

### **Herd Chiropractic v. State Farm**

#### **Insurance — Automobile — Motor Vehicle Financial Responsibility Law — Peer Review — Attorneys' Fees — Treble Damages.**

The Court had previously awarded the Plaintiff unpaid amounts for medical treatments deemed by a peer review process to be not medically necessary or reasonable, but had denied Plaintiff's requests for treble damages and attorneys' fees. The Court then reconsidered and amended its previous decision, determining that it had erred in failing to include an award of attorney fees, but still finding insufficient evidence to approve the request for treble damages.

1. The Pennsylvania Supreme Court has observed that a peer review organization is not a neutral body and that the "detachment and neutrality required of a fact-finder is conspicuously absent in the contractual relationship between a peer review organization and an insurer." *Terminato v. Pennsylvania National Ins. Co.*, 645 A.2d 1287, 1291 (Pa. 1994).

2. Any party adversely impacted by a peer review decision has recourse in the nature of a challenge before a court. 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). In such a proceeding, if the court determines that the treatment was medically necessary, the insurer must pay to the provider the outstanding amount, plus interest, as well as the costs of the challenge and all attorneys fees. 75 Pa.C.S. §1797(b)(6).

3. Wanton conduct traditionally incorporates the intentional, knowing and sometimes malicious risk of harm to another with utter disregard of the consequences. *See, e.g., Kasanovich v. George*, 34 A.2d 523 (Pa. 1943).

Motion to Reconsider. C.P., Dau. Co., No. 2006-CV-01320-CV.  
Motion granted in part.

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BRATTON, J., April 30, 2010. – On December 14, 2009, this Court entered a decision in favor of the Plaintiff, Herd Chiropractic Clinic, following a non-jury trial of its challenge to the Defendant, State Farm's, refusal to pay for certain treatments of accident-related injuries suffered by Mrs. Miriam Mitten based upon a decision made in a peer review process that the treatments were not medically necessary or reasonable. The Court awarded the amount claimed by Herd Chiropractic which were unpaid by State Farm for the questioned treatments to Mrs. Mitten, but denied Herd Chiropractic's demand for treble damages and for attorneys' fees. Herd Chiropractic filed a Motion to Reconsider that decision, which was granted on January 29, 2010, and oral argument of counsel was held on February 18, 2010. Herd Chiropractic has argued that this Court misapplied the provisions of the Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. §1701, *et seq.*, and the regulations of the Pennsylvania Insurance Department adopted there under, 31 Pa. Code §69.1, *et seq.*

In this action, the evidence at trial established that the Herd Chiropractic had rendered chiropractic services to a State Farm insured, Mrs. Mitten, for injuries she had sustained in a motor vehicle accident in 2000. In 2002, State Farm referred chiropractic bills from Herd Chiropractic for its last several months of treatment of Mrs. Mitten to Health Quest, an insurance department-approved peer review organization approved under the insurance department's regulations. Health Quest, in turn, referred the records of Herd Chiropractic's treatment to a practicing chiropractor, Dr. Joseph Camilli, who opined that the treatments rendered during the last two months of treatment by Herd Chiropractic were not medically necessary or reasonable. Based upon that opinion, then, State Farm refused to pay the amount of \$1,360.68 for approximately two months of treatment rendered by Herd Chiropractic to Mrs. Mitten prior to May 30, 2002. Herd Chiropractic filed this action as an appeal from the peer review determination.

Citing the provisions of 75 Pa.C.S. §1797, Herd Chiropractic sought in this action not only a reversal of the peer review determination as to the reasonableness and medical necessity of treatment it had rendered to Mrs. Mitten and the payment of its

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unpaid bills, but also the additional sanctions of attorneys' fees and trebling of damages.<sup>1</sup>

We note preliminarily that the Motor Vehicle Financial Responsibility Act, 75 Pa.C.S. §1701, *et seq.*, was adopted with the intent to provide for the prompt payment of valid claims under auto insurance policies issued within the Commonwealth of Pennsylvania. Further, the act was amended in 1990, the act of February 7, 1990, P.L. 11, §18, which included the language which became 75 Pa.C.S. §1797 of the Motor Vehicle Financial Responsibility Law. Act 6, as these amendments are often called, was an effort to contain the rising costs of consumer automobile insurance. *Holland v. Marcy*, 883 A.2d 449, 457 (Pa. 2005). Act 6 provided for a limitation on the amount that would be payable for various services rendered for various treatment, accommodations, products or services rendered to one injured in an automobile accident under the terms of an automobile insurance policy, generally, to one hundred and ten percent of the "prevailing charge at the 75th percentile" for comparable services rendered under the Medicare program at the time services had been rendered. 75 Pa.C.S. §1797(a); Act 6 also added to the law a procedure or process to be utilized by insurers for challenging the reasonableness and necessity of treatment provided by physicians and other health care providers and institutions to those injured in automobile accidents. *Id.*, §1797(b); *Schappell v. Motorists Mutual Ins. Co.*, 934 A.2d 1184, 1190 (Pa. 2007); *Perkins v. State Farm Ins. Co.*, 589 F. Supp. 2d 559, 562 (M.D. Pa. 2008).

