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WORKERS' COMPENSATION ALERT

TO: Our Clients and Friends
FROM: Bleakley, Cypher, Parent, Warren & Quinn, P.C.
RE: Supreme Court Decides Attorney Fee Issue in the Case of *Petersen v Magna Corporation and Midwest Employers Casualty Company* (Decided July 31, 2009).
DATE: August 6, 2009

Supreme Court *Petersen* Decision

The wait is over. The Supreme Court has finally issued its decision regarding whether attorney fees may be assessed against employers and/or their carriers on unpaid medical bills.

In the case of *Petersen v Magna Corporation and Midwest Employers Casualty Company*, (Decided July 31, 2009), the Michigan Supreme Court determined that magistrates may award attorney fees and prorate the fees between the employer, its insurance carrier, or against both.

The Supreme Court's decision was fractured among its members and emphasized the difficulty of interpreting Section 315, and who may be responsible for attorney fees.

That being said, four justices (a majority) did adopt the rule of law that an employer, its carrier, or both may be ordered to pay attorney fees if they fail, neglect, or refuse to provide appropriate reasonable and necessary medical treatment or appliances. [The majority decision was authored by Chief Justice Marilyn Kelly with Justice Cavanagh concurring; Justices Weaver and Hathaway concurred in result only and the rule of law noted above; Justices Young and Corrigan would only have allowed proration of attorney fees between the claimant and the employer/carrier; Justice Markman would have allowed proration between the claimant and medical providers only].

Unfortunately, the Supreme Court did not provide much in the way of guidance to determine under what circumstances constitute a refusal, neglect, or an outright failure of the employer to provide appropriate medical, that would be subject to the magistrate's discretionary award of an attorney fee on the unpaid medical bills.

It is unclear whether attorney fees may be awarded in cases that involve good faith, factual, or legal disputes, and that issue will certainly need to be flushed out in the future.

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Previous appellate commission decisions interpreting what constitutes failure, neglect, and/or refusal subject to an award of attorney fees indicates that the employer/carrier must have notice of the bills and an opportunity to pay them, but other than that, there was little guidance to evaluate under what circumstances a magistrate's discretionary authority to award attorney fees exist, but based upon past cases, it appears that at least some magistrates have interpreted the neglect, refusal, and failure language to be satisfied by mere notice of the bills and nonpayment of same. Again, that issue will need to be flushed out in the future with further litigation, and we will keep you advised of developments.

For the time being, the practical impact of the Supreme Court's decision in *Petersen* is that all employers and insurance carriers should be aware that increased exposure now exists, in the form of an additional 30 percent on "unpaid" medical bills.

The potential award of an additional 30 percent, on top of unpaid medical, after cost containment, may be significant in those cases where medical treatment and bills are substantial.

Case law indicates that only "unpaid" bills are subject to an attorney fee, therefore, if a group health carrier has paid the bills but is seeking reimbursement, arguably those bills are not subject to an attorney fee award. With that in mind, it may be beneficial to be more aggressive to have employer's group health step in and pay bills in cases of a dispute. To facilitate payment of bills in cases of dispute, it may warrant an indemnity agreement with the group health provider. That allows dispute, but repayment if found liable. By taking that approach, all interests may be considered, i.e. the employee gets needed medical care, the group health has a right to reimbursement if a work-relationship is found, and the employer/carrier is allowed to dispute payment of medical in good faith and avoid increased exposure related to unpaid medical bills. Certainly, there are many ways to deal with the issue and we at Bleakly Cypher Parent Warren & Quinn pride ourselves on being your advocates to creatively deal with all issues.

If you have any questions whatsoever regarding the Supreme Court's decision in *Petersen* and the attorney fee issue, or any other issue for that matter, please do not hesitate to contact any of the attorneys at Bleakley, Cypher, Parent, Warren & Quinn, P.C.