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Expo Med. Supplies, Inc. v Clarendon Ins. Co.
2006 NY Slip Op 50892(U)
Decided on May 16, 2006
Civil Court Of The City Of New York, Kings County
Thomas, J.
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Civil Court of the City of New York, Kings County

<p>Expo Medical Supplies, Inc., Plaintiff,</p> <p>against</p> <p>Clarendon Insurance Company, Defendant,</p>

96268 KCV 2004

Delores J. Thomas, J.

In the instant action plaintiff, a medical supplies provider, sues to recover \$2,882.85 for medical supplies provided to its assignor Barry Galleh for injuries stemming from an auto accident on March 3, 2004.

At trial, the parties stipulated to plaintiff's prima facie case and defendant's timely denial of claim. The parties further agreed that the only issue for trial would be defendant's defense of lack of medical necessity. The parties also stipulated the following documents into evidence: Plaintiff's Exhibits:

1A - Invoice dated May 20, 2002 for \$1,532.85

1B - Invoice dated April 10, 2004 for \$ 1,350.00

2A - Prescription from Oleg Barshay, D.C. dated March 5, 2004

2B - Prescription from Oleg Barshay D.C. dated April 19, 2004

3 - April 13, 2004 chiropractic report from Oleg Barshay for Barry Galleh

Defendant's Exhibits:

A1 - NF10 dated May 10, 2004

A2 - NF10 dated June 1, 2004

B1 - Peer Review dated May 5, 2004

B2 - Peer Review dated May 28, 2004

The supplies at issue were: cervical pillow, Philadelphia tracheotomy cervical collar, TLSO Dorso-lumbar surgical supply, lumbar cushion, bed board, egg crate mattress, thermophone, EMS Unit, EMS accessory Kit, EMS belt, massage and an infra-red heating lamp (Exhibit 1A & 1B).

At trial, defendant called Ronald A. Csillag, a doctor of chiropractic ["D.C."] the person who performed the peer review. Dr. Csillag was qualified without objection as an expert in the practice of chiropractics. Dr. Csillag testified that the cervical pillow prescribed for the assignor is usually prescribed for injuries which are chronic in nature. He described the assignor's injury as being acute and opined that the pillow

was not needed and that the patient could have simply been instructed to roll up a towel and use it with the same benefit. In the peer review report, Dr. Csillag indicated that the effectiveness of cervical pillows in whiplash associated disorders is inconclusive and cites as authority several publications, (i.e. Whiplash Associated Disorders, [*2]Spine 1995, 20 (85); 25-73s Clinical Evidence BMJ Publishing Group, page 232-2003).

With regards to the lumbosacral belt and cervical collar, Dr. Csillag testified and wrote in the peer review report that these supplies were unnecessary because these devices work through immobilization and this type of support is not consistent with the trend in the management of lumbar sprains. He also wrote and testified that current scientific research documents the importance of early range of motion as mobility enhances recovery (see Defendant's Exhibit B-1, pg. 4). Dr. Csillag cited the text, Physical Medicine and Rehabilitation: State of the Art Reviews: Vol. 9(3) October 1995 as supporting authority (Id.). Dr. Csillag further testified that many of the medical supplies were unnecessary because there was no indication from the treating doctor how to use them or to what areas to apply the device. He further opined that the patient was undergoing physical therapy, chiropractic care, acupuncture, message therapy and adjunctive therapy and that the massager, infrared heating lamps, EMS Unit and associated EMS equipment represented a duplication of services.

Plaintiff did not call a witness but as indicated the report of Dr. Barshay was admitted into evidence as Plaintiff Exhibit 3. The Initial Diagnosis portion of the report indicates:

1. 1. Traumatic cervical sprain/strain with cervical myofascitis and possible radicular involvement, complicated by C4-C5 and C5-C6 bulging disc (MRI finding).
2. 2. Traumatic Lumbar sprain/strain with intermittent radiating sciatic neuralgia, concomitant with Lumbar myofascitis (MRI finding pending).
3. 3. Post traumatic cervicogenic headaches.
4. 4. Head and right knee contusion.
5. 5. Multiple intersegmental functional dysarthroses of the cervical thoracic and lumbar vertebral motor units.

The report also list a patient management plan, to wit: "The treatment in this case was directed toward conservative chiropractic management. This consisted of specific vertebral adjustments to correct functional dysarthroses and adjunctive therapy in the form of manual intersegmental traction. To enhance recovery, manual massage therapy and acupuncture by a licensed therapist was incorporated into the treatment plan. The frequency of treatments is 2-3 times a week. The patient was also advised to wear an orthopedic lumbosacral support and cervical collar to minimize pain and prevent a re-injury. A TENS unit was given to the patient and after a two week trial was proven to be effective for pain management."

