[J-119-2012] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

HERD CHIROPRACTIC CLINIC, P.C.,	:	No. 35 MAP 2012
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered on 8/23/11 at No. 882 MDA
	:	2010, which affirmed the judgment of
v.	:	Dauphin County Court of Common Pleas,
	:	Civil Division, entered on 6/29/2010 at No.
	:	1320 CV 2006
STATE FARM MUTUAL AUTOMOBILE	:	
INSURANCE COMPANY,	:	29 A.3d 19 (Pa. Super. 2011)
	:	
Appellant	:	ARGUED: October 16, 2012

DISSENTING OPINION

MR. JUSTICE BAER **DECIDED: February 20, 2013**

The Majority reverses the award of attorneys' fees to a chiropractic clinic in its action against an automobile insurer because the insurer complied with the peer review process when it denied the clinic's claim for unpaid treatments to the insured. The trial court found the chiropractic treatment was reasonable and necessary for the insured's ongoing pain, a finding the insurance company does not dispute. Because I believe that the due process concerns that animated our decision in Terminato v. Pa. Nat'l Ins. Co., 645 A.2d 1287 (Pa. 1994), require the shifting of attorneys' fees where a provider is seeking remuneration for medically necessary treatment, and that the lower courts' interpretation of the statutory provision authorizing attorneys' fees was correct, I respectfully dissent.

In this case, the insured had an insurance contract with State Farm Mutual Automobile Insurance Company (Insurer) to provide first party medical benefits of $10,000, coverage which was more than the minimum required by law and for which the insured paid an increased premium. The insured was injured in a car accident and received treatment from Herd Chiropractic, P.C. (Provider). Relying on a determination by a peer review organization (PRO) that the treatment was not reasonable and necessary, Insurer declined to pay for it. Provider sought recourse in the trial court based on Insurer's failure to pay the bill in breach of the insurance policy. The trial court disagreed with the PRO's conclusions and, conversely, agreed with Provider that the treatment was reasonable and necessary and that Insurer was contractually obligated to pay for it. Consequently, the trial court awarded Provider the amount of the outstanding bill ($1,380.68), interest, and attorneys' fees in the amount of $27,047.50.

As the Majority notes, the statute at issue in this case, Section 1797 of the Motor Vehicle Financial Responsibility Law (MVRL), 75 Pa.C.S. § 1797, pertains to treatment provided to an injured person for an injury covered by first party medical benefits, and requires the provider to bill the insurer rather than the insured for the treatment. 75 Pa.C.S. § 1797(a). Insurers are required to contract with a peer review organization (PRO), 75 Pa.C.S. § 1797(b)(1); Terminato, 645 A.2d at 1288. If the insurer disputes the necessity or reasonableness of treatment of an injured person who is covered by the insurance policy, the insurer may submit the bill to the PRO for evaluation. The provider and insured are not involved in the PRO process; they are not represented by counsel and do not participate. Terminato, 645 A.2d at 1291. If the PRO believes that the provider's treatment was medically necessary, the insurer must pay the provider the

amount of the outstanding bill in addition to 12% interest. 75 Pa.C.S. § 1797(b)(5). Because there are no attorneys involved, there is no need for the award of attorneys' fees in order to make a provider or insured whole following a PRO decision. The statute provides no avenue for judicial review from a PRO determination.

The statute does provide, however, that where the insurer has not submitted the bill to a PRO but refuses to pay, the provider may seek recourse in the courts:

> (4) Appeal to court.--A provider of medical treatment or rehabilitative services or merchandise or an insured may challenge before a court an insurer's refusal to pay for past or future medical treatment or rehabilitative services or merchandise, the reasonableness or necessity of which the insurer has not challenged before a PRO. Conduct considered to be wanton shall be subject to a payment of treble damages to the injured party.

75 Pa.C.S. § 1797(b)(4). When the court finds in favor of the provider, determining that the services rendered were indeed medically necessary, the statute provides for damages as follows: "the insurer must pay to the provider the outstanding amount plus interest at 12%, as well as the costs of the challenge and all attorney fees." 75 Pa.C.S. § 1797(b)(6). Hence, the statutory scheme as enacted by the legislature is logical: because counsel fees are not expended in a PRO review process, they are not recoverable; conversely, because a provider cannot meaningfully seek relief before a court without representation, if it prevails, it is entitled to reimbursement of counsel fees.

