

COURT OF APPEALS, STATE OF
COLORADO

2 E. 14th Avenue
Denver, CO 80203

Appeal from:
DISTRICT COURT, CITY AND COUNTY OF
EL PASO, COLORADO
The Honorable Thomas Kelly Kane
2021CV31761

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Appellant: Adam Strange,

v.

Appellee: GA HC Reit Liberty CRCC, LLC

Court of Appeals
Case Number: 2022CA2086

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**APPELLEE GA HC REIT LIBERTY CRCC, LLC'S
CROSS-APPEAL REPLY BRIEF**

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I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 3,018 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

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STATEMENT OF THE ISSUE

1. Whether the Trial Court erred in permitting Appellant Strange to recover damages for physical impairment and disfigurement, resulting in a double recovery.

STATEMENT OF THE CASE - APPEAL

Appellant Strange was employed by Johnson Controls. While in the course of his employment, he slipped on ice on Appellee Liberty Heights' premises and sustained a broken ankle. Prior to commencing this action, Adam Strange elected workers' compensation remedies from his employer and its carrier, Old Republic Insurance Company [The worker's compensation claim was adjusted by Sedgwick, a third-party administrator]. He sought damages for the injuries he had sustained and received substantial compensation in the form of medical expenses, lost wages, and permanent impairment and disfigurement damages, all paid under workers' compensation policy procured by his employer's carrier.

In this action, Appellee Liberty Heights filed a Motion in Limine re: Damages Paid by Workers Compensation ("WC") Carrier (CF, pp # 91-95) in which it sought an Order from the Court precluding the introduction of or reference to any evidence of the medical expenses, lost wages, and permanent impairment or disability compensation paid by the worker's compensation carrier Old Republic. This was

based on representation from counsel that the WC carrier had told its counsel that the lien was not to be assigned to anyone, nor was the WC carrier taking part in pursuing the lien. (CF, p # 99).

The Court entered an Order that Plaintiff would not be allowed to submit a claim for reimbursement of medical care and treatment expenses because he did not own the claim. (CF, p. # 788).

The Parties sought clarification of the order and the Court stated Appellant Strange would be allowed to pursue damages not extinguished by the subrogation rights of the workers' compensation carrier, but it also held that Strange would be able to pursue physical impairment and disfigurement damages. (CF, pp # 403 and 577).

SUMMARY OF THE ARGUMENT

Colorado statute does not permit an injured party to recover damages for impairment and disfigurement for which the party received payment from a worker's compensation carrier. It was error to permit the jury to make an award for impairment and disfigurement damages that were not noneconomic.

ARGUMENT

A. Under Colorado law Appellant is not entitled to pursue recovery of benefits he received from the workers compensation carrier

Old Republic [sometimes referred to as Sedgwick in the trial court file] was the WC carrier for Appellant Strange's employer. It paid for Adam Strange's

medical expenses, lost wages and also paid compensation for permanent impairment and disability as provided for in §8-41-203(1)(d)(I)(A)-(B) C.R.S.

An injured employee is entitled to bring a claim for compensation for damages the employee has sustained for which the worker's compensation statute [i.e., carrier] does not provide coverage. C.R.S. §8-41-203(1)(a). Appellant Strange brought such an action here. A worker's compensation carrier has a subrogation/assignment interest given to it by statute for the amount of the benefits paid that it paid to an injured party.

The purpose of the subrogation/assignment interest in § 8-41-203(1) C.R.S. is twofold: 1) to adjust the rights between a claimant and an insurer; see *Jordan v. Fonken & Stevens, P.C.*, 914 P.2d 394 (Colo. App. 1995); and 2) to prevent a claimant injured by a third-party from receiving duplicate benefits for the same injury. See *Id.*; *Sneath v. Express Messenger Service*, 931 P.2d 565 (Colo. App. 1996). When compensation is paid, the insurer becomes subrogated to the rights of the claimant to proceed against the third party, but only to the extent the insurer is liable for workers' compensation benefits. It is the payment of compensation which operates as a statutory assignment of the cause of action against the third-party to

the insurer.² If the workers' compensation insurer settles its subrogation claim with a third-party tortfeasor, it is in fact settling the claimant's claim for damages arising out of past medical expenses covered by workers' compensation.

