STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 19-0006
Decision No. 20-15

MICHAEL CORDEIRO
(Appellant)

v.

GIFFORD'S FAMOUS ICE CREAM
(Appellee)

and

ACADIA INSURANCE COMPANY
(Insurer)

Conference held: September 11, 2019
Decided: July 28, 2020

PANEL MEMBERS: Administrative Law Judges Hirtle, Collier, and Stovall
BY: Administrative Law Judge Stovall

[¶1] Michael Cordeiro appeals from a decision of a Workers' Compensation Board administrative law judge (*Elwin, ALJ*) denying in part his Motion to Confirm Lien for Attorney's Fees and Costs. Mr. Cordeiro, by counsel, requested that the insurer be ordered to withhold 30% of all amounts payable as a result of the successful litigation of Mr. Cordeiro's Petition for Payment of Medical and Related Services, including 30% of amounts payable to MaineCare. The ALJ granted the Motion with respect to amounts owed to all providers except MaineCare, concluding that by the plain language of 39-A M.R.S.A. § 209-A(7) (Pamph. 2020), MaineCare is entitled to recoup 100% of the medical expenses it incurred for Mr. Cordeiro's work-related injury. Mr. Cordeiro contends this was error because (1) he is entitled to be paid pursuant to 39-A M.R.S.A. § 325 (Pamph. 2020), under a common fund

theory, or as in a *qui tam* action; (2) pursuant to 39-A M.R.S.A. § 106 (2001), MaineCare has no lien against workers' compensation benefits; and (3) the statutory scheme of which section 209-A(7) forms a part authorizes recovery of attorney's fees from recovered amounts payable to MaineCare. We affirm the decision.

I. BACKGROUND

[¶2] Michael Cordeiro sustained a work-related injury to his low back on August 11, 2016, while working for Gifford's Ice Cream. Gifford's disputed the compensability of certain physical and psychological complications that arose from this injury. Mr. Cordeiro filed a Petition for Payment of Medical and Related Services. The petition was resolved by a Consent Decree that granted the petition and awarded payment of identified medical expenses. Some of these expenses had been covered by MaineCare.

[¶3] Counsel for Mr. Cordeiro filed a Motion to Confirm Lien for Attorney's Fees and Costs. The ALJ issued an order on December 20, 2018, granting the Motion and determining that counsel for Mr. Cordeiro is entitled to a lien of up to 30% of the benefits accrued including the unpaid medical bills, with the caveat that the order would not increase the amount the insurer is obligated to pay for the medical bills.

[¶4] By letter dated January 10, 2019, counsel for Gifford's insurer notified the ALJ that MaineCare disputed counsel's right to recover 30% of any reimbursement obligation owed to MaineCare. After a conference at which counsel

for MaineCare participated, the ALJ determined that pursuant to 39-A M.R.S.A. § 209-A(7), the board lacked authority to order the insurer to withhold 30% of the medical expenditures incurred by MaineCare on Mr. Cordeiro's behalf. The ALJ further denied the request that the insurer hold the disputed funds in escrow pending appeal. Mr. Cordeiro appeals.

II. DISCUSSION

A. Standard of Review

[¶5] The Appellate Division's role on appeal "is limited to assuring that the [ALJ's] findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). When construing provisions of the Act,

> "[O]ur purpose is to give effect to the Legislature's intent." *Hanson v. S.D. Warren Co.,* 2010 ME 51, ¶ 12, 997 A.2d 730. "In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Id.* We also consider "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Davis v. Scott Paper Co.,* 507 A.2d 581, 583 (Me. 1986). "If the statutory language is ambiguous, we then look beyond the plain meaning and consider other indicia of legislative intent, including legislative history." *Damon v. S.D. Warren Co.,* 2010 ME 24, ¶ 10, 990 A.2d 1028. "Statutory language is ambiguous if it is reasonably susceptible of different interpretations." *Id.*

Graves v. Brockway Smith Co., 2012 ME 128, ¶ 9, 55 A.3d 456.

B. Title 39-A M.R.S.A. § 325, Common Fund, or *Qui Tam* Action

[¶6] Pursuant to the Workers' Compensation Act, each party is responsible for their own attorney's fees and costs. 39-A M.R.S.A. § 325(1). Fees for services are capped at "30% of the benefits accrued, after deducting reasonable expenses incurred on behalf of the employee." *Id.* § 325(3).[1] Benefits accrued may include "unpaid medical bills." Me. W.C.B. Rule, ch. 10, § 1(3).

