

Nos. A09-173 and A09-522

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State of Minnesota  
**In Court of Appeals**

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Curtis R. Graff,

*Respondent (A09-173),  
Appellant (A09-522),*

vs.

Robert M. Swendra Agency, Inc.,

*Appellant (A09-173),  
Respondent (A09-522).*

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**REPLY BRIEF OF  
RESPONDENT/APPELLANT CURTIS R. GRAFF**

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## ARGUMENT

**I. THE PURPOSE OF THE COLLATERAL SOURCE STATUTE IS TO PREVENT DUPLICATE RECOVERY, AND A COLLATERAL SOURCE REDUCTION IS ONLY APPROPRIATE WHERE A SPECIFIC ITEM OF DAMAGES HAS PREVIOUSLY BEEN PAID BY A COLLATERAL SOURCE, AND THERE WOULD BE DOUBLE RECOVERY.**

Pursuant to Minn.Stat. §548.251, a party who is found liable for tort damages for injury may file a motion requesting the Court to reduce the amount of the award to plaintiff by the amount the plaintiff has already received from “collateral sources.”

Minn.Stat. §548.251, subd. 2-3. The purpose of the collateral source statute is to prevent duplicate recovery. *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 335 (Minn. 1990).

Absent a finding of double recovery, application of the collateral source statute would result in the injured party being “under compensated” and is “not justified.” *Id.*

Under the collateral source statute, the parties are required to submit evidence and the Court is to determine, first, the amounts of the collateral sources paid that would result in double recovery, and, second, the amounts the plaintiff paid to secure the right to the collateral source benefit. Minn.Stat. §548.251, subd. 2. Once the Court has determined the amount of collateral sources which would result in a double recovery, the Court is to reduce the award by the amount of these collateral sources, but only after offsetting any reduction in the award by the amounts determined to have been paid by the plaintiff to secure the right to the collateral source benefits. *Id.* Attorney’s fees paid in pursuit of workers’ compensation benefits properly qualify as an amount paid or forfeited by a plaintiff in securing the right to a collateral source benefit, and the amount of any

attorney's fees should offset any collateral source reduction. Minn.Stat. §548.251, subd. 2(2); see also *Buck v. Schneider*, 413 N.W.2d 569, 570 (Minn.Ct.App. 1987).

It is not proper for the Court to simply reduce a damage award by the total workers' compensation benefits paid, without regard to whether any such amounts were included in the jury award. *Western Nat'l Mut. Ins. Co. v. Casper*, 549 N.W.2d 914, 918 (Minn. 1996). In the end, only when the defendant demonstrates that the amount awarded by the jury includes specific items of damages already specifically paid by workers' compensation, and where it establishes that there has been a double recovery, should there be a collateral source offset for workers' compensation benefits. *Id.* When there is no double recovery, the collateral source statute is inapplicable. *Midway Nat'l Bank v. Estate of Bollmeier*, 504 N.W.2d 59 (Minn.Ct.App. 1993); see also *Heine v. Simon*, 702 N.W.2d 752, 764-67 (Minn. 2005).

**II. THE WORKERS' COMPENSATION PAYMENT MADE UNDER THE STIPULATION FOR SETTLEMENT OF MAY 18, 2006, WAS NOT A PROPER COLLATERAL SOURCE, AND NO PAYMENTS UNDER THE STIPULATION FOR SETTLEMENT SHOULD HAVE BEEN DEDUCTED AS A COLLATERAL SOURCE.**

Under the workers' compensation settlement of May 18, 2006, payment was made of two separate types of workers' compensation benefits. First, the workers' compensation insurer agreed to pay a lump sum amount of \$17,800 representing payment of permanent partial disability benefits. Second, the workers' compensation insurer also agreed to pay an unspecified amount of temporary partial disability wage loss benefits upon submission of appropriate documentation of earnings. Any temporary partial disability wage loss paid under this Stipulation which would have represented payment of

past wage loss, which was not claimed at trial by Respondent Graff. Therefore, any wage loss paid under this Stipulation is not at issue in this appeal.

As such, while there was wage loss to be paid under the Stipulation, the payment at issue of \$17,800 was for permanent partial disability benefits, not wage loss.

