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No. 41
In the Matter of Peter E.
Bissell,
 Appellant,
 v.
Town of Amherst, et al.,
 Respondents.

Alan D. Voos, for appellant.
Hal Friedman, for respondent.

PIGOTT, J.:

In Matter of Kelly v State Insurance Fund, we held that when a workers' compensation claimant recovers damages in a third-party action, "the compensation carrier's equitable share of litigation costs incurred by the claimant may be apportioned on the basis of the total benefit that the carrier derives from

the claimant's recovery" (60 NY2d 131, 135 [1983]). The carrier's "total benefit" is the recoupment of its lien (the sum of past benefits paid the claimant) and relief from future obligations to make benefit payments to the claimant (id.). Where a carrier's future benefit "cannot be quantified or reliably predicted", i.e., the future benefit is speculative, it is improper for a court to apportion litigation costs based on that benefit (Burns v Varriale, 9 NY3d 207, 215 [2007]).

On this appeal, we are asked to determine whether the future medical benefits that a compensation carrier has been relieved of paying due to a claimant's successful prosecution of a third-party action are "so speculative that it would be improper to estimate and assess litigation costs against [that] benefit to the carrier" (Matter of Kelly, 60 NY2d at 139). We conclude that they are, and hold that the carrier need only pay its equitable share of attorneys' fees and costs incurred by a claimant once the claimant incurs and pays each medical expense.

I.

Peter Bissell sustained injuries in a work-related accident that rendered him a paraplegic. The Workers' Compensation Board concluded that Bissell sustained a permanent total disability and ordered the New York State Insurance Fund ("the Fund"), the compensation carrier for Bissell's employer, to pay Bissell \$400 a month for the duration of his life. Pursuant to Workers' Compensation Law § 29 (1), Bissell commenced a third-

party action against the Town of Amherst. As relevant here, the jury awarded Bissell \$4,650,000 in damages over 32.7 years to cover future medical expenses.¹ The trial court reduced that award to its present value of \$4,259,536.

The Fund asserted a lien against Bissell's judgment in the amount of \$219,760, representing \$154,880 in past workers' compensation benefits and \$64,880 for past medical expenses. It acknowledged its Kelly obligation to contribute towards attorneys' fees relative to the present value of the lost wages compensation benefit given Bissell's permanent total disability designation; however, the Fund refused Bissell's request that it pay that share of attorneys' fees relative to the recovery of the future medical expenses awarded him, offering to pay its share of the cost when Bissell actually incurred each medical expense.

Bissell commenced a proceeding pursuant to section 29 (1) of the Workers' Compensation Law to extinguish the Fund's \$219,760 lien against the third-party recovery and demanded \$1,399,734 in "fresh money" representing, in part, the Fund's equitable share of the cost of recovery of the \$4,259,536 in future medical expenses that the Fund had been relieved of expending for Bissell's future medical care. The Fund countered

¹ The jury returned a verdict of \$30 million against the Town, but the Appellate Division reduced that amount to \$23.4 million, finding that certain of the awards were excessive. It did not alter the jury's award for future medical expenses, holding that the jury's verdict in that respect was supported by the trial evidence (56 AD3d 1144, 1148 [4th Dept 2008]).

that it was not bound by a jury's future medical expenses award, and that because it was impossible to reasonably ascertain the "total benefit" the Fund received by virtue of that award, it would reimburse Bissell the agreed-upon 33.5% reimbursement of those expenses only when Bissell actually incurred them.

Supreme Court entered a judgment granting Bissell's petition in its entirety. The Appellate Division "modif[ied] the judgment by denying those parts of the petition seeking to extinguish [the Fund's] lien and seeking to recover from [the Fund] its share of litigation costs insofar as the benefit received by [the Fund] with respect to the foregone future medical payments is included in the calculation of its share of litigation costs," and remitted the proceeding to Supreme Court for a recalculation of the Fund's share of litigation costs (79 AD3d 1638, 1641 [4th Dept 2010]). This Court granted leave to appeal and we now affirm.

II.

There is no question that the Fund received a benefit from the third-party action, i.e., it will be relieved of paying a substantial sum of Bissell's future medical expenses and lost wages (see Workers' Compensation Law § 29 [4] [setting forth the carrier's right to credit the claimant's recovery in the third-party action against its obligation to pay additional workers' compensation indemnity and/or medical benefits]). As a result, the Fund must pay its equitable share of the litigation costs

expended in obtaining that recovery (see Workers' Compensation Law § 29 [1]). At issue, however, is whether the Fund is bound by the jury's future medical expenses award, such that the Fund's 33.5% share of litigation costs can be "quantified or reliably predicted" and, therefore, should be included as part of the Kelly calculation. We conclude that the jury verdict for future medical expenses is not the proper barometer by which the Fund's share of litigation costs may be measured.

Relying on our holdings in Burns and Kelly, Bissell contends that the amount of future medical expenses - having been decided by a jury and upheld by the Appellate Division as being supported by the trial evidence - cannot be deemed speculative since the benefit to the Fund can be "quantified by actuarial or other reliable means" (Burns, 9 NY3d at 146; Matter of Kelly, 60 NY2d at 139). Therefore, according to Bissell, the present value of the future medical expenses should be included as part of the Kelly calculation, entitling him to an immediate payment of the attorneys' fees expended in obtaining that portion of the award. We disagree.

We held in Burns that "if a claimant does not receive benefits for death, total disability or schedule loss of use, the carrier's future benefit cannot be quantified by actuarial or other means" (Burns, 9 NY3d at 146 citing Matter of McKee v Sithe Independence Power Partners, 281 AD2d 891 [4th Dept 2001] and Matter of Briggs v Kansas City Fire & Mar. Ins. Co., 121 AD2d

810, 812 [3d Dept 1986]). Similarly, future medical expenses - when considered in light of the benefit to the carrier, which is the focus of the Kelly analysis - cannot reliably be calculated in a manner similar to any of the three aforementioned classifications because it is impossible to reliably predict the future medical care the claimant will need, when the expenses from such care will accrue and how much it will cost when it does. While some of those items may reasonably be ascertained by a jury in a third-party action, there is a distinction between a non-speculative future medical expenses award made by a jury and the benefit that the carrier receives under the Workers' Compensation Law as a by-product of that award.

In a third-party action, the injured employee will have only one opportunity to obtain a recovery for future medical expenses, and the jury assessing the medical evidence will have the chance to make but one award for such expenses, if any. By contrast, in the workers' compensation context it is possible to wait and see what happens, and to require the carrier to pay its share of litigation costs when that share can be accurately calculated - i.e., when the actual medical expenses that the carrier has been relieved from paying are known. Moreover, whether the claimant is entitled to medical treatment pursuant to the Workers' Compensation Law is a determination that must be made by the workers' compensation board, and such determination is not dependent upon the jury's verdict in the third-party

action.

Although the claimant cannot include future medical expenses as part of the Kelly calculation, that does not mean that the carrier is relieved of paying its equitable share of the benefit. The trial court has the discretion to "fashion a means of apportioning litigation costs as they accrue and monitoring (e.g., by court order or stipulation of the parties) how the carrier's payments to the claimant are made," thereby ensuring that the carrier's equitable share of litigation costs is based on concrete, realized benefit, while concomitantly ensuring that the claimant will not wait indefinitely for the carrier's payment of its share (Burns, 9 NY3d at 217).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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Order affirmed, with costs. Opinion by Judge Pigott. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

Decided March 27, 2012