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Courts Struggle to Determine Point at Which No-Fault Benefits Become Available in Workers' Compensation Situations

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MCL 500.3109 provides in pertinent part that "[b]enefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the [Personal Protection Insurance (PIP)] ... benefits otherwise payable for an injury."

It has long been established in Michigan that Workers' Compensation (WC) benefits fall under section 3109 and are primary over no-fault benefits for medical expenses and wage loss (subject to the WC cap) caused by injuries that arose out of a claimant's scope of employment. However, where WC benefits have not yet been paid, the point at which a no-fault insurer then becomes responsible for benefits has long been debated.

The prevailing authority on the issue is *Perez v State Farm*, 418 Mich 634 (1984), in which the Michigan Supreme Court held that section 3109 obligates the injured person to use *reasonable efforts* to obtain workers' compensation benefits *available* before seeking no-fault benefits. The opinion in *Perez* is now 30 years old, and lower courts have continued to struggle with what constitutes *reasonable efforts* with little direction from the state's higher courts in the last three decades. The following cases that have touched on this section may provide persuasive authority to more easily navigate this issue.

In *Durmishi v Nat'l Cas Co*, 720 FSupp2d 862 (ED Mich 2010), the United States District Court for the Eastern District of Michigan found that the plaintiff had done all that the law required of him in pursuing *reasonable* efforts when he applied for and was denied WC benefits and then pursued the matter through litigation against the WC insurer.

The *Durmishi* court agreed with the principle enumerated by the Michigan Court of Appeals in *Specht v Citizens Ins Co of America*, that a no-fault insurer cannot delay payment of benefits while awaiting a determination by the workers' compensation bureau. 234 Mich App 292 (1999). The basis of this

concept in *Specht* was derived from the principle that a no-fault carrier may "intervene" and "actively participate" in the workers' compensation proceeding in order to protect its "reimbursement interest."

Perez and *Durmishi*, stand for the principle that *reasonable efforts* have been made once a determination is pending with the WC bureau. Functionally, this *should equate* to the filing for an application for mediation or hearing (Form OCR 104A), which institutes a formal dispute with the WC bureau. Once formal dispute procedures are initiated, the no-fault insurer can properly intervene and/or issue a notice of lien to the WC insurance carrier so that it can protect its right of reimbursement.

In pre-suit situations, no-fault carriers should encourage claimants to, at the very least, file an application for WC mediation so that the insurer can properly protect its reimbursement rights and the claimant can receive timely no-fault benefits, if appropriate. Although arguments based on the functional application of *Perez* and *Durmishi* are persuasive, insurers should be aware that lower courts will continue to struggle with this issue until further clarification is offered by Michigan's appellate courts.

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