



## IDAHO INDUSTRIAL COMMISSION

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**RE:** Resolution of the Claims of Subrogated Payors in Connection with Lump Sum Settlements

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This guidance is provided to parties to proposed Lump Sum Settlements submitted to the Commission for approval pursuant to I.C. 72-404, and addresses the Commission's expectations regarding the resolution of the claims of subrogees who have paid some portion of medical expenses which are claimed to be necessitated by a covered injury, but which, for one reason or another, have been denied by surety. *Williams v. Blue Cross*, 151 Idaho 515 (2011), treats the Commission's obligations in this regard, and this guidance is based on that decision. There are many scenarios in which this issue arises, but the following example is typical:

Claimant suffers an accident related to strenuous pulling on an overhead device in connection with an emergency at work. She suffers a shoulder injury which is accepted by Surety. She receives medical treatment for this injury and is paid benefits as required by statute. Some months after the original injury, Claimant presents with new complaints of cervical spine discomfort. She is worked up for this problem and is found to have multi-level degenerative disc disease, including a C5-6 disc herniation of indeterminate age. The physician who treated Claimant for her cervical spine condition cannot say whether, or to what extent, Claimant's cervical spine condition is related to the work accident. Defendants retain a medical expert who opines that the cervical spine condition is altogether unrelated to the original work accident. Claimant retains another medical expert who opines that the cervical spine condition was permanently aggravated by the work accident, and that Claimant's need for surgical care is a direct result of the subject accident. Surety denies responsibility for Claimant's cervical spine surgery. Nevertheless, Claimant has the recommended surgery, the cost of which is paid by Claimant's non-occupational group health carrier. The non-occupational group health policy creates in the carrier, a right of subrogation in the event it is determined that the expenses associated with the neck surgery should have been paid by the worker's compensation carrier. Had the case gone to hearing, the Commission would have been asked to decide whether the neck injuries were related to the subject accident. A finding that the injuries were so related would result in an order requiring surety to pay to Claimant the invoiced amount of the bills she incurred, and from that sum the subrogated carrier would be reimbursed. However, the case does not go to hearing. Instead, it is resolved by way of lump sum settlement (LSS). The LSS specifically resolves the issue of whether Claimant's cervical spine injury, and related surgery, were causally related to the subject accident. It is presumed that part of the consideration paid in the proposed LSS is paid to resolve the issue of Claimant's entitlement to recover the denied medical bills, even though the LSS does not attempt to allocate any portion of the settlement to the resolution of the claim for the denied medical bills.

*Williams* makes it clear that the Industrial Commission has jurisdiction to consider whether a medical insurer is a subrogee, and if so, the extent of the subrogee's entitlement to the proceeds of a LSS. The grant of jurisdiction derives from I.C. 72-404, which requires the Commission to approve all LSSs, and in so doing, be satisfied that the settlement is in the best interest of the parties. As the Court stated:

If an injured worker's insurance company has provided compensation for medical expenses for which the worker is now seeking to obtain workers' compensation benefits, it is in the best interest of the parties to ensure that the insurance company's subrogation claim is resolved contemporaneously with

the proposed settlement. This would help ensure that the parties will not be subjected to further litigation after the settlement agreement is finalized. Coupled with the jurisdiction grants in I.C. 72-707 and -803, section 72-404 requires the Commission to do so. *Williams v. Blue Cross of Idaho*, 151 Idaho 515, 520, 260 P.3d 1186, 1191 (2011).

Accordingly, in treating the issue of subrogation, the Commission is, in the first instance, actuated by a concern for the best interest of the claimant. The Commission recognizes that in looking out for claimant's best interest, the interests of a subrogated carrier are incidentally served, even though that carrier is not currently a party to any proceeding before the Commission.

