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Case Study

Role of Payments by Liability Insurer in Calculating UIM Benefits Made Clear

— by Jeffrey D. Eberhard

Claims Pointer: UIM benefits are calculated by subtracting the insurer's liability payment from the insured's UM policy limit. The fact that an insured's total damages exceed the UM policy limit is irrelevant in the calculation of benefits. The insured is not entitled to a recovery that exceeds his contracted for UM coverage.

Oregon case law, particularly over the past year, has raised many questions as to how to treat payments from a tortfeasor's insurer when calculating UIM benefits. Plaintiffs have urged courts to subtract any payments from the total damages while defendants have promoted the practice that the payments be subtracted from the insured's insurance limits. Fortunately, the Oregon Supreme Court finally put this dispute to rest by deciding in favor of UIM insurers. Vogelin v. American Family Mutual Ins. Co., ---P3d--- (July 16, 2009).

Jessica Vogelin was injured when another driver collided with Ms. Vogelin's vehicle. Ms. Vogelin alleged that she suffered monetary damages from the accident and the liability insurer responded by paying its policy limits of \$25,000. Believing that she had not yet been made whole, Ms. Vogelin filed a UIM claim with her insurer, American Family Mutual Insurance Company ("American Family"), for \$100,000—her UM policy limit. American Family, believing that the payment by the liability insurer should be subtracted from its policy limits, refused to pay any amount above \$75,000. Ms. Vogelin believed the \$25,000 should have been subtracted from her damages—which were found at trial to be approximately \$300,000—and not her policy limit. Ms. Vogelin sued American Family for breach of contract for not paying the additional \$25,000. The trial court and court of appeals held in favor of American Family and held that the payment by the liability insurer should have been subtracted from the policy limits and not Ms. Vogelin's

total damages. Ms. Vogelin appealed the case to the Oregon Supreme Court.

On review, the Oregon Supreme Court considered how a liability payment, recovered by the insured from a tortfeasor, affected the insured's recovery of UIM benefits under her own insurance policy. Ms. Vogelin argued that ORS 742.504(7)(c)—as interpreted by Bergman v. Hutton in a workers' compensation case—required liability payments to be deducted from the insured's total damages, and not the UM policy limits. American Family argued that ORS 742.502(2)(a) required that liability payments be deducted from the UM policy limits, and not the total damages.

Following a thorough analysis of the legislative history behind ORS 742.502 and ORS 742.504, the court found that the state legislature intended UM/UIM benefits to allow an injured policy holder to recover damages as if the tortfeasor carried insurance coverage equal to the policy holder's insurance coverage. In other words, the insured would recover benefits equal to the limitations contracted for in the insured's policy. In agreeing with American Family, the court held that the relevant statutes permitted the insurer to calculate the insured's benefit by subtracting the liability payment from the UM limits of the insurance policy. The decision of the court of appeals and the judgment of the circuit court were affirmed. ❖

Appellate level case update available at: http://www.smithfreed.com/Library/ByPracticeArea/Insurance/Oregon/08-08-13/Calculation_of_UIM_Benefits_Determined_by_Court_of_Appeals.aspx

Supreme Court case available at: <http://www.publications.ojd.state.or.us/S056655.htm>

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Medical Notes

Healing Times & Treatment of Soft Tissue Injuries

Article provided by Health Cost Management

Literature Review by **Mary McLean**

Approved by **Donald Schroeder, MD, Orthopedic Surgeon**

The stages of healing for soft tissue injuries, typical time frames and recommended treatments are summarized in the table below:

Soft Tissue Injury Rehabilitation Summary Table

Phase	Duration	Characterized by	Treatments
#1: Acute Inflammation	Up to 72 hours after injury	Initial reaction of the body. Swelling, pain, redness, warmth. Signs are sometimes not readily visible.	R.I.C.E. in response to swelling and pain, cryotherapy, specific modalities, and a controlled program of CMP (continuous passive motion) and manipulations.
#2: Repair	48 hours to 6 weeks	Production and laying down of new collagen. Determines functional capabilities of the repaired tissue.	Mobilization, manipulations, modalities, strengthening program within patient's limits of pain.
#3: Remodeling	3 weeks to 12 months +	Reorientation of collagen in the direction of tensile strength. Determines functional capabilities of the repaired tissue.	Mobilization, manipulations, modalities, strengthening program within patient's limits of pain. Emphasis on home exercise program.

