

Complete Med. Care SVCS of NY, PC v Government Empls. Ins. Co.
2017 NY Slip Op 32203(U)
October 17, 2017
Civil Court of the City of New York, Bronx County
Docket Number: CV-90515/2010
Judge: Sabrina B. Kraus
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 15

COMPLETE MEDICAL CARE SVCS OF NY, PC
Assignee of MARIA VALERIS

Plaintiff,

-against-

DECISION & ORDER

Index No.: CV-90515/2010

HON. SABRINA B. KRAUS

GOVERNMENT EMPLOYEES INSURANCE CO.,

Defendant

X

PROCEDURAL HISTORY

Plaintiff commenced this action to recover assigned first-party no fault benefits, pursuant to a summons and complaint Filed October 19, 2010.

Defendant appeared, by counsel, and filed an answer with discovery demands on November 23, 2010.

Notice of Trial was filed on February 3, 2011. Trial was initially scheduled for June 29, 2012, and was adjourned by the parties, over eight dates to October 16, 2017.

On October 16, 2017, the court held a bench trial and reserved decision.

FACTS

The parties stipulated to the following facts:

1. Plaintiff timely submitted a Proof of Claim to Defendant on or about September 16, 2010.

2. Defendant timely mailed a Denial of Claim on or about October 8, 2010.

3. After crediting for payments, the total amount of the bill in dispute is \$2,832.14.

4. The sole issue for trial is the medical necessity of neurological testing performed.

The parties also stipulated to the admission of a package of documents (Court Exhibit 1).

Maria Valeris (Assignor) was injured in a car accident on June 22, 2010. She struck her head, and the left side of her body, but did not lose consciousness. She was transported by ambulance to the hospital, where she was examined and an x-ray of her neck was taken. She was given a cervical collar and medication, and she was released. In addition to headaches, she complained of pain in her neck, back, and down the left side of her body.

Assignor saw a chiropractor, Dr. Zeren three days after the accident. Dr. Zeren treated Assignor a course of conservative management of her spinal injuries.

On July 2, 2010, Assignor had MRIs of her lumbar spine and cervical spine. On August 1, 2010, Assignor had an MRI of her left shoulder and left knee.

Assignor received approximately two months of physical therapy and chiropractic treatment, but only had a partial response to treatment.

On September 1, 2010, the date of service (DOS), Dr. Hausknecht performed a Nerve Conduction Velocity (NCV) and Electromyograph (EMG) to determine whether there was neurological damage, and determine the Assignor's further course of treatment. The reasons he decided to do such testing are embodied in a letter to Dr. Zeren dated September 1, 2010, which included the results of his examination of Assignor. The report, stated in part:

The patient has been symptomatic for over 2 months and has had only a partial response to conservative management. She has persistent radiating neck and back pain ... This is interfering with her activities of daily living. The MR imaging reveals structural pathology at multiple levels in the neck and back. I recommend NCV/EMG studies to assess for electro-diagnostic evidence of radiculopathy. On the basis of this information,

she may be an appropriate candidate for interventional pain management or spinal surgery.

PEER REVIEW

A Peer Review dated October 4, 2010, by Dr. Terence McAlarney was admitted into evidence. In the Peer Review, Dr. McAlarney stated that the testing was not medically necessary based on his review of the records and the test results. Dr. McAlarney noted that the Assignor had soft tissue injuries, and focused on the fact that no treatment recommendations came about as a result of the testing. Dr. McAlarney concluded that any pain management decisions could be made without the information provided from the testing.

TESTIMONY AT TRIAL

At trial, Plaintiff rested upon the parties stipulated facts and documents. The parties further stipulated to the expertise of the two doctors that testified.

Dr. Stephen Ender

Dr. Stephen Ender testified for Defendant. Dr. Ender's testimony was based in his review of the medical records and Peer Review. Dr. Ender testified that he agreed with the Peer Review and was of the opinion that the testing was not medically necessary. Dr. Ender testified that the testing was minimally sensitive and would be appropriate for some neurological disorders, but not for a patient with injuries such as the Assignor. Dr. Ender focused on the fact that the tests did not change the treatment plan for the Assignor.

Dr. Philip Alexandre

Dr. Philip Alexandre testified in rebuttal for the Plaintiff. Dr. Alexandre specializes in physical medicine and rehabilitation. Dr. Alexandre reviewed the Peer Review and the other medical records and testified that it was his opinion that the tests ordered were medically necessary.