At the bench trial held July 14, 2009, we heard from representatives of State Farm involved in the decision to refer this matter to the peer review process, heard testimony concerning the contracting for peer

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1. Section 1797(b)(4) of the MVFRL provides:

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.

Section 1797(b)(6) of the MVFRL provides:

COURT DETERMINATION IN FAVOR OF PROVIDER OR INSURED. — If, pursuant to paragraph (4), a court determines that medical treatment or rehabilitative services or merchandise were medically necessary, 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.

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review services by State Farm with Health Quest, as well as from the peer-review organization's retained chiropractor who stated his opinions and testified as to the basis for those opinions. We also heard testimony from the treating chiropractor and others stating a contrary opinion as to the reasonableness and necessity of the treatment rendered by Herd Chiropractic during the questioned period of time. Herd Chiropractic also submitted exhibits including statistics regarding the amount of payments made by State Farm to Health Quest, the purpose of which was to establish a significant financial relationship between the two companies so as to call into question the objectivity and credibility of Health Quest's peer review decision.

At the conclusion of the trial, after reviewing all of the testimony and other evidence, the Court concluded by preponderance of the evidence that the questioned treatments rendered by Herd Chiropractic were reasonable and necessary for the treatment of Mrs. Mitten's on-going pain. We ordered the payment of those unpaid bills but did not award fees, nor treble damages.

The peer review process established by Act 6 has been viewed with skepticism by our courts. The Pennsylvania Supreme Court, for example, has observed that a peer review organization is not a neutral body and that the "detachment and neutrality required of a fact-finder is conspicuously absent in the contractual relationship between a [peer review organization] and an insurer." *Terminato v. Pennsylvania National Ins. Co.*, 645 A.2d 1287, 1291 (Pa. 1994). The Courts have also determined that a peer review organization does not have those characteristics of an independent body for which the legislature would seek or require judicial deference. *Harcourt v. General Accident Ins. Co.*, 615 A.2d 71, 78 (Pa. Super. 1992). Pennsylvania Courts have also acknowledged that peer review organizations are naturally biased in favor of insurance companies and that the credibility of the peer reviewing doctor's testimony is a factual issue to be determined by the Court in an appeal from a peer review determination. *Henninger v. State Farm Ins. Co.*, 719 A.2d 1074, 1077 (Pa. Super. 1998).

In the instant case, we determined as a fact that State Farm had complied in all material respects with Act 6's requirements in conducting a peer review of Herd Chiropractic's billings at issue in this case. The statistical evidence presented by Herd Chiropractic was without sufficient context to prove more than that State Farm and Health Quest have had a significant financial relationship, something one could expect to have developed following the legislature's creation of the

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peer review system by the enactment of Act 6. Without some additional evidence in support of Herd Chiropractic's allegations that the peer review process was so tainted as to have been a sham, however, we could not conclude that Herd Chiropractic had proven that State Farm's conduct had been shown to be wanton, a term undefined in Act 6, but which traditionally incorporates the intentional, knowing and sometimes malicious risk of harm to another with utter disregard of the consequences. *See, e.g., Kasanovich v. George*, 34 A.2d 523 (Pa. 1943). Then we denied Herd Chiropractic's request for treble damages.

We did find, however, that the peer review organization's reviewing chiropractor had failed to take into account the medical necessity of providing palliative treatment for the relief of pain experienced by Mrs. Mitten. In Pennsylvania, the courts have, on multiple occasions, held that even temporary pain relief can be reasonable and necessary medical treatment. *See, Trafalgar House v. WCAB*, 784 A.2d 232, 236 (Pa. Cmwlth. 2001); *Glick v. WCAB*, 750 A.2d 919 (Pa. Cmwlth. 2000); *Cruz v. WCAB*, 728 A.2d 413, 417 (Pa. Cmwlth. 1999). Having heard testimony that Mrs. Mitten continued to suffer pain from the injuries she sustained in the auto accident in 2000, we found that the questioned treatments rendered by Herd Chiropractic to Mrs. Mitten were intended to provide relief or management of her pain, even if only temporarily, and we determined that such care was reasonable and necessary under the circumstances. Herd Chiropractic was, therefore, entitled to payment for these services rendered, but for which payment had been refused by State Farm.

