

HOFFMAN, Senior Judge

Plaintiffs-Appellants Eric Abernathy and Karen Abernathy appeal the trial court’s judgment awarding them damages for injuries Eric sustained in an automobile collision.

We affirm in part and reverse in part.

The Abernathys present one issue, which we restate as: whether the trial court erred by applying set-offs to the award of damages for worker’s compensation, medical benefits, and recovery from the other driver.

Eric was involved in an automobile collision with Scott Davis. Due to the injuries Eric sustained, he was off work for several months and received worker’s compensation payments. In addition, Eric received \$25,000 in medical benefits from Erie Insurance Exchange (“Erie”) pursuant to the Abernathys’ policy with Erie. The Abernathys’ policy provided medical payments of \$25,000 per person per accident and uninsured/underinsured coverage up to \$250,000 per person for bodily injury.

The Abernathys filed suit against Erie and Davis. They settled with Davis for his policy limits of \$100,000, and Davis was dismissed from the lawsuit. A jury trial was held on the Abernathys’ remaining claims against Erie, and the jury returned a verdict for Eric in the amount of \$425,000 and for Karen in the amount of \$75,000. In its judgment, the trial court reduced the award of \$500,000 to \$250,000, based upon the policy limits of the Abernathys’ policy with Erie. The trial court then reduced the \$250,000 to \$121,928.24 by applying set-offs. The trial court calculated the amount as follows:

\$	250,000.00	Limit of UIM coverage
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(100,000.00)	Amount paid by or for Davis
(25,000.00)	Amount paid by Erie pursuant to medical payment provision of policy
<u>(3,071.76)</u>	Worker's compensation benefits received by Eric
\$ 121,928.24	Amount Erie owed to the Abernathys

It is from this judgment that the Abernathys now appeal.

First, the Abernathys assert that the worker's compensation benefits Eric received from his employer must be repaid and, therefore, Erie should not receive a set-off for that amount. This issue presents a question of law for this Court to determine. Questions of law are reviewed *de novo*. *Indiana Dept. of Environmental Management v. Construction Management Associates, L.L.C.*, 890 N.E.2d 107, 112 (Ind. Ct. App. 2008).

We begin by reviewing the Abernathys' policy with Erie. The reduction provision contained in the policy issued by Erie to the Abernathys states:

The limits of protection available under this Uninsured/Underinsured Motorists Coverage will be reduced by:

1. the amounts paid by or for any person who or organization which may be liable for bodily injury or property damage to **anyone we protect**.
2. the amounts paid or payable under any workers compensation, disability benefits or similar law.
3. the amount of any Liability Protection paid or payable to **anyone we protect**. This includes all sums paid under the Liability Coverage of this policy.
4. the amount of any payments to the **Insured** and/or injured party made pursuant to any auto medical payments provision in this or any other policy applicable to the loss.

Appellant's Appendix at 51 (emphasis in original).

In the present case, the Abernathys claim that, pursuant to the Federal Employees' Compensation Act, they must repay the worker's compensation benefits Eric received from his employer, the Internal Revenue Service. The Federal Employees' Compensation Act provides that if the employee makes a recovery against a third party that is liable for the employee's injuries, the government is entitled to a refund of the compensation it paid to the employee. *See* 5 U.S.C. § 8132. In a situation where an employee is required to refund his or her worker's compensation benefits, we believe it to be improper to allow a set-off for those benefits against the employee's recovery. Accordingly, to the extent that the Abernathys actually repay the federal government for any benefits it paid to Eric as a result of this accident, Eric may not take a set-off. *Cf. Wildman v. National Fire and Marine Ins. Co.*, 703 N.E.2d 683, 687 (Ind. Ct. App. 1998), *trans. denied* (construing similar policy language in relation to state worker's compensation act and holding that insurance company entitled only to set-off of worker's compensation benefits which are received and not subject to repayment obligation).

Additionally, the Abernathys argue that the medical payment set-off is improper. There being no dispute regarding the relevant facts, we must determine whether the trial court properly granted the set-off as a matter of law. We apply a *de novo* standard of review to questions of law. *Fitzgerald v. U.S. Steel*, 892 N.E.2d 659, 662 (Ind. Ct. App. 2008).

