IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DENTON DAVIDSON, Plaintiff, v. TRAVELERS HOME AND MARINE INSURANCE COMPANY, Defendant.	))))))))	C.A. No.: 11C-01-008 FSS **(E-FILED)**

Submitted: September 8, 2011
Decided: December 30, 2011

ORDER

Upon Defendant's Motion for Partial Judgment on the Pleadings - ***GRANTED.***

This dispute stems from an automobile insurance carrier's refusal to pay $15,000 in alleged lost wages to its insured. When the insured called-in sick more than two months after an automobile collision, his employer fired him on the spot. After that, his doctor declared him disabled, and he was that way until a DME found him fit. So, the insured demanded that his PIP cover his lost wages for the 13 weeks between the day he was fired and when he was declared fit.

When the carrier refused to pay, the insured triggered an insurance arbitration proceeding, which ended in the carrier's favor. Now, the insured demands the lost wages previously denied by the carrier and the insurance arbitration. Not only that, the insured alleges bad faith, primarily because instead of responding directly to the insured's demand for coverage, the insurer scheduled the DME. The insured contends that the DME's scheduling was not a legally sufficient response to his demand. Hence, his bad faith claim.

I.

From the pleadings, it appears that on May 27, 2010, Plaintiff, Denton Davidson, was injured when another car crashed into his on I-95. Despite ongoing back pain, Davidson continued working as an electrician at Wilmington Electric. On August 3, 2010, at 4:41 a.m., Davidson sent Jim Malcolm, his boss, a text message stating, "Jim, I won't be in, sick." At 5:48 a.m., Mr. Malcom replied, "Don't come back. Your (sic) fired."

According to an affidavit from the employer, which is not referred to in the complaint, the employer was generally fed-up with Davidson's poor attendance and work. The employer also claimed that when it fired him, Davidson had three months left on the project he was working on. At this point, however, the cause for termination is an open question, and it must be assumed for now that he was fired

because he was medically unfit due to the earlier collision.

After he was fired, Davidson saw a specialist, Dr. Barry Bakst, who disabled him as of August 3, 2010. Davidson's lawyer later informed Davidson's insurance company, Travelers, that Davidson was fired due to back pain and asked what was needed to process his lost wages claim. Travelers responded that it needed employer verification. On August 11, 2010, Davidson's lawyer replied with a letter, including Davidson and Malcolm's August 3, 2010 text message exchange.

Significantly, for present purposes, Travelers did not respond directly to Davidson's letter. Instead, Travelers scheduled a defense medical examination for September 14, 2010. The record does not reveal exactly when Travelers scheduled the DME, but it is not alleged that the scheduling happened more than 30 days after Davidson's demand. The record also does not show when Davidson learned of the DME's scheduling. But, again, it is not alleged that 30 days elapsed between the demand and when Davidson learned that Travelers wanted a further examination before it decided whether to pay.

The DME found Davidson's injuries had "resolved." On October 4, 2010, Travelers issued a letter "denying any further Personal Injury Protection (PIP) benefits to [Davidson] with regard to the motor vehicle accident," as of October 11, 2010.

Meanwhile, on September 14, 2010, Davidson filed for insurance arbitration,[1] alleging Travelers had not responded to his lost wages claim within 30 days as required by 21 *Del. C.* § 2118B(c).[2] On November 22, 2010, the day before the arbitration hearing, Jim Brooks, Davidson's former Wilmington Electric co-worker, issued a letter verifying Davidson's dismissal due to back pain. That same day, Davidson's lawyer contacted Travelers and advised Davidson was "demanding immediate payment of his lost wages or he would seek bad faith damages for nonpayment."

On December 6, 2010, the arbitration panel found for Travelers, holding, "[Davidson] was fired before he was placed on total disability and that he was therefore unemployed at the time his physician disabled him." On January 4, 2011, Davidson appealed the arbitrator's decision. He demands statutory damages for the insurer's alleged failure to respond to his demand within 30 days.[3] He also claims, "The refusal to pay the expenses by Defendant is wrongful, unreasonable, in bad faith and in violation of 18 *Del. C.* § 2304."

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[1] *See* 21 *Del. C.* § 2118B(d).

[2] 21 *Del. C.* § 2118B(c) ("An insurer shall, no later than 30 days following receipt of written request for first-party benefits and documentation that the treatment or expense is compensable . . ., make payment, or [if denied], provide . . . written explanation.").

[3] 21 *Del. C.* § 2118(B)(b), (c).

On February 21, 2011, Travelers responded, denying it owed benefits. On April 18, 2011, Travelers filed this motion for partial judgment on the pleadings seeking dismissal of Davidson's bad faith claim. The court heard oral argument on September 8, 2011.

II.

In a Rule 12(c) motion for judgment on the pleadings, Travelers must show there are no genuine material issues of fact.[4] Davidson is entitled to the benefit of any inferences fairly drawn from his pleadings.[5]

An insurance company must "compensate injured persons for reasonable and necessary expenses incurred within 2 years from the date of the accident."[6] If an insurer fails to comply with § 2118B(b) or (c), a claimant may recover the amount due through a civil action or through a Delaware Insurance Commissioner's Arbitration Proceeding.

