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Case Study

## PIP Insurers' Exposure to Attorney Fees Greatly Increased

— by Jeffrey D. Eberhard

**Claims Pointer:** Court holds that despite sending a letter consenting to coverage, if an insurer denies one or more of a PIP claimant's medical bills, the insurer has not actually consented to coverage under ORS 742.061 (2) and therefore may be liable for claimant's attorney fees.

In order to encourage out of court settlements between insurers and their insureds, Oregon enacted ORS 742.061 which provides that, in some cases, an insurer may be responsible for the attorney fees incurred in actions brought by insureds to recover benefits under their policy. Specifically, if an insured makes a claim for benefits, settlement is not made within six months, and the insured ultimately receives an award from the court which exceeds the amount of any offer made by the insurer, then the insurer will have to pay the insured's attorney fees. But ORS 742.061 includes an important escape clause: ORS 742.061(2) provides that the statute does not apply in actions to recover PIP benefits if, within six months from receipt of the proof of loss, the insurer consents to arbitration, accepts coverage and "the only issue remaining is the amount of benefits due the insured." However, recently, in Badrick v. Farmers Insurance Co. (case no. A1142539, October 27, 2010), the Oregon Court of Appeals rendered an opinion which significantly narrowed this escape clause, holding that if an insurer refuses payment of a single medical bill – even if it consents to payment of all other claimed PIP benefits – the insurer may be denied the safeguard of ORS 742.061(2).

In August 2007, the Supreme Court of Oregon rendered an important decision regarding the application of ORS 742.061 – and its central exception – to insurer/insured communication in the case of Grisby v. Progressive Preferred Insurance. In Grisby, claimant sought PIP benefits from his insurer. The insurer sent claimant a letter accepting

coverage of his claim and agreeing to pay for the reasonable and necessary medical expenses related to the accident. Insurer then paid most of claimant's medical expenses but refused to pay a \$4,000 chiropractic bill which it determined was unrelated to the accident. When the court ordered that the chiropractic bill be paid, claimant sought attorney fees under ORS 742.061. The insurer was unsuccessful in arguing that a determination as to whether a particular claimed expense was "reasonable and necessary" was merely part of the consideration of "the amount of benefits due"; instead, the Court held that an insurer's denial of payment for a specific service had the effect of denying coverage, not merely disputing the amount due. Thus, the Court granted claimant's request for attorney fees.

The recent Badrick case gave the Oregon Court of Appeals an opportunity to apply Grisby to an insurer's written communication with its insured. On December 14, 2006, plaintiff Enola Badrick suffered injuries as the result of a car accident. Badrick sought PIP benefits from her insurer, Farmers Insurance Company. On December 19, 2006, Farmers sent Badrick a form letter acknowledging her PIP claim, providing the necessary paperwork for her to fill out and stating, in part, "[p]lease be aware that we may deny, limit or terminate benefits if we determine the medical and hospital services are not reasonable or necessary, or not related to the accident..."

Badrick completed the requisite paperwork, including the proof of loss form, and submitted it to Farmers. Farmers paid some, but not all, of Badrick's requested PIP benefits. Approximately a year and a half later, on May 12, 2008, Badrick brought a breach of contract lawsuit against Farmers for failure to pay benefits under the policy. During the suit, it was determined that only one doctor bill remained unpaid. Farmers paid that bill, and Badrick then sought attorney fees under ORS 742.061(1).

Badrick's request for attorney fees was granted, and Farmers disputed the award before the trial court arguing that the ORS 742.061(2) escape clause applied because Farmers had consented to coverage in its December 19 letter. Badrick, relying on the holding in Grisby, argued that since Farmers had actually denied payment of some of her requested benefits, the Farmers' letter did not leave as the

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## Case Study... (Continued from page 1)

only remaining issue “the amount of benefits due,” and therefore the attorney award safeguard did not apply. The trial court agreed with Farmers and reversed the attorney fee award. Badrick appealed to the Oregon Court of Appeals.