However, the statute is flawed in that it does not provide for judicial review of a PRO determination. Thus, medical service providers and an insured challenged the constitutionality of the lack of judicial review pursuant to Section 1797(b) on due process grounds in Pennsylvania Chiropractic Fed'n v. Foster, 583 A.2d 844 (Pa. Cmwlth. 1990). In preliminary objections, the Insurance Commissioner conceded that

the statute did not provide for judicial review of PRO decisions. It argued that there was no right to judicial review, or, alternatively, if due process required judicial review, the court should construe the statute to avoid an unconstitutional result. Id., 583 A.2d at 849-50. The Commonwealth Court concluded "that Commissioner has failed to clearly establish that Petitioners have no right to judicial review of PRO decisions." Id., 583 A.2d at 844.

While Foster proceeded to the summary judgment stage of litigation, the Insurance Commissioner promulgated a regulation providing for judicial review of a PRO decision, but only after reconsideration by a PRO had been sought and completed. See 31 Pa. Code 69.52(m) ("Upon determination of a reconsideration by a PRO, an insurer, provider or insured may appeal the determination to the courts."). This regulation was most likely an attempt to address the due process concerns raised by the lack of judicial review in the statute. See Terminato, 645 A.2d at 1293, n.3 (noting that it was possible that the regulation was promulgated in response Foster and the due process concerns raised therein). When the Insurance Commissioner filed a motion for summary judgment in Foster, following its promulgation of the regulation, the Commonwealth Court granted it. Pennsylvania Medical Providers Association v. Foster, 613 A.2d 51 (Pa. Cmwlth. 1992). The court held that because the regulation provided for an appeal of a PRO determination to the courts, the due process concerns raised concerning the statute were ameliorated. Id., 613 A.2d at 53, n.3.

We construed Section 1797(b) in Terminato, 645 A.2d 1287, where the issue was whether an insured must seek reconsideration of an adverse PRO determination before seeking judicial review. We held that the doctrine of exhaustion of administrative

remedies, which would have militated in favor of requiring a request for reconsideration, had no application to the peer review procedure: "A peer review organization is not an administrative agency, a court of record, or a tribunal authorized to resolve disputes arising out of an automobile insurance policy." Terminato, 645 A.2d at 1290. Rather, a PRO is established by the state or local professional society and chosen solely by the insurer before the dispute arises; it does not accept and review conflicting medical evidence proffered by an insured or provider; and only the insurer participates in the process. Id. at 1291. Accordingly, we held that a PRO lacks the neutrality required of a fact-finder and that seeking reconsideration from the PRO was not a prerequisite to judicial review:

> A PRO is not a neutral body. While a PRO cannot be owned by or be otherwise affiliated with the insurance company [31 Pa. Code § 69.55], the law provides for the insurance company to select the PRO that will review the claim. The insurance company initially pays the PRO for its services. The insured plays no role in the selection process. Obviously, PROs have a strong financial incentive to appear fair in the eyes of the insurance company. Otherwise, the insurance company will take its business elsewhere. On the other hand, the PRO is not concerned with how the insured views the PRO because this will not affect its future business. Consequently, the PRO does not have the characteristics of an independent body for which the Legislature would seek judicial deference.

Terminato, 645 A.2d at 1291 (quoting Harcourt v. General Accident Insurance Company, 615 A.2d 71, 78 (Pa. Super. 1992)). See also Kuropatwa v. State Farm Ins. Co., 721 A.2d 1067 (Pa. 1998) (reaffirming that an insured has the right to bring an action against the insurer under Section 1797(b) where peer review was performed). To the extent the regulation required reconsideration prior to judicial review, we held that it should be disregarded. Terminato, 645 A.2d at 1293.