As shown by the reduction provision set forth above, specifically paragraph 4, the policy unambiguously requires that any payments made to Eric and/or the Abernathys

pursuant to the medical benefits provision in their Erie policy or in any other policy will be set-off from the policy limits. The Abernathys acknowledge, and the materials submitted on appeal show, that Erie made medical payments on Eric's behalf. *See* Appellant's Brief at 3 and Appellant's App. at 19-23A. To refuse the set-off of the medical benefits payments would result in a double recovery for the Abernathys. They would recover the same damages under both the underinsured motorist coverage and the medical payments coverage of their policy. *See Standard Mut. Ins. Co. v. Pleasants*, 627 N.E.2d 1327, 1329 (Ind. Ct. App. 1994), *trans. denied* (stating that set-off provision for medical payments clearly prohibits double recovery and holding that uninsured motorist clause of policy entitled insurer to credit for payments made under medical payments coverage of policy). We hold that the medical payment set-off in this case is proper. *See Wineinger v. Ellis*, 855 N.E.2d 614, 622 (Ind. Ct. App. 2006), *trans. denied* (holding that uninsured motorist carrier's payment of insured's medical expenses entitled carrier to set-off of those expenses).

Finally, the Abernathys suggest that a set-off for the payment made by or for Davis renders their underinsured coverage illusory. The Abernathys postulate that because every driver in the State of Indiana is required to have a minimum of \$25,000 in liability coverage for bodily injury,¹ they could never recover more than \$225,000 of the \$250,000 coverage for which they are paying due to the allowance of a set-off for payment from another driver.

¹ *See* Ind. Code § 9-25-4-5.

We note first that the Abernathys' policy clearly states in its reduction provision, paragraph 1, that Erie will reduce the limits of protection available under its underinsured/uninsured motorists coverage by any amount paid by anyone who is liable to Erie's insured for any bodily injury or property damage. This language provides policy holders in general, and the Abernathys in particular, with express notice of the limits of protection of their uninsured/underinsured motorists coverage.

Moreover, the Abernathys received \$250,000 in coverage. By way of example, we will deal only with the policy amount and the amount received from another driver.

\$	250,000	Abernathys receive from Erie under their underinsured/uninsured policy (policy limits)
	<u>25,000</u>	Abernathys receive from other driver who is insured only with state required minimum
\$	275,000	
	<u>(25,000)</u>	Set-off pursuant to paragraph 1 in reduction provision of Erie policy
\$	250,000	

When the set-off is applied for payment by another driver pursuant to paragraph 1 of the reduction provision in the policy, the result is that the Abernathys receive the full \$250,000 for which they have paid premiums. Although the amount recovered from Davis in the instant case is \$100,000 rather than the minimum \$25,000, the result is the same. The flaw in the Abernathys' argument is that they failed to realize they had already received the money from Davis, the worker's compensation benefits, and the medical benefits payments at the time the court entered its judgment. In its judgment, the

trial court used a short-hand version to show what had transpired with all of the funds involved in this case. To show all of the transactions would look like this:

\$	100,000.00	Abernathys received from Davis
	25,000.00	Medical benefits payments Abernathys received under their Erie policy
	3,071.76	Worker's compensation benefits from Eric's employer
	<u>250,000.00</u>	Policy limits from the Abernathys' policy with Erie
\$	378,071.76	
\$	(100,000.00)	Set-off for payment from Davis
	(25,000.00)	Set-off for medical benefits payments
	<u>(3,071.76)</u>	Set-off for worker's compensation benefits
\$	250,000.00	Total to Abernathys

Thus, the policy is not illusory because the Abernathys received the policy limits of \$250,000, which is exactly the amount for which they contracted and for which they paid premiums.

Based upon the foregoing discussion and authorities, we conclude that the trial court properly applied set-offs to the Abernathys' damages award for the payment from Davis and for medical benefits payments. With regard to the set-off for worker's compensation benefits, we conclude that the trial court should allow a set-off only for the amount the Abernathys did not repay to Eric's employer.

Accordingly, we affirm in part and reverse in part.

DARDEN, J., and BROWN, J., concur.