

Colorado Court of Appeals Permits Evidence of Billed Workers' Compensation Benefits at Trial



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The Colorado Court of Appeals announced a recent [published opinion](#) in which, although the Court considered multiple issues on appeal, its opinion focuses primarily on the admissibility of evidence of past medical expenses when the plaintiff is injured during the course of his employment, received workers' compensation benefits, and sued the third-party tortfeasor. In this context, the Colorado Court of Appeals considered the admissibility of billed amounts of past medical expenses where, before trial, the defendant extinguishes the workers' compensation insurer's subrogated interest in the amounts paid by paying off the insurer's claim for those damages.

Ultimately, the Court held:

- The collateral source rule barred admissibility of the medical expenses paid by the workers' compensation insurer.
- The plaintiff could present evidence of the higher medical expenses actually billed by his medical providers.
- At most, the defendant, by way of its settlement with the workers' compensation insurer, may receive a post-trial set-off against any damages

awarded to the plaintiff.

Background

An airline employee driving a ground support vehicle in the course of his employment was struck by an employee of another airline who was driving a similar vehicle. The first driver sustained injuries and missed work, for which his employer paid through its workers' compensation program.

The employer sued the other airline and its driver to recover the benefit amounts it had paid to or on behalf of the injured driver, who also sued the same defendants to recover for injuries related to the collision. The trial court consolidated the actions. The claim settled through a negotiated payment, resulting in a dismissal with prejudice. Additional claims were resolved and the remaining parties disputed damages only with respect to the injured driver's claim for injuries related to the collision.

The case proceeded to a trial on damages, during which the trial court considered evidence of the amounts paid by the employer for medical treatment rather than the higher amounts billed by the medical providers, which were excluded. The trial court awarded the injured driver \$259,176, which included \$194,426 in economic damages, and subsequently entered a set-off order reducing his economic damages award by the amount the defendant had already paid to settle the claim.

The injured worker appealed raising, among other issues, whether the trial court should have considered the amounts *billed* by the medical providers rather than the amounts *paid* by his employer for medical treatment.

The Decision

In reaching its decision, the Colorado Court of Appeals considered Colorado's collateral source rule, workers' compensation statute, and case law analyzing each.

First, the Court extended the collateral source rule to apply to workers' compensation benefits. The primary impact of this holding is that workers' compensation benefits will not diminish the plaintiff's otherwise recoverable billed medical expenses. The Court observed that, although the injured driver did not personally pay premiums toward his workers' compensation insurance, he gave consideration for same in the form of his employment services. Comparatively, the defendant did not contribute in any way to the workers' compensation premiums paid to him and, therefore, the benefits paid were wholly collateral to the defendant. As such, the collateral source rule applies, so that the defendant may be responsible for the injured plaintiff's damages notwithstanding any workers' compensation benefits received. The Court rationalized this will prevent a wrongdoer from reaping the benefits of a contract to which he is not a party.

The Court considered the defendant's argument on appeal that this line of reasoning undermines the 2011 Colorado Supreme Court decision [*Ferrellgas, Inc. v. Yeiser*](#), 247 P.3d 1022 (Colo. 2011), under which a defendant may be entitled to a post-trial set-off from the damages award. The Court distinguished *Ferrellgas*, finding that the

opportunity for a potential set-off did not require exclusion of the plaintiff's billed amounts of past medical expenses at trial. The Court reasoned that the defendant's settlement of the plaintiff's damages claim did not change the fact that the workers' compensation benefits arose from a contract collateral to the defendant, which thus should not be allowed to benefit twice via admitting evidence of the paid amounts only *and* allowing a post-trial set-off for the settlement amount.

In holding that the amounts billed by the medical providers are admissible, the Court acknowledged the workers' compensation statute provides that amounts billed in excess of the statutory fee schedule are "unlawful, void, and unenforceable." This statutory language effectively prevents the plaintiff, as a matter of law, from having any legal obligation to pay such billed amounts. Regardless, the Court relied on another Colorado Supreme Court decision, *Volunteers of America v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010), in determining that the fact that the bill is uncollectable does not render it entirely irrelevant to the reasonable value of the medical services provided. Drawing on similar reasoning in *Forfar v. Wal-Mart Stores, Inc.*, 2018 COA 125, the Court analogized this situation to those in which a plaintiff has medical insurance or receives Medicare/Medicaid benefits; in both situations, evidence of the full amounts billed is admissible rather than the amounts paid by insurance.

While concurring with the majority's ultimate holding, the Court issued a dissenting opinion on this issue, which cited arguments previously articulated in the federal decision *Lebsack v. Rios*, No. 16-CV-02356-RBJ, 2017 WL 5444568 (D. Colo. Nov. 14, 2017).

Specifically, the dissenting opinion observed:

- Allowing the injured driver to pursue expenses against the defendant in excess of what workers' compensation already paid for his injuries contravenes the intent and purpose of the workers' compensation statute, in part because the statute is not designed to afford the injured employee a windfall.
- Allowing the injured driver to pursue expenses that are void and unenforceable puts the court in the position of enforcing unenforceable contracts.
- Precluding the injured driver's claim for his billed past medical expenses would avoid various subsidiary issues.

The Court also distinguished the case from those relied on by the majority, in part by recognizing that only the subject case concerns a payment to the injured party for benefits provided via the workers' compensation system.

Impact

In sum, the court held that workers' compensation benefits are a collateral source and that amounts paid as workers' compensation benefits are not admissible at trial. A defendant's settlement with the insurer, however, will still entitle the defendant to a post-trial set-off. This decision effectively allows injured employees to pursue greater claims for past medical expenses per the billed amounts of such services, thereby potentially diminishing the impact of a post-trial set-off for settlement with

an insurer for paid amounts. The decision does not address whether workers' compensation benefits would be admissible if the carrier did participate in trial rather than reach a pre-trial settlement for the benefits paid.

There will no doubt be a tendency to view this decision as creating a windfall in favor of the injured employee, and rendering the pre-suit settlement negotiations with workers' compensation carriers significantly less meaningful. Nonetheless, this decision does appear to be in line with Colorado courts' propensity to provide unavoidable windfalls to an injured plaintiff rather than insurance carriers or tortfeasors. Thus, while certainly a disappointing decision for Colorado defense attorneys and insurance carriers, the decision is not entirely surprising.

It is likely that the plaintiff airline will file a petition for writ of *certiorari* with the Colorado Supreme Court for consideration of the issue and clarification of how courts should harmonize *Ferrellgas* and *Gardenswartz*, arguing that the Colorado Court of Appeals erred in its decision. The Colorado Supreme Court, however, recently denied a petition for writ of *certiorari* regarding a similar intersection of the personal injury and workers' compensation spheres. See *Herrera v. Lerma*, 2018 COA 141, *cert. denied* Apr. 29, 2019. The *Herrera* case concerned the admissibility of workers' compensation permanent impairment ratings in personal injury trials against the tortfeasor, in which the Court of Appeals held that such ratings are admissible in personal injury trials despite their specific creation for and use in the workers' compensation context.

Without additional consideration of such intersecting issues by the Colorado Supreme Court, divisions among the intermediate Court of Appeals may continue to resolve these issues in favor of the injured employees.

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