Treatments for acute, minor, straightforward soft tissue injuries include:

- The R.I.C.E system (rest, ice, compression, elevation)
- CMT (chiropractic manipulative therapy; spinal manipulation, adjustment)
- STM (soft tissue manipulation such as massage, myofascial release, manual trigger point therapy, energy techniques, etc)
- Physical therapy or physiotherapy, including CPM (continuous passive motion)
- Anti-inflammatory and pain medications

R.I.C.E. is the most common and essential system for minor soft tissue injury treatment. R.I.C.E. can be used for minor injuries such as bruises, sprains, strains, and pulled muscles. The earlier the R.I.C.E. treatment is started after an injury, the better it works. This method stems from the use of rest to prevent further injury, as well as the use of

cryotherapy and injury site compression and elevation to reduce swelling. If moving the injured area causes pain, this is the body's way of saying stop. Many healthcare systems encourage light, consistent physical activity during recovery, but this is subject to controversy because it is easy to overexert the site of injury, leading to further tissue destruction. J.A. Buckwalter of the University of Iowa Orthopaedics Department states that after a brief period of rest, controlled use of an injured muscle will promote the optimal healing.

Reduced swelling helps with pain management so that fewer medications are needed, making the healing process simpler and reducing potential for further injury from desensitization of the site. Cryotherapy is defined as the therapeutic use of cold to reduce discomfort, limit progression of tissue edema, or break a cycle of muscle spasm. The results of a study performed by Dr. Mac Auley were released in 2001 by the International Journal of Sports Medicine. Melting iced water applied through a wet towel for repeated periods of 10 minutes is most effective. The target temperature is reduction of 10-15 degrees C. Using repeated, rather than continuous, ice applications helps sustain reduced muscle temperature without compromising the skin and allows the superficial skin temperature to return to normal while deeper muscle temperature remains low. Reflex activity and motor function are impaired following ice treatment so patients may be more susceptible to injury for up to 30 minutes following treatment. It is concluded that ice is effective, but should be applied in repeated application of 10 minutes to be most effective, avoid side effects, and prevent possible further injury.

Compression should be applied lightly in the form of an elastic wrap so that it accommodates swelling. Anytime the wrap seems too tight or causes swelling

PERSPECTIVES ON THE LAW

Lachenmeier Enloe Rall & Heinson
Attorneys at Law

Upcoming Changes (Improvements) in Minor Settlement Statute

— by Martin M. Rall and Flavio A. Ortiz

One of the bills passed by the 2009 Oregon Legislative Assembly was House Bill 2687 (which will become effective on January 1, 2010), which addresses settlements of claims by minors. This law will amend ORS 126.725 which was passed by the 2007 Oregon Legislative Assembly. In our Perspectives on the Law article from February 2008, we wrote about some concerns that we had about ORS 126.725. In this article, we will be describing some of the improvements to ORS 126.725 and how compliance should be a more simple matter.

As we have described previously, minors generally cannot enter into binding agreements, and for this reason, attempting to enter into a binding settlement with a minor can be problematic. A conservator appointed by a court can settle a claim on a minor's behalf, but this procedure can make a small claim unnecessarily complicated. ORS 126.700 has been relied on to settle claims under \$10,000 with minors, but that statute does not explicitly state that a guardian may enter into a settlement agreement which is binding on the minor child. In response to the above concerns, the 2007 Oregon Legislative Assembly passed ORS 126.725, which established how an entity can settle a claim by a minor for \$25,000 or less.