The due process concerns that compelled our decision in Terminato, the Commonwealth Court's decision in Foster, and the Insurance Commissioner's regulation allowing for an appeal from a PRO determination, lead me to dissent from the Majority's holding that Section 1797(b)(6) does not permit attorneys' fees following a court determination where the insurer first sought review by a PRO. Because we have permitted a direct appeal to the trial court under Section 1797(b), see Terminato, it follows that such an appeal must be real and meaningful, and not illusory, to comport with due process. As explained below, unless the remedies provision of Section 1797(b)(6) is applied following a court determination, the appellate rights granted by the Insurance Commissioner and verified through Terminato will cease to exist for pragmatic purposes, returning the state of the law to where it was before Foster, the Insurance Commissioner's regulation at 31 Pa. Code 69.52(m), and Terminato, and rendering the statutory scheme unconstitutional under basic due process.

If a medical provider must pursue judicial review to obtain fair treatment of its claim, then the reimbursement of costs and attorney's fees associated therewith are necessary. If providers are unable to recover the costs associated with obtaining the payments to which they are due, the courts will be closed to the providers and insureds seeking to recover payment of bills which the insurance company has contracted to pay.

The record in this case amply supports this conclusion. Insurers here have engaged in a "scorched earth litigation strategy," see Appellees' Brief at 36, where insurance companies demonstrate their willingness to spare no expense to deter providers from pursuing their claims in court, even when the care is reasonable and necessary. As Provider describes, Insurer seeks to intimidate health care providers into

either not treating automobile crash victims at all or cutting off their health care prematurely.

In the instant case, Provider's care was judicially determined to be reasonable and necessary. Notwithstanding, they have spent the last ten years, and $27,000 in attorneys' fees, to recover $1,380.68, which Insurer was contractually, statutorily, and factually obligated to pay. Insurer spent over $40,000 defending against its contractual obligation to pay this bill. The motivation is clear: insurance companies know that if they defend every claim to this extent, providers will quickly be forced to relinquish their right to payment for provided services because the cost of litigation will always outweigh the cost of their services. The insurance industry should not be permitted to deprive providers of their rightful day in court through this strategy, which, again, is amply demonstrated on this record. In short, the due process that the Insurance Commissioner and the case law have granted to the provider community will have been abrogated.

There is ample room to construe the statute to avoid this violation of due process. There are two remedies provisions in Section 1797(b): Section 1797(b)(5), which applies when the PRO determines the care was reasonable and necessary and which requires the insurer to pay the outstanding bill plus interest; and Section 1797(b)(6), which applies when the court determines that care was reasonable and necessary and requires the insurer to pay the outstanding bill, interest, costs, and attorneys' fees. Of these two subsections, only Section 1797(b)(6) discusses the participation of a court and counsel. If the court determines the treatment was medically necessary, therefore, the only statutory section regarding court involvement provides

that the insurer must pay the outstanding amount, interest, costs, and attorneys' fees. Without the attorneys' fees, the provider will not be made whole and its due process rights will not be accommodated.

On appeal, Insurer recognizes that the statute does not provide for judicial review of PRO determinations. Conceding that judicial review is nevertheless required as a matter of regulation and case law, it argues that the remedies provision that applies following judicial review is Section 1797(b)(5). This section, however, is clearly implicated only where a PRO makes a determination in favor of the insured, and does not account for attorneys' fees, as attorneys are not involved with peer review. Because counsel is not involved, Section 1797(b)(5) does not capture the reality of the costs associated with a court challenge, and is not applicable to a court determination.

Even with the award of attorneys' fees following an adverse court determination, insurers will remain incentivized to utilize the peer review process, therefore accommodating the cost-containment goals articulated in the Majority Opinion. Specifically, Section 1797(b)(4) provides for the award of treble damages for wanton conduct. As the lower courts here found, Insurer's use of the PRO process defeated Provider's claim for treble damages, as it was indicative of a lack of wanton conduct. To avoid or defeat of claim for treble damages, therefore, Insurers would continue to seek peer review of bills for services which they believe they are not contractually obligated to pay.

Consistent with a providers' due process right to seek judicial review, therefore, I believe that the statutory section applicable to a court determination, which expressly

permits attorneys' fees, applies notwithstanding an insurer's use of the peer review process, and, accordingly, I respectfully dissent.

Mr. Justice McCaffery joins this opinion.