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Dealing with Workers' Comp credits in UM and UIM arbitrations

The UM carrier wants credit for workers' comp benefits "paid" or "payable"

By Barry P. Goldberg

Plaintiffs' attorneys have been scrambling to figure out how to respond to Uninsured and Underinsured Motorist UM/UIM insurers' insistence that the claimant/insured exhaust workers' compensation benefits before making a UM/UIM claim. The insurers have been successful, so far, in forcing insureds to make a workers' compensation claim or claim a substantial credit even when the worker prefers to bypass the workers' compensation system and go directly to a UM/UIM claim.

Although there are many questions about where this issue will end up, the only reported decision that addresses the issue head on holds that it is not bad faith for an insurer to insist on a "final lien" from the workers' compensation carrier before it has an obligation to consider or arbitrate the UM/UIM claim. (*Case v. State Farm Mutual Automobile Ins. Co., Inc.* (2018) 30 Cal.App.5th 397 ("*Case*").)

Most California automobile insurance policies have a provision stating that the UM benefit "shall be reduced by any amount paid or *payable* to the insured *under any workers' compensation*, disability benefits, or similar *law.*" How to interpret and apply "payable" can cause confusion given the varied circumstances presented with many workers' compensation claims. To complicate the matter, some first-party UM/UIM insurers are either unaware of the workers' compensation credit or are confused as to its application. The result creates an inconsistent message to plaintiff/insured's counsel regarding whether there will be a workers' compensation credit, and if so, how much. (This author recently settled a UIM case wherein the insurer did not recognize and did not assert a workers' compensation credit of over $300,000.)

This article attempts to clarify the legal tension caused by the co-existence of UM/UIM laws and workers' compensation laws.

Background

Anecdotally, about half of all automobile-accident claims involve an uninsured or underinsured motorist. Those numbers are rising and the future statutory minimum of $30,000 per person and $60,000 per accident effective January 1, 2025, is expected to increase the number of uninsured motorists. As a result, many practitioners who have avoided UM/UIM claims, except on a rare occasion, must soon wrestle with complex and non-intuitive nuances which are the basis for California's Uninsured Motorist Law. (Ins. Code, § 11580.2, et seq.) Unfortunately, for such a commonplace body of law, these code sections are considered difficult to interpret and understand. The result is that this frequently litigated area of law is unclear even for practitioners who work in this area.

The UM/UIM statute history

The basic purpose of the uninsured-motorist statute is to minimize losses to the people of California who are involved in accidents with uninsured or financially irresponsible motorists. Under the statute, at least some coverage is afforded to an insured person with injuries caused by an uninsured or underinsured motorist.

The effect of the statute is to guarantee to an *insured* motorist the minimum financial responsibility under his or her own policy for injuries resulting from a collision with another party who either has no automobile liability insurance or has insurance with insufficient limits.

The Uninsured Motorist Law was *not* designed to make California drivers whole or to even get what they seemingly paid for. Instead, the law defaults to providing only "some" coverage to help minimize losses. This is an important backdrop to understanding workers' compensation credits in UM/UIM cases. For example, in California, an insured is granted "underinsured" motorist benefits only after the third-party liability limits have been exhausted. Then, the benefit is only the amount of the "uninsured" motorist policy limits, minus the amount paid by the third party. Compare California's law with many other states which allow "stacking" of UM policy limits in order for the insured "to get what they paid for."

Consistent with the purpose of the UM law, section 11580.2 contains provisions intended to prevent a "double recovery" of UM/UIM benefits and workers' compensation benefits for the same injury. Subdivision (h) states: "Any loss payable under the terms of the uninsured motorist. . . coverage to or for any person may be reduced: . . . By the amount paid and the present value of all amounts payable to him or her . . . under

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any workers' compensation law, exclusive of nonoccupational disability benefits."

Similarly, subdivision (f) states: "If the insured has or may have rights to benefits . . . under any workers' compensation law, the arbitrator shall not proceed with the arbitration until the insured's physical condition is stationary and ratable. In those cases, in which the insured claims a permanent disability, the claims shall, unless good cause shown, be adjudicated by award or settled by compromise and release before the arbitration may proceed."

The above provisions are also consistent with the requirement in section 11580.2, subdivision (f) mandating a declaration regarding the status of workers' compensation, if any, as part of a formal demand to initiate an UM/UIM arbitration. (See *Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App.4th 783.) As stated in *Gonzalez*, "Any demand or petition for arbitration *shall contain a declaration, under penalty of perjury, stating whether (i) the insured has a workers' compensation claim*; (ii) the claim has proceeded to findings and award …; and (iii) if not, what reasons amounting to good cause are grounds for the arbitration to proceed immediately." (Original italics.) In view of what the statute required, the attorney's letter was found not a proper demand. (*Id.* at 792.)