[¶7] The ALJ concluded that attorney fees could not be deducted from amounts owed to MaineCare, based on the plain meaning of 39-A M.R.S.A. § 209-A(7), which provides:

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[1] Title 39-A M.R.S.A. § 325 provides, in relevant part:

> **1. Costs and attorney's fees.** Except as otherwise provided by law, by the Maine Rules of Civil Procedure or by rule of court, each party is responsible for the payment of the party's own costs and attorney's fees. In the event of a disagreement as to those costs or fees, an interested party may apply to the board for a hearing.
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> **2. Restriction on attorney's fees.** An attorney representing an employee in a proceeding under this Act may receive a fee from that client for an activity pursuant to the Act only as provided in this section. The fees and payment of fees to all attorneys for services provided to employees under this Act are subject to the approval of the board. The board may approve the payment of attorney's fees by the employee for services provided to the employee pursuant to this Act. Any attorney who violates this section must forfeit any fee in the case and is liable in a court suit to pay damages to the client equal to 2 times the fee charged to that client.
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> **3. Rules.** The board shall adopt rules to prescribe maximum attorney's fees and the manner in which the amount is determined and paid by the employee. The maximum attorney's fees prescribed by the board in a case tried to completion may not exceed 30% of the benefits accrued, after deducting reasonable expenses incurred on behalf of the employee, or be based on a weekly benefit amount after coordination that is higher than 2/3 of the state average weekly wage at the time of injury. The board may by rule allow attorney's fees to be increased above or decreased below the amount specified in the rule when in the discretion of the board that action is determined to be appropriate.

> **MaineCare reimbursement.** MaineCare must be paid 100% of any expenses incurred for the treatment of an injury of an employee under this Title.

[¶8] Mr. Cordeiro contends that because MaineCare is a party in interest, it is responsible under section 325 for its share of the fees incurred. He bases this argument in part on the "common fund" doctrine. "The common fund doctrine provides that when a fund is created to which more than one party is entitled each party must pay a share of the expenses incurred in creating the fund, including reasonable attorney fees." *York Ins. Grp. v. Van Hall,* 1997 ME 230, ¶ 4, 704 A.2d 366. Alternatively, Mr. Cordeiro characterizes his Petition for Payment of Medical and Related Services as a *qui tam* action, in which counsel acted as private attorney general on behalf of MaineCare.[2]

[¶9] These contentions lack merit. Claims brought under the Workers' Compensation Act are strictly statutory. *Beaulieu v. Me. Med. Ctr.*, 675 A.2d 110, 111-12 (Me. 1996). The common fund doctrine does not apply in workers' compensation cases. *See Doucette v. Pathways, Inc.*, 2000 ME 164, ¶ 14, 759 A.2d 718. Moreover, Mr. Cordeiro points to no provision of the Act that authorizes a *qui tam* action.

[2] "'*Qui tam*' is short for '*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,' which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 463 n.2 (2007) (overruled on other grounds by *Allison Engine v. United States ex rel. Sanders*, 553 U.S. 662 (2008)).

[¶10] The allocation of responsibility for attorney's fees authorized by section 325 does not contradict or render ambiguous the plain meaning of section 209-A(7). Nothing in section 325 requires a medical provider to pay a portion of an employee's attorney's fees. *Doucette*, 2000 ME 164, ¶ 12, 759 A.2d 718. And, neither the common fund doctrine nor a *qui tam* action is authorized by the Workers' Compensation Act.

C. Title 39-A M.R.S.A. § 106

[¶11] Mr. Cordeiro contends that pursuant to 39-A M.R.S.A. § 106, no lien or other assigned interest arises in MaineCare under the Workers' Compensation Act. Section 106 provides:

> **Invalidity of waiver of rights; claims not assignable**
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> No agreement by an employee, unless approved by the board or by the Commissioner of Labor, to waive the employee's rights to compensation under this Act is valid. No claims for compensation under this Act are assignable or subject to attachment or liable in any way for debt, except for the enforcement of a current support obligation or support arrears pursuant to Title 19-A, chapter 65, subchapter II, article 3 or Title 19-A, chapter 65, subchapter III, or for reimbursement of general assistance pursuant to Title 22, section 4318.

[¶12] Because the Legislature expressly included exceptions to the prohibition against assignment of claims and liability for debt, and did not make a similar exception for MaineCare, Mr. Cordeiro asserts that MaineCare has no lien against his recovery in this case.

[¶13] Section 106, however, does not preclude reimbursement of all medical expenses incurred by MaineCare on behalf of Mr. Cordeiro due to his work injury. Section 106 prohibits an employee from assigning the right to receive compensation under the Act to a third party, or to have that right be subject to the claims of a third party. Direct payments to medical providers for medical services are expressly authorized by 39-A M.R.S.A. §§ 206(7) (Pamph. 2020). Here, no assignment is involved, and Mr. Cordeiro's compensation is not being subjected to claims of a third party.