Nonetheless, after deducting attorney's fees paid out of the settlement, as well as purportedly apportioning amounts from this payment related to past wage loss and future wage loss, the Court characterized \$13,122.24 of this payment as related to "future loss of earnings," and reduced the jury's award by this amount. (See AAD-34, AAD36) In doing so, the Trial Court mischaracterized the nature of this payment, and erroneously deducted \$13,122.24 as a collateral source. Although there was language in the Stipulation prorating this payment over the employee's lifetime, this language is typically inserted as a precaution in workers' compensation stipulations for purposes of minimizing any potential Social Security Disability offset. Nothing about the inclusion of this language in the Stipulation changed the nature of the payment, specifically its nature as payment for permanent partial disability and not for wage loss.

Contrary to the Court's finding, payment of permanent partial disability is not payment for wage loss, and is not dependent upon wage loss or related to ability to work. Minn.Stat. §176.101, subd. 2a; *Moes v. City of St. Paul*, 39 W.C.D. 675, 402 N.W.2d 520 (Minn. 1987); *Tracy v. Streater/Litton Indus.*, 32 W.C.D. 142, 283 N.W.2d 909 (Minn. 1979); *Smith v. Armour & Co.*, 360 N.W.2d 925 (Minn. 1982). Therefore, payment of permanent partial disability under this settlement should not have been characterized as

“future loss of earnings,” and should not have been offset against the jury’s award for future loss of earning capacity of Respondent Graff.

Even if the payment under the Stipulation was characterized as wage loss, the elements of a claim for impairment of earning capacity in a negligence claim is an item of general damages, and is not synonymous with loss of actual earnings in a workers’ compensation claim. *Heine*, 702 N.W.2d at 762. The requirements for determining wage loss in a workers’ compensation proceeding are different from those used to determine wage loss in a tort action. *Id.* As such, an award of damages related to Respondent Graff’s loss of earning capacity as found by the jury in his negligence claim does not result in double recovery based on any wage loss paid under workers’ compensation.

Appellant Swendra Agency also argues that even if this were not a payment related to wage loss, it is a payment related to injury or disability and would still be subject to collateral source offset for the future damages awarded to Respondent Graff. However, workers’ compensation claims are generally limited to damages for medical and healthcare expenses and wage loss benefits, and there is no provision for pain and suffering or other similar non-economic losses under the workers’ compensation system. See Minn.Stat. §176.001; Minn.Stat. §176.105, subd. 1; Minn. Rule §5223.0010, subp. 2. Specifically, with regard to permanent partial disability, the rating is based on objective factors. *Id.* Further, the elements of a claim for permanent partial disability in a workers’ compensation claim are different than the elements in a negligence action for either a loss of earning capacity or future damages related to bodily and mental harm. Since, there is no provision for payment under workers’ compensation related to any pain and suffering,

loss of enjoyment of life or other non-economic damages which can be claimed in a negligence action, the payment of permanent partial disability under this settlement would not result in double recovery based on any of the future damages awarded by the jury to Respondent Graff.

As a result, whether you characterize this payment as related to wage loss or not, it is a payment that is not duplicative of any damages awarded by the jury to Respondent Graff for his future damages. Since this payment was related to permanent partial disability, a type of compensation unique to the workers' compensation system, there was no double recovery related to this payment and there should not have been a collateral source offset.

**III. THE WORKERS' COMPENSATION SETTLEMENT OF DECEMBER 13, 2006, INCLUDED COMPENSATION FOR ITEMS OF DAMAGES NOT SUBMITTED TO OR AWARDED BY THE JURY AT TRIAL, AND THE COLLATERAL SOURCE OFFSET ORDERED BY THE TRIAL COURT RELATED TO THIS SETTLEMENT WAS NOT APPROPRIATE.**

The workers' compensation settlement of December 13, 2006, included a lump sum payment of \$67,500. This payment included compensation for past and future rehabilitation or retraining benefits, out-of-pocket medical expenses and medical mileage, a close out of certain claims for medical expense, additional permanent partial disability benefits, as well as past and future wage loss. After reducing this payment by \$7,500 for attorney's fees paid out of the settlement, the Court then apportioned \$2,861.95 to past benefits, and the remaining \$57,138.05 as being compensation for future benefits. The Court then deducted \$57,138.05, concluding that it was a collateral source that would result in double recovery. In doing so, the Trial Court did not make a specific finding of

double recovery, and instead indicated that the payment under the settlement “appears to compensate Plaintiff for future losses,” and indicated that since the jury awarded Plaintiff “for future loss of earning capacity,” this payment would result in double recovery if it were not considered a collateral source. (AAD-35)