Also, section 11580.2, subdivision (c)(4) provides, "The insurance coverage provided for in this section does not apply either as primary or as excess coverage . . . [¶] (4) In any instance where it would inure directly or indirectly to the benefit of any workers' compensation carrier or to any person qualified as a self-insurer under any workers' compensation law, or directly to the benefit of the United States, or any state or any political subdivision thereof."

After medical and other benefits have been paid by workers' compensation, usually only non-economic benefits are at issue in a UM/UIM claim. This is because workers' compensation insurance does not cover general damages such as pain and suffering. (See *Baur v. Workers' Comp. Appeals Bd.* (2009) 176 Cal.App.4th 1260, 1265.)

There are four common scenarios in which an injured employee who also has UM/UIM coverage may be subject to the workers' compensation credit:

1. Make a workers' compensation claim and wait until its conclusion to make a UM/UIM claim;

2. Forgo the workers' compensation system entirely and seek self-procured medical care in anticipation of a UM/UIM claim;

3. Obtain "some" care from the workers' compensation system and obtain self-procured medical care; and

4. Make a UM/UIM claim and contend that benefits were neither paid nor payable.

In each scenario, expect that the UM/UIM insurer will demand a credit for all amounts "paid" or "payable" through the workers' compensation system.

Most of the confusion calculating a workers' compensation credit occurs because the UM/UIM insurers are inconsistent with requiring a declaration regarding workers' compensation pursuant to section 11580.2, subdivision (f). If the insurer allows a claim to proceed into the arbitration process without the declaration, it is unclear exactly what will be arbitrated at the arbitration. Section 11580.2, subdivision (f) "permits the insurer to wait until the workers' compensation award has been determined before paying benefits to the insured, in the absence of a showing of good cause." (*Rangel v. Interinsurance Exchange* (1992) 4 Cal.4th 1, 16.)

It does not appear to be bad faith for an insurer to refuse to engage in the arbitration process without a definitive explanation of whether workers' compensation benefits were afforded or could be afforded. In *Case*, the plaintiff was injured in a car accident with an uninsured driver in the course and scope of his employment. This is an all-too-common scenario for most practicing personal injury lawyers in California.

In *Case*, the plaintiff immediately sought workers' compensation benefits through his employer and promptly submitted his UM claim to his personal automobile insurer. After the plaintiff submitted a demand for his UM benefits, the insurer refused to consider the claim until it received verification of a "final lien" relating to medical expenses incurred as workers' compensation benefits. When the insurer failed to pay, plaintiff demanded arbitration. Plaintiff then sued the insurer for its bad-faith failure to pay the UM benefits.

Only after the insurer in *Case* received information showing that plaintiff had exhausted the possibility of receiving additional payments through the workers' compensation system, it then immediately settled plaintiff's UM claim. The insurer moved for a summary judgment that it had no obligation to consider the UM claim until after plaintiff had demonstrated that workers' compensation benefits were exhausted. The motion was granted and affirmed on appeal. Although not necessary to the decision, the court's comments regarding the "paid" or "payable" language provides the basis for UM/UIM insurers to claim extensive credits in worker cases, including "what could have been paid by workers' compensation."

Trying to bypass the workers' compensation system

Most practitioners can state with certainty that the workers' compensation system fails to provide the best and most advanced medical care that would be both the most beneficial for the plaintiff and that would operate to provide the best building blocks of a successful UM/UIM claim and arbitration. Any attorney who has represented an injured worker knows that the workers' compensation system is flawed and is biased towards cutting costs, including a bias towards finding that the injured worker has recovered fully and is ready to return to work. Accordingly, plaintiff lawyers often attempt to provide "self-procured" medical treatment with top doctors who can write persuasive reports and testify in arbitration, if necessary.

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It is fundamentally unfair that a worker may be placed in a worse position to request damages in a UM/UIM claim because of the limited medical care available in the workers' compensation system. A worker's award will be less than an award to a non-worker who has no limitations to the medical care he or she can procure. The non-worker can benefit from receiving superior care from doctors that also make excellent witnesses.

Plaintiffs' lawyers who utilize self-procured medical care and are presenting a UM/UIM claim should be warned that the insurer will take the position that the insured must first make a workers' compensation claim. If not a claim, the insurer will be entitled to credit the UM/UIM damages by what could have been "payable" through the workers' compensation system – which could be all or most of the medical economic damages in the case. This may leave only the non-economic damages for the UM/UIM award, "including his general damages and lost wages in excess of disability benefit offsets." (See *Baur v. Workers' Comp Appeals Bd*. (2009) 176 Cal.App.4th 1260, 1265.) Out of this settlement or award, the insured may then have to pay substantial medical liens, which will not be included as part of the settlement or award.

Although arguably dicta in *Case*, this untenable predicament relies on the fallacy that in workers' compensation, the injured worker is entitled to recover the costs of medical treatments "reasonably required to cure or relieve. . . the effects of his or her injury." (Citing Lab. Code, § 4600, subd. (a).) Therefore, the insurer will argue that the plaintiff should be barred from recovering past or future medical costs from the UM/UIM insurer, including for past or future wage loss to the extent that loss is recoverable as disability benefits under workers' compensation.