Since the only issue for trial was whether the supplies provided to the assignor were medically necessary, defendant bore the burden of proof on this issue (*A.R. Medical Art.P.C. v. State Farm Mut. Auto Ins. Co.*, 11 Misc 3d 1057 [A][Civ. Ct., Kings Co. 2006]; *CityWide Social Work & Psychological Servs. v. Travelers Indem. Co.* 3 Misc 3d 608 [Civ. Ct., Kings Co., 2004]; *Elm Medical P.C. v. American Home Assurance Co.*, 2003 NY Slip Op. 51357 [U], 2003 WL 22471156 [Civ. Ct., Kings Co., 2003]; *Fifth Ave. Pain Control Ctr. v. Allstate Ins. Co.*, 196 Misc 2d 801 [Civ. Ct., Queens Co., 2003]).

A no-fault insurer defending a denial of first party benefits on the ground that the billed for services or equipment/supplies were not "medically necessary" must show that the services or supplies/equipment provided were inconsistent with generally accepted medical/professional practices. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden of proving that the services or supplies/equipment were not "medically necessary"

*[*3]*(*CityWide Social Work & Psychological Servs. v. Travelers Indem. Co.* , *supra* at 609; *Ultimate Med. Supplies v. Lancer Ins. Co.*, 7 Misc 3d 1002 [A] [Civ. Ct., Kings. Co. 2004]).

In *United Medical Supplies v. Lancer Ins. Co.*, *supra*, plaintiff had supplied its assignor with certain medical equipment (i.e. TENS Unit, LSO, etc) pursuant to a

prescription. Defendant denied payment based upon a peer review. At trial, the peer review doctor, Dr. Moshkovski, testified that based upon her experience none of the prescribed durable medical equipment was necessary. She cited no authority other than her own experience. Judge Alice Fisher Rubin found it clear that Dr. Moshkovski admitted to never having prescribed any of the subject medical equipment with the sole exception of ice packs, on no basis other than her own opinion. Thus, the court held that such an opinion was biased against the prescribing doctor so as to make the peer review a nullity and not credible.

The instant case is at opposite with the facts of *United Medical Supplies v. Lancer Ins.Co. supra*. Here Dr. Csillag opinion as to whether the various medical supplies were necessary was based not only upon his experience but based upon medical authority cited in the peer review reports (Defendant's Exhibit B, page 4). Dr. Csillag wrote in his report and testified that the type of lumbar support prescribed was no longer used to manage lumbar sprains because it immobilized that portion of the body and the current trend in treatment was to allow mobility because mobilization fostered recovery. Dr. Csillag also testified that the massager, infrared heating lamp, EMS unit and associated EMS equipment was a duplication of services available and provided through the physical therapy, chiropractic care, acupuncture, message therapy and adjunctive therapy that the assignor was to have begun as of the April 13, 2004 report.

Considering the testimony of Dr. Csillag at trial coupled with the contents of the peer review reports of May 5, 2004 (Defendant's Exhibit B1) and May 28, 2004 (Defendant's Exhibit B2) the Court finds defendant has proven its defense that the supplies were not medically necessary. The burden now shifts to plaintiff to refute defendant's evidence.

As previously indicated, plaintiff did not call a doctor but relied upon its cross examination of Dr. Csillag and the report of Dr. Barshay. It is undisputed that a chiropractor may prescribe the supplies which are the basis of this litigation (*ABC Med. Mgt. v. GEICO Gen. Ins. Co.*, 3 Misc 3d 181 [Civ. Ct., Queens Co., 2003]) and

such may be justified in light of the patient's overall condition (Id); herein, however, there is no evidence in the record to refute defendant's expert witness' testimony (*cf A.R. Med. v. State Farm, supra*) and to explain why the medical supplies were necessary.

In *A.R. Med. v. State Farm, supra* plaintiff also did not call the treating doctor; however, in that case the treating doctor had issued a Letter of Medical Necessity, which was stipulated into evidence, in which he clearly set forth the reasoning and purpose for the conduction of the NCV/EMG test that were at issue.

The April 13, 2004 report from Dr. Barshay merely sets forth what the finding of the patient's examination were, the diagnosis, a management(treatment) plan and a prognosis. This Court has no way of knowing why these supplies were prescribed. Viewing Dr. Barshay's report (Plaintiff's Exhibit No. 3), the only portion that may be read as giving any indication of why the supplies were prescribed appears in the Patient Management section where Dr. Barshay indicated, "The patient was also advised to wear an orthopedic lumbosacral support and cervical collar to minimize pain and prevent a re-injury." In light of the reasoning set forth in the peer [*4] review and the testimony at trial, plaintiff evidence in rebuttal is insufficient to prove medical necessity for the supplies.

Accordingly, judgment for defendant, the summons and complaint are dismissed.

Defendant shall serve a copy of this decision/order with Notice of Entry upon the appropriate clerk and the plaintiff within 15 days after receipt.

This constitutes the decision and order of the Court.

DATED: May 16, 2006 Brooklyn, New York

DELORES J. THOMAS
Judge Civil Court