Dr. Alexandre based his conclusion in part, on the amount of time Assignor had been undergoing treatment and while only partially responsive to same. Dr. Alexandre further noted the results of the prior MRIs and physical testing, as well as Assignor's complaints of pain radiating down the left side of her body. Dr. Alexandre testified that these factors together suggested the presence of radiculopathy. Dr. Alexandre testified that the tests ordered were objective and would reveal whether there were neurological conditions present, and if so the location and number of nerves involved. This information could then allow for the patient to be treated for pain management by specific injections at the site revealed or surgery if necessary. Dr. Alexandre concluded that the two tests, which he referenced as an electro-diagnostic investigation, were necessary to confirm suggestions that had presented clinically.

DISCUSSION

Under No Fault Law claimants are entitled to recover for basic economic loss which Insurance Law § 5102(a)(1) defines as :

(1) All necessary expenses incurred for: (I) medical, hospital (including services rendered in compliance with article forty-one of the public health law, whether or not such services are rendered directly by a hospital), surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services; (ii) psychiatric, physical and occupational therapy and rehabilitation; (iii) any non-medical remedial care and treatment rendered in accordance with a religious method of healing recognized by the laws of this state; and (iv) any other professional health services; all without limitation as to time, provided that within one year after the date of the accident causing the injury it is ascertainable that further expenses may be incurred as a result of the injury. For the purpose of determining basic economic loss, the expenses incurred under this paragraph shall be in accordance with the limitations of section five thousand one hundred eight of this article.

Some courts have defined a necessary medical expense to be for "... treatment or services that are reasonable in light of the patient's injury, subjective and objective evidence of the patient's complaints of pain, and the goals of evaluating and treating the patient (*Complete Medical Care Services of NY, PC v State Farm Mutual Automobile Insurance Company* 21

Misc.3d 436, 440 (2008) citing *Fifth Avenue Pain Control Center v Allstate Insurance Company* 196 Misc.2d 801, 807).”

A determination of medical necessity must be based on evidence in existence prior to the rendering of the service (*Foster Diagnostic Imaging, PC v General Assur Co.* 10 Misc3d 428).

The purpose of the No Fault law is to “... deliver better protection for the insured and to pay off claims quickly (NY Legis Ann. 1973 p.298).” The intent is to permit the liberal recovery of money spent in the treatment of accident related injuries, and to encourage the prompt payment of claims without prolonged delay (*Vidra v Shoman* 59 AD2d 714, 716; *Dermatossian v NYCTA* 67 NY2d 219, 225).

Initially, there is a presumption of medical necessity in favor of the insured (*Foster Diagnostic Imaging, PC v General Assur Co.* 10 Misc3d 428). Thus, once Plaintiff establishes a *prima facie* case, the burden is on Defendant to establish by a preponderance of credible evidence that the services were not medically necessary (*Nir v Allstate Insurance Co.* 7 Misc.3d 544,546). The defense must be supported by sufficient factual basis, and medical rationale for denying the claim (*Healing Hands Chiropractic, PC v Nationwide Assur. Co.* 5 Misc3d 975).

“Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity [*Tremont Medical Diagnostic, PC v Geico Insurance Co.* 13 Misc3d 131(A)].”

Ultimately, the determination is a question of fact to be determined by the court at trial based upon the testimony of expert witnesses and the court’s determination regarding the credibility of said testimony (*A-Quality Medical Supply v Geico General Ins. Co.* 39 Misc3d 24).

The court credits the testimony of Dr. Alexandre that the diagnostic testing was medically necessary, over the testimony of Dr. Ender, that it was not necessary. The court found that Dr. Alexandre's testimony was more detailed and fact specific. The court finds that Dr. Alexandre's testimony was based on specific factual context and medical rational, that the Assignor had been only partially responsive to treatment up to that date and that the tests would be useful in determining whether injections or surgery would be an appropriate course of treatment for Assignor. The court further notes Dr. Ender's focus on the fact that the treatment plan was not altered after the tests were conducted is not a proper basis to determine lack of medical necessity, as a determination of lack of medical necessity can not be made retrospectively (*Foster Diagnostic Imaging, PC v General Assur Co.* 10 Misc3d 428)

Based on the foregoing, the court finds that Defendant failed to establish a lack of medical necessity for the tests in question by a preponderance of credible evidence and that Plaintiff is entitled to a judgment in the amount of \$2,832.14 plus interest from October 19, 2010, along with attorneys fees, costs and disbursements.

This constitutes the decision and order of this court.

Dated: October 17, 2017
Bronx, New York

Hon. Sabrina B. Kraus
JCC

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