

JBT

IN THE COUNTY COURT IN AND FOR BROWARD COUNTY, FLORIDA

KORUM CHIROPRACTIC CENTER (as
assignee of Tisha Thomas),

CASE NO.: 09-03859-COCE-55

Plaintiff(s),

Vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant(s).

_____ /

ORDER GRANTING DEFENDANT'S FINAL SUMMARY JUDGMENT ON EXHAUSTION

THIS CAUSE having come before the Court on August 10, 2011 pursuant to Defendant's Motion for Final Summary Judgment, and the Court having reviewed the file, considered the argument, and Memorandum of Law submitted by the parties, and being otherwise fully advised in this matter, does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On October 7, 2008, Tisha Thomas (the "insured") was involved in an automobile accident. At the time of the accident, Ms. Thomas was insured by Defendant, State Farm Mutual Automobile Insurance Company, under a policy which provided personal injury protection (PIP) benefits to Ms. Thomas in the amount of \$10,000.00 and Medical Payments coverage (Med-pay) in the amount of \$5,000.00.

2. As a result of injuries sustained in the accident, Ms. Thomas received medical treatment from Plaintiff, Korum Chiropractic Center. However, the only date of service in question is November 3, 2009. The only CPT code in question is 97124 (massage).

3. On October 7, 2008, Tisha Thomas assigned the aforementioned benefits to Plaintiff, Korum Chiropractic Center.

4. Plaintiff timely submitted a billing statement for the above-referenced service to Defendant.

5. Defendant denied said CPT code for the date of service in question in an explanation of

2012-01-21

2012-01-21

review (EOB or EOR) that referred to NCCI edits.

6. On December 19, 2008, Plaintiff sent a demand letter to Defendant pursuant to Fla. Stat. §627.736(11).

7. On January 12, 2009, Defendant responded to said demand letter and maintained its denial.

8. The insured/patient, Tisha Thomas continued her medical treatment with other providers who continued to bill the Defendant, State Farm Mutual Insurance Company.

9. On March 26, 2009, Plaintiff filed the instant suit. At the time of filing suit, Defendant still had policy benefits available for both PIP and Med-Pay.

10. On March 28, 2009, the PIP benefits were exhausted but Med-Pay benefits were still available.

11. On April 2, 2009, the lawsuit was served upon the Defendant with available Med-Pay benefits still remaining

12. On April 22, 2009, Med-Pay benefits exhausted.

13. On May 11, 2009, Defendant filed its Answer and Affirmative Defenses and failed to claim exhaustion of benefits as an affirmative defense.

14. On December 20, 2010, Defendant filed its Motion to Amend its Answer and Affirmative Defenses to allege exhaustion of benefits.

15. On November 11, 2009, Defendant filed its Motion for Final Summary Judgment based on exhaustion of benefits. This was heard before the Court on August 10, 2011 and was denied on procedural grounds because exhaustion was never alleged as an Affirmative defense.

16. On February 23, 2011, Defendant's Motion to Amend its Answer and Affirmative

defenses was scheduled for hearing and an Order granting this Motion was subsequently entered on March 24, 2011.

17. On August 10, 2011, Defendant's Motion for Summary Judgment was heard before this Court which is the subject of this Order.

18. The Plaintiff has not alleged that the Defendant's actions were done in bad faith.

CONCLUSIONS OF LAW

The issue presented to this Court is whether an insurance company, which issued a personal injury protection policy and Med-Pay to an insured, has a legal obligation to pay a bill submitted by a medical provider, based upon the following facts:

a) Plaintiff provided medical treatment to the insured when PIP benefits were available under the policy.

b) Defendant denied the claim within thirty (30) days after it was furnished with written notice by Plaintiff.

c) Plaintiff filed suit against Defendant when PIP and Med-Pay benefits were still available under the policy.

d) The PIP benefits available under the policy were exhausted after suit was filed, but before the complaint was served, on March 31, 2009.

e) The Med-Pay benefits available under the policy did not exhaust until April 22, 2009 after the Complaint was filed and service was obtained on the Defendant.