The insurer has its own right to maintain a claim without joining the injured employee as a party. See *Business Ins. Co. v. BFI Waste Sys. of N. Am., Inc.*, 23 P.3d 1261, 1265 (Colo. App. 2001) (“The clear and unambiguous language of § 8–41–203(1) allows the workers' compensation carrier to seek reimbursement of its ...payments from the third-party tortfeasor”). Thus, while restricted in the amount it can pursue, the WC carrier is entitled to resolve the claim as it sees fit. A workers' compensation insurer may settle its subrogation claim with a third-party tortfeasor before the injured employee seeks or receives any compensation from the same tortfeasor. *Delta Air Lines, Inc. v. Scholle*, 2021 CO 20, ¶ 20, 484 P.3d 695, 700, reh'g denied (May 3, 2021).

As set forth above, the WC insurance carrier's rights in any action it may bring are limited by the worker's compensation act. If the carrier desires to settle its rights

² This partial assignment of the employee's claim actually results in the creation of two claims - one “owned” by the employee and one “owned” by the carrier. Each of the parties may prosecute his or its own individual claim; the statutory “assignment” does not result in the carrier being granted authority to control the prosecution of the employee's claim. *Sneath v. Express Messenger Serv.*, 931 P.2d 565, 568 (Colo. App. 1996). The inverse is also logically true.

it may do so with or without the consent of the employee. *Kirkham v. Hickerson Bros. Truck Co.*, 29 Colo. App. 303, 312–13, 485 P.2d 513, 517 (1971). Logically, if the WC carrier decides it does not wish to pursue the subrogation claim and has not assigned the claim to another party, then the claim for benefits it paid has been ‘resolved’ or otherwise waived.

In *Colorado Compensation Ins. Authority v. Jorgensen*, 992 P.2d 1156 (Colo. 2000), the Court stated that an important policy of Section 8-41-203 is to avoid double recoveries by claimant. The Court stated this would occur when the claimant receives workers’ compensation benefits, such as medical costs and lost wages, and then subsequently recovers those same benefits from the tortfeasor. *Id.* at 1166. This is precisely what Appellant Strange seeks to do in this case, contrary to prohibitions of Colorado law.

If Appellant Strange’s argument that he is entitled to seek those damages were to be adopted, the result would be a holding that the claim assigned to the WC carrier MUST be pursued in all cases, either by the carrier or the claimant, regardless of the desire of the worker’s compensation carrier. Such a holding would 1) deprive a WC carrier of its right to resolve its claim as it believes is in its best interest

[including not pursuing the claim]; or 2) permit a claimant a double recovery.³

Nothing in the history of the statute or in case law supports the novel interpretation of Appellant Strange.

While not binding on this court, the Colorado Industrial Claims Office's analysis of this scenario is instructive. It held:

Although the workers' compensation insurer may waive, or be estopped from asserting, its' right to credit the claimant's third-party settlement proceeds against liability for future compensation benefits, see *Sneath v. Express Messenger Service*, 931 P.2d 565 (Colo. App. 1996), it must demonstrate a voluntary, knowing, and intelligent waiver of the right. See *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1988).

Whether the respondent intended to waive the right to recoup the overpayment in this case is largely a factual matter for determination by the ALJ. *Id.* Consequently, we must uphold the ALJ's resolution of these issues if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Under this standard of review, we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In the Matter of the Claim of Karyn (Karen) Milazzo (Trujillo), Claimant, No. W.C. No. 4-852-795-02, 2014 WL 2726594, at *2 (Colo. Ind. Cl. App. Off. June 11, 2014).

³ A third alternative would be authorizing an ethically unsound civil action in which counsel for a claimant would pursue all compensation without an agreement from the WC carrier as to attorney's fees and cost-sharing.

Appellee asserts that the analysis of the CCIA is appropriate and correct. Here, WC carrier waived or resolved its claim against the Appellee. The Trial Court denied Appellant Strange's suggestion that he could pursue the claim that had been waived by the WC carrier without the agreement of the WC carrier. The Trial Court denied this unusual interpretation of the statute. It made its ruling based on established Colorado law. There was no abuse of discretion or error. Appellant Strange was not entitled to pursue any claim assigned to the Worker's Compensation carrier.

