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Can “Medicare’s Gorilla Body be Squeezed into Workers’ Compensation Overalls”?

According to the United States District Court for the Southern District of Texas, Medicare’s “gorilla body” could not be squeezed into Guadalupe Caldera’s (Caldera) “workers’ compensation overalls” via a private cause of action under the Medicare Secondary Payer Act (MSP). This analogy was the court’s clever way of describing Caldera’s theory for his action seeking Declaratory Judgment that the Defendant, Insurance Company of the State of Pennsylvania (ICSP), was liable for the full amount Medicare paid on his behalf.¹

Caldera injured his back in 1995 and ICSP originally paid some benefits pursuant to Texas law based upon his compensable injury and impairment rating. Additionally, Caldera applied for and received Social Security disability benefits in 1998. A few years later in 2002, ICSP filed a formal denial with the Texas Workers Compensation Commission denying Caldera additional medical benefits, asserting that the covered injury was previously resolved and that any new medical issues were not related. Although Caldera had been given notice and an opportunity to further pursue his claims with ICSP, he chose not to appeal and Medicare paid for his medical expenses including two back surgeries in 2005 and 2006 totaling \$42, 637.41.

Years later, on April 12, 2011, the parties entered into an Agreed Judgment in state court holding that the back injury and resulting surgeries were related to the initial 1995 workers’ compensation injury. While this Agreed Judgment in state court did establish ICSP’s responsibility for medical expenses required for treatment of the injury, it did not liquidate any damages or require any payment by ICSP. Additionally, there was no determination that Medicare’s payments for Caldera’s back surgeries were the responsibility of ICSP or owed by ICSP. To the contrary, ICSP denied any liability for those charges due to the fact that Caldera failed to comply with preauthorization requirements and did not timely submit his medical bills for payment. The parties agreed that the time for doing so had long passed and there was no longer any administrative remedy available to require ICSP to pay.

With Caldera’s declaratory judgment, ICSP countered with the filing of a motion to dismiss, stating that the pleadings did not constitute a proper MSP claim because Caldera did not exhaust his administrative remedies with ICSP when his claims were denied. Although Caldera agreed that he did not exhaust his administrative remedies, he claimed that the MSP preempted the

¹ *Caldera v. The Insurance Company of the State of Pennsylvania*, 2012 U.S. Dist. LEXIS 12888 (February 2, 2012).



unexhausted remedies which would therefore confer jurisdiction on the court. Calling Caldera's theory "ambitious," the court noted that it was one of first impression.

Whether Caldera was entitled to bring an MSP claim as a private cause of action hinged on whether payment "had been made or could have reasonably expected to be made under his workers' compensation law or plan." ICSP argued that no payment could have been expected to be made until ICSP's objections were overruled and ordered to pay at the conclusion of the workers' compensation administrative hearing. Conversely, Caldera argued that because the state court found his back surgeries to be compensable and ICSP has conceded responsibility for the injury, they are obligated to pay his medical expenses for his lifetime. Therefore, the amount paid by Medicare is sufficient to liquidate the claim (settle the claim) and would depict that ICSP would be reasonably expected to pay by "other means," thus proving responsibility for payment. Additionally, liquidating the claim through workers' compensation is a technicality that would conflict with the MSP so it should be preempted.

ICSP admitted that Caldera's injury was compensable, but yet also stated it had not agreed to pay any damages, medical or otherwise. Additionally, the opportunity to liquidate the damages was clearly barred by the statute of limitations. The court agreed with ICSP in this regard and further found that ICSP's liability for payment must be determined by workers' compensation law and the terms of coverage, which includes the preauthorization requirement and the timely submission of medical bills. The court explored case law and determined that any "other means" for demonstrating ICSP's liability to pay must involve an enforceable obligation such as a judgment or settlement. Additionally, it found that simply a theory of ICSP's liability would not qualify as "other means."

The court further stated that state workers' compensation systems do not conflict with, and are not preempted by, the MSP. Instead, state workers' compensation systems are incorporated into the MSP and must be exhausted. In the end, ICSP's Motion to Dismiss was granted because Caldera had not exhausted his workers' compensation administrative remedies and had not established ICSCP's responsibility to pay by judgment, settlement, or other means.

This case was interesting on multiple levels. Most interesting, is that Caldera sought a Declaratory Judgment that ICSP was liable for Medicare's conditional payments, yet it appears that no conditional payment demand had been issued. Because Medicare's right to recovery of conditional payments does not ripen until there is a settlement, judgment, or award², explains why Medicare had not yet issued a demand. Also, because there was no settlement, judgment, or award, Medicare would have probably never sought recovery of its conditional payments from Caldera (unless by mistake). Even if there was a settlement, judgment or award, it appears that due to the court's decision, ICSP would not be considered a primary payer under the MSP and Medicare could not seek recovery from either Caldera or ICSP.

² See *Sullivan v. Farm Bureau*, 2011 U.S. Dist. LEXIS 35817 (April 2011).



In speaking with Caldera’s attorney, Daniel F. Horne, as to why he sought Declaratory Judgment in this matter, he mentioned how future medicals are truly never really settled in Texas. When asked why seek a Declaratory Judgment at all since the case would never truly settle, he said he felt that Caldera’s right to a private cause of action under the MSP was separate and distinct from any right that Medicare would have to subrogate or recover. So, in the end, was there a reason for Caldera to “don Medicare’s gorilla suit” at all? It remains to be seen as Attorney Horne stated that he intended to appeal the decision.

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