D. Statutory Context

[¶14] Mr. Cordeiro next contends that subsection 209-A(7), relied on by the ALJ, must be considered in the context of its enactment. Subsection 209-A(7) is codified within the section entitled "Medical Fee Schedule." It was enacted as part of P.L. 2007, ch. 311, which contains three sections:

> **Sec. 1. 22 MRSA §14, sub-§2-J is enacted to read:**
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> **2-J. Authority to contract for attorney services.** The department is authorized to pursue rights under this section, including 3rd-party reimbursement of MaineCare costs in workers' compensation claims cases, through contracted attorney services. The department may adopt rules as necessary to implement this subsection. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.
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> **Sec. 2. 39-A MRSA §209, sub-§4 is enacted to read:**
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> **4. MaineCare reimbursement.** MaineCare must be paid 100% of any expenses incurred for the treatment of an injury of an employee under this Title.

Sec. 3. 39-A MRSA §324, sub-§1, as enacted by PL 1991, c. 885, Pt. A, §8 and affected by §§9 to 11, is amended to read:

> **1. Order or decision.** The employer or insurance carrier shall make compensation payments within 10 days after the receipt of notice of an approved agreement for payment of compensation or within 10 days after any order or decision of the board awarding compensation. . . . The board shall notify the Commissioner of Health and Human Services within 10 days after the receipt of notice of an approved agreement for payment of compensation or within 10 days after any order or decision of the board awarding compensation identifying the employee who is to receive the compensation.

[¶15] Mr. Cordeiro asserts that the purpose of this legislation, viewed as a whole, is to provide the Maine Department of Health and Human Services with notice or opportunity to pursue reimbursement for MaineCare expenses paid in cases governed by the Workers' Compensation Act "through contracted attorney services." He contends that section 209-A merely requires recovery of 100% of MaineCare expenditures *under the medical fee schedule*, and title 22, section 14(2)(J) authorizes reduction of this recovery by amount of attorney's fees incurred to achieve it. Mr. Cordeiro asserts that read with section 14(1), this provision contemplates recovery by MaineCare "after the deduction of reasonable attorney's fees and litigation costs from the gross award or settlement."[3]

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[3] Title 22 M.R.S.A. § 14(1) provides, in relevant part:

> The commissioner's right to recover the cost of benefits provided constitutes a statutory lien on the proceeds of an award or settlement from a 3rd party if recovery for MaineCare costs was or could have been included in the recipient's claim for damages from the 3rd party to the extent of the recovery for medical expenses. *The commissioner is entitled to recover the cost of the benefits actually paid out when the commissioner has determined that collection will be cost-effective to the extent that there are proceeds available for such recovery after the deduction of reasonable attorney's fees and litigation*

[¶16] We disagree with Mr. Cordeiro's reading of the statutory scheme. Section 209-A(7) directly addresses the repayment of funds to MaineCare and plainly states that "MaineCare must be paid 100% of any expenses incurred for the treatment of an injury of an employee under this Title." Lacking ambiguity, there is no need to examine Legislative history. Even if we were to find an ambiguity, we would apply the very specific provision of section 209-A(7) because "we favor the application of a specific statutory provision over the application of a more general provision when there is any inconsistency." *Central Me. Power Co. v. Devereux Marine, Inc.,* 2013 ME 37, ¶ 22, 68 A.3d 1262 (citing *Fleet Nat'l Bank v. Liberty*, 2004 ME 36, ¶ 10, 845 A.2d 1183).

[¶17] And, although title 22, section 14(2)(J) authorizes the Department of Health and Human Services to contract with a private attorney to recoup MaineCare expenditures in workers' compensation cases, there is no evidence of a contractual arrangement in this case that could arguably bring the provisions of title 22, section

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> *costs from the gross award or settlement.* In determining whether collection will be cost-effective, the commissioner shall consider all factors that diminish potential recovery by the department, including but not limited to questions of liability and comparative negligence or other legal defenses, exigencies of trial that reduce a settlement or award in order to resolve the recipient's claim and limits on the amount of applicable insurance coverage that reduce the claim to the amount recoverable by the recipient. *The department's statutory lien may not be reduced to reflect an assessment of a pro rata share of the recipient's attorney's fees or litigation costs.*

(Emphasis added.)

14 into play. Even if such a contract existed, workers' compensation claims remain uniquely statutory, and may be pursued pursuant to title 39-A exclusively.

III. CONCLUSION

[¶18] The ALJ neither misconceived nor misapplied the law when determining that pursuant to the plain language of section 209-A(7), MaineCare must be paid 100% of the expenses incurred for the treatment of the employee's injury.

The entry is:

The administrative law judge's decision is affirmed.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Pamph. 2020).

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

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