B. A Workers Compensation carrier is not obligated to pursue its assigned claim

Appellant also argues that the trial court erred in holding that the claim of the WC carrier cannot be waived or otherwise resolved. Appellant argues that the statute requires that the claim be either 'fully litigated or settled'. [Appellee presumes that by settled, Appellant means money must change hands]. *Appellant Opening Brief* p # 16. There is absolutely no support for such a requirement. Indeed, Section 8-41-203(2) states that the claim belonging to the WC carrier 'may be prosecuted or compromised by it'. Of course, compromised is a much broader term than settled.

In this case, the WC carrier chose to waive its claim for its own reasons, but presumably as a compromise to avoid litigation. Such an action is its right to compromise its claim under the statute. The statute does not require the WC carrier to 'fully litigate or settle' its claim. The statute is explicit – that the claim MAY be prosecuted or compromised. As the Colorado Supreme Court said in 1882:

A party, however, instead of appealing to the courts for redress, is always at liberty to compromise and settle matters of dispute. When such a settlement is clearly ascertained to have been fairly made, courts will not disturb it, no matter how plain and indisputable the right to redress originally may have been.

Berdell v. Bissell, 6 Colo. 162, 163 (1882)

Compromise is a yielding of the highest hopes in exchange for certainty and resolution. *Berkley v. United States*, 59 Fed. Cl. 675, 680 (2004).

The WC carrier in this matter by its counsel's statement knowingly and intentionally declined to pursue its right under statute to pursue litigation of its subrogation claim. It did so for its own reasons, including certainty and resolution. While Appellant Strange may disagree with the decision, he has no right to revoke it. The carrier's waiver, like any waiver, is a resolution of the claim.

Appellant's [or counsel's] disagreement with the compromise chosen by the WC carrier does not and cannot abrogate the decision of the WC carrier. For reasons that the WC carrier is entitled to make, matters between the WC carrier and the third-party tortfeasor were compromised and resolved. The WC carrier's decision was its to make based on its own interest and analysis. Nothing in the statute can be said to justify the Appellant [injured party] abrogating that decision of the WC carrier and 'taking' the WC claim by the Appellant for the Appellant's own benefit.

Similarly, nothing in the statute or case law creates an exception to Colorado law prohibiting double recovery in favor of Appellant Strange in this instance.

One must also note that Appellant did not conduct discovery into the WC carrier's decision, nor did it at any time seek an agreement from the WC entitling it to pursue the claim either before or after the WC carrier waived its right. It merely asserts that under law, the WC carrier cannot elect not to pursue the lien or compromise it without the exchange of money. There is no support in the statute or case law for that position.

Appellant's argument is simply wrong.

C. The Trial Court erred in permitting Appellant to recover impairment and disability damages.

Appellee Liberty Heights argued in its Opening Brief that the Trial Court erred in permitting the jury to award both noneconomic damages for impairment and disability and separately to award damages for WC benefits which it had recovered for impairment and disability. The body of law cited above supports Appellee's assertion that the Trial Court was correct in not permitting the Appellant to pursue the WC carrier's claim, but the trial court did err in permitting Appellant Strange to pursue impairment and disfigurement damages. Having paid compensation for these damages, this claim was assigned to the WC carrier. They were waived by the WC carrier just as other damages paid by the WC carrier. As Appellant was compensated by the WC carrier, the jury should not have been permitted to award these damages to Appellant.

The Trial Court error arose when the jury verdict form permitted the jury to

award damages for both noneconomic damages and for physical impairment (CF, p # 650, line 4.a.) and separately for physical impairment and disfigurement (CF, p # 650, line 4.b). Under §8-41-203(1)(d)(I), C.R.S. the WC carrier is entitled to reimbursement for all economic damages and for all physical impairment and disfigurement damages it paid. Section 8-41-203(1)(d)(I) continues on, stating that the injured party is entitled to recover **noneconomic damages** for pain and suffering, inconvenience, emotional stress, or impairment of quality of life.

The jury did make a noneconomic award [CF, p # 650] which would include the noneconomic damages for impairment of quality of life. Thus, the jury should not have been permitted to award physical impairment or disfigurement damages as a separate economic item. It was error for the jury to be permitted to make that award. The WC carrier had waived those damages.

The net result was that the Plaintiff received a double recovery for his impairment and disfigurement damages – once by the WC carrier and second in the civil action.

