

# ***LACEY & JONES***

## LEGAL MEMORANDUM

**FROM:** Jerry Marcinkoski  
**DATE:** August 6, 2009  
**RE:** *Petersen v Magna Corp*

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### SUMMARY

The Michigan Supreme Court issued a deeply divided opinion in *Petersen v Magna Corp* on July 31, 2009 (SC Docket Nos. 136542, 136543). A majority – four of the seven Justices – would rule that only employers and insurance carriers can be assessed plaintiff’s counsel’s fees on unpaid medical expenses. It is a matter of the Magistrate’s discretion as to whether or not to award such attorney fees.

There are five different opinions from the seven Justices in this case. Chief Justice Kelly authored the lead opinion with Justice Cavanagh concurring. Justice Hathaway authored the second opinion with Justice Weaver concurring. Both of these opinions reach the same result – the result described in the paragraph above – but for different reasons. Justice Markman dissented in a lengthy opinion. Justice Young dissented in a separate opinion. And, Justice Corrigan dissented joining Justice Markman’s dissent and part of Justice Young’s dissent.

With respect to the first opinion authored by Chief Justice Kelly (with Justice Cavanagh concurring), the Chief Justice finds that the statutory language at issue in MCL 418.315(1) is ambiguous. The language at issue says: “The worker’s compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.” This sentence concludes the long provision of the Act that describes the employer’s obligation to pay for reasonable and necessary medical expenses. The Chief Justice’s opinion says the statute is ambiguous in the sense that it does not identify amongst whom the attorney fees are to be prorated, *e.g.*, the employee, the employer, the insurance carrier, or the medical provider who gets paid. The Chief Justice concludes that the statute only allows a proration between employers and their carriers. In response to one of the dissents, Chief Justice Kelly clarifies that nothing in her opinion is to be construed as *requiring* a Magistrate to prorate a fee against an employer or the employer’s carrier; it is a matter of the Magistrate’s discretion.

In the course of her opinion, the Chief Justice embarks on a discussion of how to determine when a statute is ambiguous. In so doing, the Chief Justice disapproves of more recent opinions from the Supreme Court that define ambiguity. The Chief Justice would abandon that definition of “ambiguity,” and change the rules as to when Supreme Court precedent can be overturned.

The second opinion authored by Justice Hathaway (with Justice Weaver concurring) reaches the same result “to the extent that it [the lead opinion] concludes that the term ‘prorate’ in MCL 418.315(1) applies exclusively to employers and their insurance carriers.” What Justice Hathaway disagrees within the lead opinion is the lead opinion’s finding that the statute is ambiguous. Justice Hathaway says it is unambiguous. Therefore, there is no majority for anything but the result. That is, Chief Justice Kelly’s discussion of ambiguity and precedent has no majority support.

The primary dissenting opinion is that of Justice Markman. Justice Markman says the proration sentence in § 315(1) contemplates a division of attorney fees among the different medical providers who reap the benefit of the unpaid medical award. In the course of his opinion, Justice Markman says that if the Legislature had intended to impose payment of attorney fees upon the employer or carrier, the Legislature would have done so explicitly with clarity as it did elsewhere in the statute. Justice Markman says the majority is adding an additional cost upon the workers’ compensation process “by penalizing employers and forcing them to pay not only for their own attorneys, but also for their employees’ attorneys.” Justice Markman also criticizes the Chief Justice’s discussion of ambiguity as creating “an extraordinarily low threshold for finding ambiguity,” which then permits a Justice to “utilize whatever factors are deemed appropriate [by that Justice] in reaching a result.” Justice Markman says the Chief Justice’s definition of ambiguity is “avoiding the difficult process of giving fair meaning to a statute, the fair meaning of which may not be to her liking.”

Justice Young joined in parts of Justice Markman’s dissent, but he would hold that the term “prorate” applies only to a proration between the claimant and the employer – not to medical providers or medical creditors who are not parties to the case or represented by counsel. Justice Young finds the majority’s opinion as having a chilling effect on employers and carriers contesting medical expenses.

Finally, Justice Corrigan fully agreed with Justice Markman’s opinion and a portion of Justice Young’s criticism of the majority’s holding.

The bottom line in all of this is that we should now be prepared to face requests from plaintiff’s attorneys for imposition of attorney fees on the employers and carriers in relationship to unpaid medical expenses. Please bear in mind on the positive side, however, that this is an entirely discretionary point for the Magistrate. That is, a Magistrate is not obliged to impose attorney fees on unpaid medical expenses. The current case law from the Workers’ Compensation Appellate Commission in terms of *when* a Magistrate can legitimately impose attorney fees on the employer and/or carrier provides that: “At a minimum, he or she [the Magistrate] must find each medical expense for which a fee is imposed was 1) reasonable and necessary and 2) the employer had appropriate notice they were due.” *Beattie v Wells Aluminum Corp*, 2005 ACO #157. *Beattie* adds that when the “validity and necessity of such benefits and treatment are reasonably in dispute, the magistrate cannot order the payment of such fees (without some findings and rationale upon which to rest his discretion) based only on his opinion that such would promote the assistance of counsel in medical dispute cases where there are only minimal wage benefits in dispute.” *Beattie* has largely been followed as setting forth the governing standard for determining when attorney fees can be imposed on employers and carriers.