House Bill 2687 will maintain the basic statutory scheme of ORS 126.725. Basically, the statute may be used to create a binding settlement for a claim by a minor if: (1) the total amount of the claim is \$25,000 or less, (2) the person entering into the settlement has legal custody of the minor, (3) no conservator has been appointed for the minor, and (4) the person with legal custody signs both the affidavit or verified statement and a release. Some of the most significant changes to the ORS 126.725 in House Bill 2687 relate to how a settlement is paid.

Under House Bill 2687, if the minor is represented by an attorney, payment will be much simpler for the settling party. If the settling party pays the settlement in cash (which should include "check"), there shall be a direct deposit into the minor's attorney's trust account. The minor's attorney shall then deposit the money from the trust account to a federally insured savings account in the sole name of the minor. The original statute states that the settlement funds were to be deposited directly into an account in the sole name of the minor, which raised a significant question regarding how the minor's attorney would ever be paid. The settling party can probably just instruct the minor's attorney to distribute the funds as described in ORS 126.725, and the minor's attorney should ultimately be responsible for complying with the statute.

House Bill 2687 does not change how payment is made for an unrepresented minor. If a minor is unrepresented, the settling party should make payment directly to a federally insured savings account that earns interest in the sole name of the minor. Notice to the minor shall be made via personal service or first class mail.

It should be noted that according to House Bill 2687, the funds in the savings account established for the minor cannot be withdrawn, removed, or transferred to any person, including the minor, except by court order or when the minor reaches 18 years old or when the minor dies. The original statute does not contain any restrictions on funds that are deposited in the minor's account.

A practical matter that the 2009 Legislative Assembly has addressed is the difficulty in locating a bank that would set up a savings account in the sole name of the minor. Most everyone who has attempted to locate a bank that would create such an account has seemingly run into some difficulties (most banks require a parent be named on the account in addition to a minor child). In response, House Bill 2687 explicitly states that an unanticipated minor may contract with a bank to establish a bank account for the purpose of depositing payments made under ORS 126.700 or 126.725. Hopefully, it will be much simpler to get an appropriate account set up.

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ing below the wrap it should be loosened. As for elevation, holding the injured part above the level of the heart is standard treatment to reduce swelling. The R.I.C.E. system is one of the most important treatments in the initial reaction phase, and it allows pain relief without medicating the patient. However, as its purpose is to reduce inflammation, its benefits are unclear after the acute inflammation phase. Use of cryotherapy into the second and third stages of rehabilitation is not proven to be harmful as long as the patient follows the recommendations for duration and intervals. Excessive or prolonged cooling of the site is damaging.

Other than R.I.C.E., the patient should avoid prolonged immobilization of the injury site. Controlled passive motion should be employed until a maximum range of motion is reached. At this point, active assistive motion should be employed. As the injury heals and the tissue adapts, the patient can be graduated to active resistive motion. Active resistive motion should be followed by a strengthening program of kinetic resistive exercise. This will insure a return to maximum strength for the patient. ❖

Perspectives... *(Continued from page 3)*

Another feature of House Bill 2687 is the option of paying a settlement through the purchase of annuity rather than by making a deposition into a checking account. The bill also describes how to make a payment to a minor pursuant to a judgment which is \$25,000 or less.

There are still some potential problems with the statute. As noted previously, although the drafters certainly intended the statute to govern any “settlement” of \$25,000 or less, they used the term “claim”. There is a potential question as to whether a \$50,000 “claim” that “settles” for \$25,000 or less is subject to the statute. But, now at least, House Bill 2687 explains that the total amount of the “claim” does not include “reimbursement of medical expenses, liens, reasonable attorney fees and costs of suit.” The statute still contains references to a “verified statement” and to the lack of need for “further court approval,” which are potentially problematic, but some of the most important issues with ORS 126.725 have been addressed. ❖

— *If you have any questions, please feel free to contact the authors Martin M. Rall (marty@lerlaw.com) and Flavio A. Ortiz (alex@lerlaw.com) at 503-768-9600.*