It is not proper for the Trial Court to reduce the jury’s award by amounts paid for workers’ compensation benefits, unless there is a specific finding that any such workers’ compensation payments resulted in double recovery. *Western Nat’l Mut. Ins. Co. v. Casper*, 549 N.W.2d 914, 918 (Minn. 1996). It is axiomatic that making a collateral source offset for any such workers’ compensation payments without a finding of a duplication of recovery can “hardly be said to promote a public policy against double recovery.” *Id.*

Although the plain language of the Stipulation establishes that this payment was not simply for wage loss, even assuming, *arguendo*, that the payment under this Stipulation for Settlement was entirely for wage loss, as outlined above, it would not result in a duplication of benefits based on the jury’s award of damages for loss of earning capacity of Respondent Graff. The elements of a claim for loss of earning capacity are different than the elements of a claim for wage loss under the Workers’ Compensation Act, and any such workers’ compensation wage loss payments should not be offset as a collateral source against the award for Respondent Graff’s loss of earning capacity.

Also, as outlined in the Stipulation, this payment also compensated Respondent Graff for items which were not claimed or awarded by the jury, such as rehabilitation and

retraining benefits, out-of-pocket medical expenses and medical mileage, and additional permanent partial disability. These damages are not related to any claim for wage loss, and certainly would not be duplicative of any damages awarded to Respondent Graff for loss of earning capacity. Likewise, any of the damages covered by the payment made as part of this settlement would not be duplicative of any damages awarded by the jury to Respondent Graff for future pain, suffering, or mental or bodily harm. These benefits were not claimed by Respondent Graff, and therefore the jury did not award any damages related to these items. As such, deducting payments related to this would result in under compensation of Respondent Graff, and it was not appropriate for the Court to reduce this payment.

With regard to the attorney's fees which were excluded as a collateral source by the Trial Court, this exclusion was appropriate. Before making any reduction for collateral source payments, the Court is to offset any reduction in the award by amounts paid or forfeited by plaintiff to secure the collateral source benefits. Minn.Stat. §548.251, subd. 2. In this case, the attorney's fees paid by Respondent Graff as part of the workers' compensation benefits qualify as amounts paid to secure the right to collateral source. *Id.*; see also *Buck v. Schneider*, 413 N.W.2d 569, 570 (Minn.Ct.App. 1987). Further, the amount paid by Respondent Graff for attorney's fee are not "otherwise available" to Respondent Graff and do not result in double recovery. Minn.Stat. §548.251, subd. 2(1). This argument would apply to the payments made under the Stipulation for Settlement of May 18, 2006, as well.

Finally, by its plain language, the collateral source statute only allows reduction for collateral source payments to compensate plaintiff for “losses available to the date of the verdict by collateral sources.” Future losses by definition would not be losses available “to the date of the verdict”, and there should have been no reduction for any collateral sources purportedly compensating plaintiff for future losses. This argument would also apply to workers compensation benefits paid under the settlements of May 18, 2006, as well.

In conclusion, however the payments made under the settlement of December 13, 2006 are characterized, they do not result in a duplication or double recovery of any of the damages awarded to Respondent Graff by the jury. Therefore, there should have been no collateral offset related to these items.

## CONCLUSION

Based on the foregoing, the Court improperly considered payments made under prior workers' compensation settlements as collateral sources, and the amount the jury verdict was reduced for these payments should be reinstated. Further, to the extent the Court eliminated attorney's fees from the collateral source calculation, this was appropriate since the attorney's fees would qualify as amounts paid or forfeited by Respondent Graff in securing the right to a collateral source benefit, and as otherwise not available to Respondent Graff.

Dated: 6-4-09

Respectfully submitted,

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CERTIFICATION AS TO BRIEF LENGTH

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I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App.P. 132.01, subds 1 and 3, for a brief produced with a proportional font. The length of the brief is 2,224 words. This brief was prepared using Microsoft Windows XP.

Dated: 6-4-09

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