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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Should evidence of the BWC's right to subrogation be admissible in a claimant's negligence action against a third-party tortfeasor?

Traditionally, evidence of the payment of workers' compensation benefits is excluded by the "collateral source" rule. The Ohio Court of Appeals, Eleventh Appellate District, was recently asked to apply Ohio's workers' compensation subrogation statute (R.C. 4123.93 et seq.), the "collateral source" rule, and the Supreme Court of Ohio's decision in *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, to determine whether it was reversible error for a trial court to exclude evidence of the BWC's subrogation interest at trial in a personal injury action brought by an injured worker.

Ross v. Napier, 185 Ohio App.3d 548, 2009-Ohio-6995, involved a truck driver who was injured in an accident. The employee sought and received workers' compensation benefits, then brought a negligence action against the other driver. At trial, the employee sought to introduce into evidence that the medical expenses paid by the BWC (\$12,857.80) were less than the amount billed by his physicians, and that the BWC maintained a right of subrogation for the amounts paid, as well as future expenses. The defense filed a motion *in limine* to exclude this based upon the "collateral source" rule, which was granted by the trial court. The parties stipulated as reasonable the amount paid by the BWC, but at trial Defendant's counsel argued that only \$6,000 of the medical bills were "reasonable," and the jury entered a verdict of \$17,000 in favor of the claimant. After proffering the excluded evidence, claimant appealed, arguing that the amounts billed, and the BWC's subrogation interest should have been revealed to the jury.

In a lengthy opinion, the Eleventh Appellate District reversed, finding that evidence of the BWC's subrogation interest and the amounts billed and paid should have been given to the jury, and that excluding this evidence was reversible error. The basis for this conclusion was that the trial transcript and exhibits were "saturated" with references to the BWC, the jury clearly knew that a workers' compensation claim was filed, and that refusing to admit evidence of the subrogation interest gave the jury an "incomplete picture." The Court also discussed at length the "collateral source" rule and the Supreme Court's decision in *Robinson*, and acknowledged that litigants were dealt a "Hobson's choice" because by introducing evidence of amounts billed and paid, pursuant to *Robinson*, a plaintiff necessarily reveals the existence of a "collateral" benefit. The Court also severely criticized defense counsel's conduct for arguing against his own stipulation in his closing.

The opinion in *Ross* is so fact intensive that it seems likely to be appealed.

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