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LIFE IS ABOUT CHOICES – SO TOO IS NEW JERSEY WORKERS' COMPENSATION LAW WHEN ADDRESSING AN EMPLOYER'S SECTION 40 LIEN AGAINST A PENNSYLVANIA MOTOR VEHICLE INSURANCE POLICY

*Courtesy of Robert J. Fitzgerald, Esq. Marshall Dennehey**

Can a New Jersey employer place a lien on a Pennsylvania resident's personal motor vehicle uninsured motorist recovery for New Jersey workers' compensation benefits? The Appellate Division has preliminarily addressed the standard to resolve the issue in an unreported case, *Terrence Johnson v. State of New Jersey*, Docket No. A-3202-07T3 (November 20, 2009).

In *Johnson*, the petitioner, a New Jersey Department of Corrections' employee, was injured while driving a state-owned work vehicle that was struck by an uninsured motorist in New Jersey. The petitioner was a Pennsylvania resident and owned a personal vehicle covered by a Pennsylvania automobile policy. The State provided the petitioner with New Jersey workers' compensation benefits but denied his UM claim because the State is exempt from this type of UM claim. The petitioner then filed a UM claim under his own personal Pennsylvania motor vehicle insurance policy.

The State wrote to the petitioner's attorney, stating, "We are advised that your office is handling a THIRD PARTY action for petitioner, and asserting a workers' compensation lien of \$26,769.99 for temporary compensation and medicals." See *Midland Ins. Co. v. Colatrella*, 102 N.J. 612 (1986) (holding that UM proceeds constitute a third party recovery under N.J.S.A. 34:15-40, upon which a workers' compensation lien attaches). The petitioner's attorney responded that there was no third-party claim, just the UM claim against the petitioner's own policy, and that under that policy and Pennsylvania law, there is no right to assert a workers' compensation lien in a UM claim. See *American Red Cross v. Workers' Comp. Appeal Board (Romano)*, 745 A.2d 78,81 (Pa. Cmwlth. 2000) (where a claimant receives monies from a policy purchased and paid for by the claimant for his own

benefit, be it UM or underinsured provisions of that policy, the employer does not possess a subrogation right), *aff'd per curiam*, 766 A.2d 328 (Pa. 2001).

Thereafter, the petitioner's insurance company sent a letter to the petitioner's attorney regarding the UM claim, which was referenced by the court:

Your correspondence also indicates a workers' compensation lien of \$12,628.20. As I'm sure you are aware, the carrier has no right to assert a lien in a UM claim; however, you should also be aware that your client has a right to prove, plead and recover the amount of their payment. In this case, my file reflects a total Workers' Compensation payment of approximately \$27,000, which has already been factored into my evaluation of the claim... Incidentally, since it appears we will not be able to settle the claim for my initial offer amount of \$52,000, I will be forwarding that amount to you under separate cover in the near future. It is State Farm's procedure to do this as we believe that is the minimum amount your client will be entitled to receive. The claim will of course remain open and we are not asking Mr. Johnson to sign any sort of Release. [Emphasis added.]

There was no additional language indicating as to why or how the worker's compensation lien was "factored" into the UM carrier's evaluation" or settlement offer. The petitioner's attorney and the State continued to dispute whether the State was entitled to subrogation of its workers' compensation lien. The State then filed a motion in the New Jersey workers' compensation

court to set the lien, arguing that the petitioner was bound by New Jersey workers' compensation law.

The petitioner opposed the motion on the basis that, under a conflict of law analysis, Pennsylvania law should control. In January 2008, the Judge set the amount of the lien at \$17,646.67 pursuant to Section 40, N.J.S.A. 34:15-40. Thereafter, the parties settled the petitioner's New Jersey permanency claim.

In November 2008, the Judge issued a written opinion concluding that the petitioner was required to reimburse the State for the lien. The Judge found that once the petitioner elected to receive compensation benefits pursuant to New Jersey law, he triggered the statutory subrogation rights of the compensation carrier under Section 40. The Judge found *Midland* to be decisive, concluding that denying the State's right to subrogation would result in a double recovery for the petitioner, contrary to the legislative intent of Section 40.

The petitioner appealed, arguing that the Judge failed to conclude that Pennsylvania law should apply after conducting a choice-of-law analysis. Specifically, the petitioner argued that Pennsylvania's interest in assuring full and fair compensation for its residents who are involved in motor vehicle accidents in accordance with the statutory scheme established by

Pennsylvania's Legislature is more significant than New Jersey's interest in avoiding a double recovery. The Appellate Division concluded that New Jersey's choice-of-law rule applies a "flexible governmental-interest" standard, which requires application of the law of the state with the greatest interest in resolving the particular issue that is raised in the underlying litigation. *Gantes v. Kason Corp.*, 145 N.J. 478, 484 (1996). See also *Lieberman v. Port Authority*, 132 N.J. 76, 84 (1993).

Ultimately, the Appellate Division reversed and remanded the case back to the Workers' Compensation Judge for further proceedings and testimony to address a conflict of laws analysis.

The Appellate Division also went further and made some interesting comments, addressing the UM settlement offer:

The record in this case suggests that petitioner may not, in fact, receive a "double recovery" if Pennsylvania law were applied and the State was not permitted to assert a compensation lien against petitioner's UM proceeds. According to State Farm's letter of February 8, 2007, the claim representative "factored" the workers' compensation payment "into [his] evaluation of the claim."

Whether or not petitioner received a double recovery is an important factor to consider in evaluating the governmental interest standard in this case. The record is unclear as to the extent to which it was "factored in" and whether petitioner ultimately resolved his UM claim for more than the initial offer of \$52,000.

For now, New Jersey employers can continue to rely on Section 40 in subrogating against third party types of recoveries when issuing workers' compensation benefits. Both at the outset and throughout the life of the claim, employers should thoroughly investigate when there is a potential for a third-party recovery. Moreover, employers should assert their Section 40 rights as early on as possible. Further, employers can and should take over pursuit of third-party claims in those rare instances where petitioners fail to on their own behalf. Finally, although often asked, Section 40 does not require the employer to compromise or lower its lien amount at any time. By pursuing subrogation under Section 40, employers can continue to control costs and keep the New Jersey workers' compensation system viable.

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