

THE EFFECT OF *HAYGOOD* *V. ESCABEDO*

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The Statute

CPRC §41.0105

Evidence Relating to Amount of Economic Damages

In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

The Opinion

- §41.0105 limits evidence and recovery to amount medical provider is “legally entitled to recover”
- “Actually paid or incurred” = expenses that have been or will be paid.
- Insurance payments are collateral source. Write offs are not.
- §18.001 affidavits showing only amount charged is no evidence

Question of Fact or Law?

- Amount medical provider is “legally entitled to be paid” probably a question of law.
- Question of what amount is “reasonable” is probably a question of fact.

How Do We Prove Past Medical Expenses?

- Plaintiff's burden of proof
- "New" §18.001 affidavit
- Stipulation with defense counsel
- Partial MSJ or Motion to Determine
- Expert testimony

Effect on Noneconomics

- Low medical bills imply no serious injury.
- Example: Compare MVC with \$100K in meds. Need ACDF.

Case 1:

1. Used BCBS which paid \$30K
2. Will have to pay back \$20K
3. Def offers \$75K at mediation
4. Client and firm each get \$27.5K

Case 2:

1. Used LOP or Funder
2. Will have to pay back \$80K
3. Def offers \$250K at mediation
4. Client and firm each get \$85K

Effect on Noneconomics

(cont.)

- Possible solutions:
 - Introduce evidence of insurance.
 - *University of Texas v. Hinton*, 822 S.W.2d 197 (Tex. App. – Austin 1991, no writ).
 - Introduce no evidence of medical expenses.
 - Is defense allowed to admit med exps then?

Effect on Future Medical Expenses

- Low past medical expenses make future care plan look inflated.
- Possible solutions:
 - Introduce evidence of insurance.
 - *University of Texas v. Hinton*, 822 S.W.2d 197 (Tex. App. – Austin 1991, no writ).
 - Introduce no evidence of medical expenses.
 - Is defense allowed to admit med exps then?

To Submit or Not to Submit

- Should our clients elect not to submit to health insurance?
- Can use:
 - LOP
 - Fund it with a funding company
 - Deposit arrangement with provider
- *Big Bird Tree Service v. Gallegos*, 2012 Tex App. LEXIS 2292 (Tex. App. – Dallas, Mar. 22, 2012)

But...

- What about?
 - CPRC Chapter 146
 - Labor Code
 - If we lose the case

Failure to Mitigate?

- No.
 - *City of Fort Worth v. Barlow*, 313 S.W.2d 906 (Tex. App. – Ft. Worth 1958) ; RESTATEMENT (SECOND) OF TORTS §918(1), n. 31 (1977).
- Defense has burden to prove:
 - Plaintiff lacked due diligence in minimizing damages, and
 - The amount such failure increased plaintiff's damages.

Why Plaintiff did not Submit?

- Plaintiff can't afford co-pays
- Plaintiff can't afford co-insurance
- Plaintiff can't afford deductible
- Doctor is not in the network
- Doctor will not accept health insurance on a car wreck case
- Health insurance denied due to not being primary
- Didn't want to be dropped or rates to go up
- Didn't want to reduce lifetime benefit

Potential Issues

- Admissibility of health insurance premiums
- Is the verdict for past medical expenses binding on health insurer? If not, should we join the health insurance carrier?
- Does *Haygood* apply to future medical expenses?
- How do reimbursement rates impact the determination of “reasonableness”?

THE END

Thank you.

Call me with questions.

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