The UM/UIM insurers argue that any payments they make that the workers' compensation carrier otherwise would have made, but for insured's choice to seek medical treatment outside the workers' compensation system, are to the indirect benefit of the workers' compensation carrier, and therefore are excluded under section 11580.2, subdivision (c)(4) and the equivalent language in their policies.

Some UM/UIM insurers insist that insureds open a workers' compensation claim or a claim for UM/UIM damages will not be considered. This position may be extreme because the amount of the "paid or payable" credit may simply be an evidentiary question for the arbitrator. Of course, actually making and completing a workers' compensation claim will provide a definitive final lien. However, it is not always that simple. There are legitimate reasons a workers' compensation claim cannot proceed, including a statute of limitations.

What if an insured cannot make a workers' compensation claim?

There can be many reasons a workers' compensation claim was not made before the UM/UIM claim. If a worker was not certain about whether workers' compensation was available, should he be penalized? For example, if the subject accident occurred going or coming, in a work-adjacent area or not in a company vehicle, the worker may reasonably believe that a UM/UIM claim is the only remedy. As such, it is possible that no workers' compensation claim was made timely and, by the time of a UM/UIM arbitration, the worker cannot make a WC claim. Is the insurer entitled to a credit of amounts "payable?"

In this situation, it is incumbent on the plaintiff's lawyer to demonstrate that the worker had to seek treatment outside of an established network or the employer failed in its obligation to instruct the employee as to "what to do and whom to see." (*Chom v. Workers' Comp Appeals Bd.* (2016) 245 Cal.App.4th 1370, 1377.) The plaintiff/insured might present evidence that the employer had no such medical network, or the circumstances were such that the employee could otherwise go outside that network.

It is not uncommon for an employer to simply fail in its obligations to inform an employee regarding his or her rights to initiate a claim. It is also possible that the employer failed to provide workers' compensation coverage at all.

These scenarios present some analytical difficulty. Although the UM/UIM insurer will argue that the insured could have made a claim and therefore it is entitled to credit, that is an oversimplification of the issue. A UM/UIM arbitrator must determine the factual and legal issue of the availability of workers' compensation coverage. This may include determining a close question of workers' compensation coverage. Assuming the arbitrator determines that amounts would have been "payable," it is possible to determine the amount of the credit through expert testimony without requiring that a workers' compensation case be opened and determined.

It is also conceivable that some of the insured's medical expenses may be, or would have been, denied for a reason other than the fact that the expenses were incurred outside the workers' compensation system. That is, there may be a category of medical expenses that the insured could not have recovered through workers' compensation even if it was initially sought through that system. Such medical expenses should be permitted in a UM/UIM case. It is not to the workers' compensation insurer's indirect benefit for the UM/UIM insurer to pay costs the workers' compensation insurer would never have paid in the first place.

What if an insured settles his WC case and then self-procures medical care?

It is not uncommon for an insured to both settle a workers' compensation case *and* self-procure medical care. Resourceful insured's counsel will then present only the workers' compensation settlement information to the UM/UIM arbitrator and argue that only a small amount of credit exists in the case. The amount "paid" was small and there are no other

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amounts "payable" in the workers' compensation claim. UM/UIM insurers sometimes get this issue completely wrong because they do not properly assert that there should be credit for all amounts that could have been paid through the workers' compensation system; they accept credit for the small amount "paid" in the workers' compensation system.

Most UM/UIM insurers now argue that all the self-procured medical care should not be compensable in UM/UIM because the workers' compensation system provides the injured worker the costs of medical treatments "reasonably required to cure or relieve. . . the effects of his or her injury." Thus, all the self-procured care was *not* "reasonably required" and should be excluded as UM/UIM damages. The insured must then argue that the self-procured medical care was not available in the workers' compensation system and is therefore admissible for an award of economic damages.

Conclusion

It is unclear how the courts will handle the evidentiary and legal issues presented when injured workers completely bypass workers' compensation to seek treatment, and when injured workers pursue all available treatment through the workers' compensation system but then seek additional medical coverage. In fact, if insureds "properly" initiate UM/UIM claims with the accompanying declaration regarding the availability of workers' compensation coverage, and insurers wait until the workers' compensation award has been determined before paying UM/UIM benefits to the insured, it is unlikely that the issues will ever be ripe for interpretation.

Going forward, practitioners handling uninsured and underinsured motorist claims must carefully assess if workers' compensation is available to the injured insured. If workers' compensation is or may be implicated, a careful practitioner must decide whether to direct medical care or simply leave the client to the resources of the workers' compensation system and wait to make an UM/UIM claim. As part of that claim, it will be essential to adequately address the workers' compensation credit for all benefits "paid" or "payable."

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