dahlberg provided the most reasonable projection of anticipated future medical costs. His estimate was reasonably contemporaneous with the time of the third party recovery in 1998. Accordingly, we decline to alter our previous conclusion that the present value of reasonably to be anticipated future medical costs should be determined as of the 1998 third party recovery.

We acknowledge Barrett's concern that an estimate of future costs in 1998 dollars does not account for the effects of inflation and might leave it with insufficient funds to cover future medical costs. However, as explained in *Nielson*, the third party statutes do not provide for any "after-the-fact" correction of a carrier's recovery. *See generally, Archie M. Ulbrich*, 46 Van Natta 1517 (1994) (declining to allow carrier to receive accrued interest on undisbursed lien amounts because doing so would allow carrier's lien to exceed the amount to which the parties agreed at the time of the third party settlement). Moreover, the Court of Appeals has recognized that an element of risk is present whenever a sum is reduced to present value. *See Denton v. EBI Companies*, 67 Or App 339 (1984). The court noted:

"EBI's policy arguments are unconvincing. It is true that, if the reserve is reduced to its present value, the carrier may be faced with some substantial risks. For example, the timing and extent of claimant's medical needs may be greater than anticipated, and the principal amount of the reserve could be dissipated sooner than expected. The interest rate might also be less than expected, and the carrier will be left with a reserve fund insufficient to cover the medical expenses. However, those risks are common in situations where the amount of damages to compensate for future loss must be estimated, for example, damages for loss of earning power or future medical care of an injured plaintiff.

The task EBI faced in estimating its future payments for claimant's medical care is conceptually little different from that of an injured plaintiff in a personal injury action, who must prove the gross amount of future loss and the formula to be used in reducing that amount to its present value. The risk of underestimating must fall on the party having the burden of proof." 67 Or App at 344.

Finally, claimant seeks credit for amounts already paid to Barrett. Specifically, claimant argues that the \$4,271,432 of future medical costs as of June 2, 1998 should be reduced by \$1,969,758 claimant has paid for expenses since that date. As we previously stated, the determinative date for the calculation of Barrett's statutory share of the third party recovery is June 1998. Consequently, Barrett is entitled to any claim costs actually paid as of June 1998. ORS 656.593(1)(c). In addition, Barrett is entitled to \$4,271,432 for its reasonably anticipated future claim costs. These sums can be reduced by the funds that claimant has previously paid to Barrett for expenses after June 2, 1998. (Because claimant asserted that he has already paid \$1,969,758, he may offset that amount against the total sum due Barrett as described above.)

Accordingly, on reconsideration, as supplemented and modified herein, we republish our August 19, 2008 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on January 29, 2009