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Recent Trends in What Medical Expenses are "Paid or Incurred"

Roger W. Hughes

Author Contact Information:
Roger W. Hughes
Adams & Graham, L.L.P.
Harlingen, TX

rhughes@adamsgraham.com
956.428.7495

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RECENT TRENDS IN WHAT MEDICAL EXPENSES ARE "PAID OR INCURRED"

> 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.

TEX. CIV. PRAC. & REM. CODE §41.0105.

These words have changed the basics of settlement, evaluation, and trial of personal injury cases. Between 2003 (when section 41.0105 was enacted) and *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011) inconsistent rulings and practices developed, many of which must be re-examined after *Haygood*. While *Haygood* resolved some uncertainties, courts and counsel continue to evaluate its effect and debate whether the older practices remain valid.

Further complicating the landscape is Texas Civil Practices and Remedies Code section 18.002. Questions remain whether medical expense affidavits under section 18.002(b-1) alone are some evidence of "paid or incurred" expenses or more evidence is needed. Moreover, questions have arisen whether§18.002(b) permits non-health care providers to sign the affidavit. *Katy Springs Mfg. v. Favalora*, 476 S.W.3d 579 (Tex. App.–Houston [14th Dist.] 2015, pet. denied; mtn rehearing filed).

I. Pre-*Haygood.*

Before 2012, the courts of appeal had agreed that "paid or incurred" did not include amounts that the health care provider had written off or waived. *Pierre v. Swearingen*, 331 S.W.3d 150, 155 (Tex. App.–Dallas 2011, no pet.); *Mills v. Fletcher*, 229 S.W.3d 765, 769 (Tex. App.– San Antonio 2007, no pet.). Nonetheless, there was a dispute over whether insurance reductions constituted "write offs" and how to deduct them. In *Progressive County Mutual Ins. Co. v. Delgado*, 335 S.W.3d 689, 692 (Tex. App.–Amarillo 2011, pet. denied) the court held write-offs due to managed care agreements between the provider and the patient's insurer reduced the amount "paid or incurred." *Compare Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 931-33 (Tex. App.–Dallas 2009, pet. denied)(no error in failing to apply an insurance write-off because the unadjusted bill was reduced by comparative fault), and *Gore v. Faye*, 253 S.W.3d 785, 789 (Tex. App.–Amarillo 2008, no pet.)(no error to exclude and not reduce award by amount of insurance write-offs because jury failed to award the total unadjusted bills).

However, there was disagreement over who had the burden to prove the amounts written off and the evidentiary effect of unadjusted bills. In *Pierre*, the bill attached to an expense

affidavit was ambiguous about what expenses were discounted or written off. 331 S.W.3d at 155. The Dallas court affirmed a verdict for the entire bill because Defendants had failed to offer evidence explaining which adjustments were actually write-offs. *Id.*

In *Progressive County Mutual Ins. Co.*, the defendant offered the evidence post-verdict to establish that part of the bill had been written off. 335 S.W.3d at 692. The trial court properly reduced the verdict by the amount of the write-off.

This suggested that (1) the unadjusted bill was admissible and probative of the amount "paid or incurred," (2) the defendant had the burden to prove the existence and amount of write-offs, and (3) the jury was not permitted to learn of the write-offs. Instead, the judge handled the write-offs or adjustments post-verdict.

II. What *Haygood* established.

In *Haygood*, Haygood sued Escabedo for injuries sustained in an automobile accident. His healthcare providers billed in excess of $110,000 for treatment resulting from the accident. Because Haygood was a Medicare patient, his healthcare bills were discounted by adjustments or credits of $82,000. Of the $27,000 balance remaining after adjustments and write-offs, about $13,000 was paid and $14,000 remained due and owing to Haygood's providers.

At trial, the defendant moved to exclude evidence of any medical expenses over and above the $27,000 either paid by Medicare or owed by plaintiff, while Haygood moved to exclude evidence of any amounts other than those billed. The trial court agreed with Haygood and prohibited evidence of the reductions. The jury awarded $110,000 for medical expenses and the trial court refused to reduce it to the amount allowable under Medicare. The Court of appeals reversed.

The Supreme Court held that the claimant's recovery and the evidence at trial must be limited to those expenses that the healthcare provider has a legal right to be paid. *Haygood*, 356 S.W.3d at 391. In so holding, the court rejected the common trial court practice of admitting evidence of the full bill charges and reducing the amount recoverable by a post-trial evidentiary hearing to determine what part of the sticker price was actually paid or incurred.

Specifically the Supreme Court held:

1. Recovery is limited to medical expenses that have been or must by paid by the claimant. 356 S.W.3d at 398.
2. Only evidence of recoverable medical expenses is admissible at trial. *Id.* at 399.

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