The decision in this case is controlled by Fla. Stat. §627.730-627.7405, commonly known as the Florida Motor Vehicle No-Fault Law ("No-Fault Law"), and the case law interpreting these statutes. In particular, Fla. Stat. §627.736 sets forth the specific obligations of an insurance

company with respect to a claim submitted under a personal injury protection benefits policy

The issue for the Court's determination is whether the Defendant can still be held liable for payment of Plaintiff's claim, including the statutory penalties, when the insured's Med-Pay benefits did not exhaust until post service of the Plaintiff's Complaint upon the Defendant.

This case presents a very difficult issue which requires the Court to analyze the rights of an insured or assignee to recover PIP benefits pursuant to Florida's No-Fault law in light of the rights and obligations of an insurance company pursuant to its contract of insurance with the insured. There are no District Court of Appeals decisions with the specific facts of this case. Those facts being that PIP benefits exhausted after suit was filed, but before service was completed and Med-Pay benefits exhausted after suit was filed and served upon the Defendant.

The Court in reaching its decision has analyzed the following cases:

Dr. Robert Simon, M.D., P.A. (a/a/o Hon) v. Progressive Express Insurance Company, 904 So.2d 449 (Fla. 4th DCA 2005). While this case discusses similar exhaustion issues, there is no mention as to whether the benefits exhausted before or after suit was filed and or pre or post service of the Complaint.

In Progressive American Insurance v. Stand Up MRI of Orlando, 990 So.2d 3 (5th DCA 2008) the court gets a little closer to the situation in this case. The court focuses on two issues: (1) Whether a PIP insurer is required to set aside a reserve fund for claims that are reduced or denied, when other valid health care provider claims continue to be submitted, which they said no. (2) Whether a PIP insured can be liable for benefits after the full extent of the available coverage has been paid. The facts of Progressive American Insurance v. Stand Up MRI of Orlando show that the Complaint was served on June 27, 2005 however; on June 17, 2005 the

available PIP coverage was exhausted. Therefore, the opinion made a point to recite that benefits exhausted after the suit was filed, but before it was served on the Defendant. The opinion goes on to say "As a result, we agree with the common-sense reasoning of the circuit court in Neuro Imaging Associates v. Nationwide Insurance, 10 FLW Supp 738A.

In Neuro Imaging Associates v. Nationwide Insurance, the facts show that benefits exhausted after suit was filed and served upon the Defendant.

After citing to Neuro Imaging Associates v. Nationwide Insurance, The Appellate court in Progressive American Insurance v. Stand-Up MRI of Orlando, takes a look at the lower court's analysis of the facts of this case and says, "The Circuit court found significant that PIP benefits remained available until after appellate filed its Complaint. (the opinion chose to italicize the words before and after) The Circuit Court overlooked or disregarded the fact that benefits were exhausted before Progressive American was served with the complaint."

The question this Court has is, why are they citing to Neuro Imaging Associates v. Nationwide Insurance and agreeing with the common sense reasoning of that court but then citing the Circuit Court in Progressive American Insurance v. Stand-Up MRI of Orlando and even going a step further to italicize that benefits exhausted *before* Progressive American Insurance Company was served with the Complaint?"

Next, in reviewing the case of Sheldon v. USAA, 55 So.3d 593 (1st DCA 2010), the issue was phrased, "After PIP benefits are exhausted, is a plaintiff barred from filing or maintaining a previously filed lawsuit against an insurance company to pursue a claim solely for penalties, interest, and concomitant attorney's fees on benefits that were reduced or denied prior to the exhaustion of benefits?" The facts of Sheldon v. USAA show that USAA issued partial payment

for services rendered. Plaintiff then went ahead and filed a lawsuit. Two weeks after the Complaint was filed but before USAA was served with the Complaint benefits exhausted. The Court in Sheldon v. USAA makes it a point of saying not just filing but maintaining a lawsuit. Furthermore, they also make it a point down on the head note 1 of saying, "As Dr. Sheldon acknowledges, Florida courts have established that, once an insurer has paid out the policy limits to the insured (or to various providers as assignees), it is not liable to pay any further PIP benefits, even those that are in dispute." citing to Dr. Robert Simon, M.D., P.A. (a/a/o Hon) v. Progressive Express Insurance Company. The court continues its analysis and states in its opinion, "Further, if benefits are exhausted after suit is filed, but before the suit is served on the insurer, the suit for benefits may not go forward, because the insurer has met its obligation under the contract to pay the policy amount. See Progressive American v. Stand- Up MRI of Orlando. Why is the court in Sheldon v. USAA making a point of pointing this out?