The Oregon Court of Appeals reviewed the Supreme Court’s holding in Grisby, and concluded, just as the Grisby Court had, that a letter that leaves open the possibility that a claim for certain benefits may be denied outright is not a letter that acknowledges that the only dispute is about the dollar amount of a claim, as required for the ORS 742.061 (2) exception to apply. Applying this reasoning, the Court of Appeals held that since Farmers’ December 19 letter left open the possibility that a claim for benefits may be denied (and, in fact, Farmers had denied some of Badrick’s requested benefits), it did not merely leave open for dispute the amount of benefits due to Badrick, and therefore did not satisfy the statutory requirements of ORS 742.061(2). Thus, the attorney fee award was proper.

Following this holding, we expect plaintiffs to argue entitlement to attorney fees in all cases where an insurer denies payment – even of a single bill. This presents insurers with a choice between two bad options (a “Sophie’s Choice” for insurers, if you will.): fight the payment of unrelated/unnecessary medical bills and run the risk of paying claimant’s attorney fees if you lose, or agree to pay highly questionable claims in order to avoid the threat of an attorney fee award. ❖

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### Medical Notes

## The Shoulder

By Tami Rockholt, RN, BSN

How do you treat a dislocated shoulder? In desperate circumstances, according to one field method, you should carefully follow these steps: Sedate the patient slightly, put your foot in the patient’s armpit and pull vigorously until the shoulder is returned to the socket.

The shoulder is a rather complicated joint, highly mobile and regularly involved in complex movements. It is susceptible to injuries such as fractures, dislocations and muscle / tendon injuries.

### Anatomy of the Shoulder

The shoulder joint is made up of the top of the upper arm bone (humerus), the shoulder blade (scapula) in the back, and the shoulder bone (clavicle) on the top. A pad of cartilage on top of the humerus fits into a pocket on the scapula called the glenoid, and makes up the glenohumeral joint. Tendons form the attachments between the muscles and the bones. There are four of these tendons in the shoulder joint that join together to form the rotator cuff. The function of the rotator cuff is to keep the humerus bone of the arm tightly tucked into the glenoid socket of the scapula.

Another important structure within the shoulder joint is the bursa, or lubricated sac of synovial fluid that protects the muscles and tendons as they move across each other. There is a bursa between the part of the scapula that makes up the roof of the shoulder (known as the acromion) and the rotator cuff tendons. The bursa simply allows the moving parts to slide against one another without too much friction.

### Impingement

When the space between the humerus and the acromion above is narrowed, the four rotator cuff tendons, the cartilage on the ends of the bone and the bursa are all impinged upon, or squeezed. This results in one or more forms of inflammation of the joint. Bursitis, tendonitis and arthritis are all inflam-

(Continued on next page)

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## Medical Notes... *(Continued from previous page)*

matory conditions closely related to impingement syndrome, often occurring in combination with it. Impingement syndrome also contributes to the tearing of rotator cuff tendons, as it weakens the rotator cuff and makes it more susceptible to injury.

Another problem that may contribute to impingement is the development of bone spurs. Bone spurs can further reduce the space available for the rotator cuff and cause wear and tear of the acromioclavicular (AC) joint between the collarbone and the shoulder blade.

This joint sits directly above the bursa, and any bone spurs developing beneath it irritate the bursa, making impingement worse.

### **Shoulder Injuries**

If the rotator cuff is torn, it may heal with only physical therapy, or surgery might be required, depending on the size of the tear. If a tear of the rotator cuff is not complete, the physician may recommend

treatment with “RICE”, an acronym for rest, ice, compression and elevation.

Among our panel of orthopedic surgeons, there is not a consensus regarding the best method to use for rotator cuff surgery. Many physicians tout the advantages of arthroscopic surgery, particularly since smaller incisions are required. Others will concede that a much larger incision is required, but also claim that more precise surgical repair is possible with open surgery which results in more rapid healing and recovery.

Fractures may occur to any of the three bones (humerus, scapula or clavicle) that make up the shoulder girdle. If the fracture is not displaced, then treatment with immobilization and physical therapy is an option. Typically, more complicated fractures require surgical repair.

Dislocations may be manually repositioned into place, and immobilization followed by physical therapy is generally needed. After three or more dislocations, surgery becomes an important option. ❖