In response, Appellant Strange asserts that he was entitled to pursue these damages for the same reason that he has appealed the court decision finding that he could not pursue the WC lien. That argument is addressed above.

D. Appellee did not waive its argument on disability and impairment damages.

Appellant also makes the curious argument that the Trial Court error urged

by Appellee Liberty Heights was waived. Notably, it does not explain how pleadings addressing this issue do not preserve the issue on appeal. For example, Appellee filed a Motion in Limine filed Regarding Damages Paid by Workers Compensation Carrier (CF, pp # 91-95); the Trial Court entered an Order on the Motion in Limine (CF, p # 280); and the subsequent Court Orders (CF, pp # 403, 301 and 507) all addressing what damages Appellant could pursue and which he could not in response to motions filed by the parties.

Appellant then blithely ignores the Motion for Judgment notwithstanding the verdict filed by Appellee (CF, p # 741- 745) in which the argument was again raised with the Trial Court.

The argument that the Appellants' argument was waived fails upon reading the record on appeal. Appellee asserted that it was error to allow Appellant Strange to pursue the damages for physical impairment and disfigurement, as he had received compensation for his permanent physical impairment as part of his workers' compensation benefits. The Trial Court permitted him to pursue those damages. The Trial Court erred in so doing.

E. Appellant did make a claim for impairment and disfigurement damages under the workers compensation statute. He cannot now seek those damages in the civil action.

Appellant also argues that he was not awarded any damages for disfigurement and thus the jury award was appropriate. First, the jury award was not just for

disfigurement, but rather impairment and disfigurement, so this argument does not render Appellee's argument moot.

Further, the argument is incorrect. The Final Admission of Liability (CF, p # 747) does state that the award for disfigurement was 'NA' – but the form cannot be read as saying he did not seek disfigurement, but rather it indicates that damages for disfigurement were not awarded (not applicable)⁴. The fact that an award for damages was presumably denied/not applicable does not mean that the statute assigning the impairment and disfigurement award to the WC carrier to bring that claim is abrogated or waived.

According to the final admission of liability produced by the Colorado Division of Labor, Adam Strange received PPD benefits for the 11% lower extremity rating and 4% whole person impairment rating provided by Dr. Shank on 9/14/21. See, Final Admission of Liability. (CF, p # 357). As stated above, the jury instruction given (CF, pp # 597-598) set forth separate lines for the jury to award the damages for non-economic damages, including impairment of the quality of life; and a separate line for any physical impairment or disfigurement. The entry for physical impairment or disfigurement received from the WC carrier is not an element of

⁴ The claimed disfigurement was a surgical scar.

damages which Mr. Strange can pursue. Those damages were assigned by statute to the insurance carrier, Old Republic. The damages that were not extended (assigned) to the carrier by statute relating to impairment and disfigurement are for noneconomic damages and those are set forth in line 4.a. of the verdict form and not line 4. b.

The Trial Court permitted the jury to enter damages for both the damages which were assigned to the carrier, and for those damages which were not assigned to the carrier. It was error to do so. However, the error can be easily remedied by reversing the impairment and disfigurement portion of the award [Line 4.b.] and remanding to the Trial Court to enter judgment on the remaining portion of the verdict.

CONCLUSION

The Trial Court correctly denied Appellant Strange's attempt to belatedly assert the civil action assigned to the worker's compensation carrier without any indication that he had the permission or authority to do so. In so doing, the Trial Court adhered to the long-standing common law principle that a party is not entitled to a double recovery for damages that the party may have sustained.

The Trial Court erred, however, in permitting Appellant Strange to pursue a claim for impairment and disability damages which is, by statute, assigned to the worker's compensation carrier just as are claims for wages and medical benefits.

While it was proper to allow Appellant Strange to seek non-economic damages, including damages for impairment to his quality of life, Appellant Strange had already been compensated under the worker's compensation statute for impairment and disability damages, a claim for which had been assigned to the worker's compensation carrier. It was error to permit him to seek those damages.

DATED this 12th day of October , 2023.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing APPELLEE GA HC REIT LIBERTY CRCC, LLC'S CROSS-REPLY BRIEF was [X] E-Served by the Court-authorized E-System provider to the following on this 12th day of October, 2023:

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