This Court is also aware of and considered the recent cases in the 17th Circuit, Precision Diagnostic of Lake Worth, LLC (a/a/o Joseph Sallabi) v. State Farm Mutual Automobile Insurance Company, 18 Fla. L. Weekly Supp. 692b (County Court 17th Judicial Circuit Robert W. Lee) and Pembroke Pines MRI, Inc. v. USAA Casualty Insurance company, 18 Fla. L. Weekly Supp. 613a (County Court 17th Judicial Circuit Judge Martin Dishowitz). In Precision Diagnostic of Lake Worth, LLC (a/a/o Joseph Sallabi) v. State Farm Mutual Automobile Insurance Company, Judge Lee found that a PIP insurer is not entitled to summary judgment where benefits were exhausted after suit was filed and insurer was served with process. The Court in Precision Diagnostic of Lake Worth, LLC (a/a/o Joseph Sallabi) v. State Farm Mutual Automobile Insurance Company says, "If a bill should have been paid presuit, the insurer's

09-03859-COCE-55

2012-01-21

providers counsel would not have continued to attempt to prosecute the case if insurer had advised of exhaustion of benefits, providers motion for sanctions of attorney's fees and costs is granted".

Furthermore, this Court takes note of the fact that benefits in this case exhausted on April 22, 2009 and the Answer and Affirmative defenses filed by the Defendant on May 11, 2009 did not allege exhaustion of benefits as an affirmative defense. It was not until November 11, 2009 that Defendant first alleged exhaustion of benefits in its Motion for Summary Judgment, which was improperly brought before this court because it was never alleged as an affirmative defense. It was not until December 20, 2010 that Defendant claimed exhaustion in its Amended Answer.

The Court in Medical Specialists of Tampa Bay (as assignee of Aretha Reddin) v. USAA, 18 Fla. L. Weekly Supp. 693a held, "Where benefits were exhausted after medical provider filed suit but before insurer failed to notify its own counsel of provider's counsel of exhaustion of benefits for seven months, and provider's counsel would not have continued to attempt to prosecute case if insurer had advised of exhaustion of benefits, provider's motion for sanctions of attorneys fees and costs is granted."

Based on Medical Specialists of Tampa Bay (as assignee of Aretha Reddin) v. USAA and Progressive Express Insurance Company v. South Florida Institute of Medicine (as assignee of Halil Hawkeye), 14 Fla. L. Weekly Supp. 520a, the court will consider attorney's fees to be awarded to the Plaintiff for failure of the Defendant to put the Plaintiff on notice, in a timely manner, that the benefits were exhausted.

WHEREFORE, it is ORDERED and ADJUDGED as follows:

1. That Defendant's Motion for Final Summary Judgment is hereby GRANTED.
2. That the Court reserves jurisdiction to award attorney's fees and costs to either party if appropriate.
3. Additionally, this Court certifies the following question to the Fourth District Court of Appeal:

**"WHETHER THE DEFENDANT/INSURANCE COMPANY CAN STILL BE HELD
LIABLE FOR PAYMENT OF PLAINTIFF'S CLAIM, INCLUDING THE STATUTORY
PENALTIES WHEN THE INSURED'S MED-PAY BENEFITS DID NOT EXHAUST
UNTIL POST SERVICE OF THE PLAINTIFF'S COMPLAINT UPON THE
DEFENDANT/INSURANCE COMPANY?"**

DONE AND ORDERED in chambers 425 at 201 S.E. 6th Street, Fort Lauderdale, FL
33301 this _____ day or August 2011.

JUDGE SHARON L. ZELLER
JAN 20 2012
TRUE COPY

Honorable Sharon L. Zeller

Copies furnished to.
Tara Kopp, Esq.
Jeffrey B. Tutan, Esq.