The one remaining disputed issue in this case is the question as to whether or not Herd Chiropractic is entitled to be reimbursed its attorneys' fees. A first reading of 75 Pa.C.S. §1797(b)(4) would lead one to conclude that this statute, which provides for an appeal to court by a provider of healthcare or an insured, applies only when an insurance carrier refuses to pay bills for medical services but has *not* employed the peer review process. Regulations adopted by the Pennsylvania Insurance Department, however, expanded the availability of an appeal to court to all persons and parties involved. 31 Pa. Code §69.52(m). Although that regulation refers to such an appeal after a reconsideration of the peer review organization's determination had been requested, our courts have found that there is no need to exhaust the permissive administrative remedy of requesting a reconsideration, and that a direct appeal to court is, therefore, not foreclosed by the lack of a reconsideration. An insured is not required to request reconsideration of the peer review decision before proceeding to court. *Terminato*, at 1288.

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Thus, it appears that through regulation and judicial interpretations of both the statute and the regulations, any party adversely impacted by a peer review decision has recourse in the nature of a challenge before a court under 75 Pa.C.S. §1797(b)(4). In such a proceeding under that subsection, the statute further provides that, if the court determines that the treatment was medically necessary, the insurer must pay to the provider the outstanding amount, plus interest “as well as the costs of the challenge and all attorneys fees.” 75 Pa.C.S. §1797 (b)(6).

State Farm, however, argues that the legislature intended by the enactment of Act 6 to provide immunity from an award of attorneys’ fees to insurers. We have searched in vain for an immunity provision in the statute. Although State Farm directed our attention to a Superior Court decision which seemed to support its argument, *Barnum v. State Farm Mutual Auto. Ins. Co.*, 635 A.2d 155, (Pa. Super. 1993), *reversed and remanded*. 652 A.2d 1319 (PA. 1994), that decision was reversed by the Pennsylvania Supreme Court and remanded to the Court of Common Pleas for a decision consistent with *Terminato*.

We do not believe, moreover, that State Farm’s position constitutes the only possible interpretation of this cost-containment statute. Like many disputes between a claimant and an insurer, we assume many questions are negotiated, discussed, and settled before a lawsuit is ever filed. We believe the legislature’s creation of the peer review mechanism affords an additional benefit to the insurer by establishing an alternative to immediate litigation of such matters. In the peer review process, the insurer can question the bills of a provider and seek a third party’s opinion on the reasonableness and the medical necessity of the services being rendered to the insured. During that process, a proper review is conducted by a qualified and impartial reviewer who can support and justify his or her objective opinion that the questioned treatments were not reasonable and necessary, we presume many such decisions do not ever result in a challenge in the courts.

If, however, the peer review organization’s decision is based on an opinion which does not stand up under closer examination, as the court found to be the case here, then the challenge in court by the provider is successful, and we see no reason why the courts should do less than that which the legislature has provided in Act 6, i.e., award the amount of the outstanding bills, costs and fees. Had the legislature intended to grant immunity in Act 6, it certainly could have done so, but it did not. We do not believe that the legislature intended that an insurer’s use of a peer review process which results, even if unintentionally, in a decision

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which during a court proceeding is proved to be flawed, to exempt the insurer from the statute's requirement that fees be awarded. State Farm's immunity interpretation would, in our opinion, only serve to provide an incentive to all insurers to send all bills to a peer review process in which all semblance of objectivity could be all but ignored, so long as the insurer's conduct is not "wanton", and the provider (or an insured) would be left with the enormous expense of seeking redress in the courts with no possibility of recovering those costs and fees.

Having concluded that our failure to include an award of fees in our original decision was in error, we hereby amend our Decision of December 14, 2009 to include the award to Plaintiff of its attorneys' fees. We, therefore, enter the following:

## ORDER

AND NOW, this 30th day of April, 2010, having reconsidered this Court's December 14, 2009 Decision, and following arguments of counsel, this Court hereby amends its December 14, 2009 decision to provide as follows:

We find in Plaintiff's favor in the amount of \$1,380.68 representing the unpaid medical expenses, plus 1% interest from April 2002 and costs of suit. Plaintiff is also awarded its attorneys' fees in the amount of \$27,047.50. Plaintiff's request for treble damages is denied, as there was insufficient evidence from which we can find Defendant acted wantonly.