The importance of resolving a subrogation issue at the time of the LSS is illustrated by what might happen if the matter is not taken up. Suppose that the medical bills paid by the subrogee in the above hypothetical amount to \$50,000. If the workers' compensation claim is settled for \$100,000, claimant can expect to retain approximately \$75,000 after the payment of attorney's fees. Claimant may not understand that her medical insurer has an interest in the settlement proceeds. It will be an unpleasant surprise to have the subrogated carrier later come calling for the \$50,000. Per *Williams*, the Commission will have jurisdiction of the carrier's claim for reimbursement, and the causation fight which everyone hoped to avoid by settling the case will be had anyway. Moreover, the eventual decision of the Commission is likely to be all or nothing; claimant will either prevail on her argument that the need for care was not related to the subject accident, or the subrogated carrier will prevail on its argument that the need for care was related to the subject accident. It was not in the Claimant's best interest for the Commission to have approved the LSS without first having required the parties to sort out the treatment of the right of subrogation. It is the Commission's experience that most subrogated carriers are willing to compromise the amount owed pursuant to the policy where the medical evidence cuts both ways on the question of whether the need for the care received is related to the subject accident. If the claimant and subrogated carrier cannot reach agreement, then the case may have to be tried. To attempt resolution of a claim of subrogation before approval of a proposed LSS is in the best interest of claimant.

These are the Commission's expectations regarding the treatment of subrogated payors: Claimant must inform the subrogated carrier of the pending settlement, and the fact that the settlement resolves a claim for medical benefits that was denied by the workers' compensation surety but accepted and paid by the subrogated carrier. Claimant must attempt to resolve the subrogation claim. The subrogated carrier should not be misled, but the Commission does not expect claimant to volunteer specific records in the absence of a request for information from the third party.

Anecdotally, the Commission understands that it is sometimes difficult to identify a point of contact with the subrogated carrier, obtain the applicable policy language or engage the subrogated carrier in discussion about the resolution of the claim of subrogation. However, even in these cases, the Commission expects claimants to do their best to put the subrogated carrier on notice of the potential existence of a right of subrogation to the proceeds of the proposed LSS, as set forth in the preceding paragraph.

The Commission does not expect claimant to wait forever for a response from the subrogated carrier; thirty (30) days seems adequate. If, at the end of such period, the subrogated carrier has not responded, the Commission will consider claimant's obligation to attempt resolution of the subrogation claim satisfied.

However, parties are cautioned that without resolution of the claim of subrogation, Commission approval of a LSS does not provide a safe harbor for claimant against the subsequent demand of a subrogated carrier. Such a carrier may finally become engaged after the Commission has approved the LSS, and after Claimant has committed the settlement money to other purposes, demanding satisfaction of its right of subrogation created under the policy of insurance. Suffice it to say that the Commission's approval of a LSS without resolution of a claim of subrogation does not necessarily relieve claimant of the need to deal with the matter in the future.

The *Williams* Court ruled that pursuant to Idaho Code 72-404 it is not in the best interest of a claimant for the claim of a subrogee to be left unresolved prior to Commission approval of a LSS. However, whether or not such a claim is resolved does not define the universe of circumstances which the Commission must consider in determining whether a particular settlement is in the best interest of an injured worker. It is possible that other legitimate interests of the parties might prevail over the interest served by resolution of the subrogation claim. Where negotiations have taken place, but have

been unsuccessful in resolving a subrogation claim, approval of the proposed settlement may nevertheless be in the best interest of the parties upon consideration of all the facts and circumstances pertinent to the settlement. Of course, as noted above, Commission approval of such a settlement is not a safe harbor for claimant, and he may face the subsequent claim of a subrogee in an action before the Commission.

There are many other scenarios that could be entertained which might require different treatment by the Commission, but the above is a general statement of what the Commission expects of parties to a settlement where the facts of the case suggest the existence of a right of subrogation in a third party who has paid medical benefits which are also claimed in the workers' compensation case, and which are resolved in a proposed LSS.

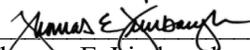
The Commission has expanded the Claimant's Attorney Memorandum (CAM) to reflect the Commission's requirements concerning resolution of claims of subrogation governed by *Williams* (See JRP, Exhibit 5B).

The above is not new law, but an agency interpretation of existing law. Further questions or comments can be directed to:

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