Davidson claims Travelers's acted in bad faith under 18 *Del. C.* § 2304. Section 2304, however, does not give Davidson a private cause of action.[7] The

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[4] *Gonzalez v. Apartment Communities Corp.,* 2006 WL 2905724 (Del. Super. Oct. 4, 2006) (Cooch, R.J.) (citing *Warner Comm. Inc v. Chris-Craft, Inc.,* 583 A.2d 962, 965 (Del. Ch. 1989).

[5] *Id.* (citing *Harman v. Masoneilan International, Inc.,* 442 A.2d 487, 489 (Del. 1982)).

[6] 21 *Del. C.* § 2118(a)(2)(a).

[7] *Yardley v. U.S. Healthcare, Inc.,* 698 A.2d 979, 988 (Del. Super. 1996) ("This Court has held that 18 *Del. C.* § 2301, et seq., especially § 2304[], does not provide a private cause of action.").

Unfair Trade Practices Act's purpose is to regulate trade practices in the insurance business.[8] Under the Act, only the Insurance Commissioner has authority to examine and investigate alleged bad faith acts[9] and file claims against "any such person [who] has been engag[ed] . . . in any unfair or deceptive act or practice, whether or not defined in § 2304."[10] The court assumes without deciding here, however, that an insurer's violation of the Act may be used as evidence of bad faith.

Attorney's fees may be awarded if it is found the insurer acted in bad faith. The claimant bears the burden of proving bad faith.[11] Not every insurer's refusal to pay a claim constitutes a breach, much less bad faith.[12] Bad faith occurs when the insurer's refusal was "clearly without reasonable justification."[13] "The ultimate question is whether at the time the insurer denied liability, there existed a set of facts or circumstances known to the insurer which created a bona fide dispute and therefore a meritorious defense to the insurer's liability."[14]

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[8] 18 *Del. C.* § 2301(a). *See also Moses v. State Farm Ins. Co.,* 1991 WL 269886, at *4 (Del. Super. Nov. 20, 1991) (Lee, J.) ("[T]he purpose of the [Unfair Trade Practices] Act was to regulate trade practices in the insurance industry, not to protect a specific class of persons.").

[9] 18 *Del. C.* § 2306.

[10] 18 *Del. C.* § 2307(a).

[11] 21 *Del. C.* § 2118B(d).

[12] *Casson v. Nationwide Ins. Co.,* 455 A.2d 361, 365 (Del. Super. 1982).

[13] *Id.* at 369.

[14] *Id.*

III.

As to Davidson's complaint that Travelers violated 21 *Del. C.* § 2118B(c) and it acted in bad faith because, as presented above, it failed to respond to his lost wages claim within 30 days. Davidson was placed out of work as of August 3, 2010, and immediately contacted Travelers about his benefits. Travelers responded, requiring documentation to process his claim.[15] Davidson submitted the documentation on August 11, 2010. Travelers responded to Davidson's request by setting up a DME. Davidson filed an insurance arbitration appeal "because Travelers failed to respond to his claim for lost wages."

Although Davidson did not receive a direct denial including its reasons, Travelers did not do the wrong that the statute addresses. It did not ignore its insured's demand, nor did it leave him wondering. From the pleadings, it appears that Travelers promptly set-up a DME and it told Davison. The unmistakable import of Travelers's setting up a DME was that it questioned the extent or cause of Davidson's injuries. Thus, in effect, Davidson was legally on notice that the claim was being denied pending a DME meant to confirm or refute the claim's medical justification.

Taking Davidson's complaint, apart from its conclusions, as true, there is no reason to make Travelers pay the statutory penalty. That holding also knocks-

[15] *See* 21 *Del. C.* § 2118B(c) ("Insurer [must receive] . . . documentation that the treatment or expense is compensable pursuant to § 2118(a) of this title.").

out Davidson's bad faith claim to the extent it relies on Travelers's alleged failure to respond within 30 days. That allegation is flat on its face.

The rest of Davidson's bad faith claim fails because it is conclusory and not sustainable. Davidson claims the text message exchange "verifies [he] was fired for missing work because of his back pain." True. At minimum, however, the text messages provide reason for setting up a DME to determine the extent of Davidson's residual injury more than two months earlier.

The arbitration panel's decision also helps make Travelers's argument that it reasonably denied Davidson's request. The panel concluded Davidson was fired before Dr. Bakst disabled him, and it did not award lost wages. While the panel's decision is appealable, it speaks to the idea that Travelers acted reasonably when it denied Davidson's benefits. In other words, if the neutral arbitration panel, after considering the same evidence, found for Travelers, a jury, *a fortiori*, cannot find Travelers acted in bad faith by denying the claim. In the end, it may be that Travelers and the panel were wrong. It cannot be said that the carrier's view, which was consistent with the panel's, is bad faith.

Most importantly for the motion's purposes, when the complaint is read closely, it does not appear that it alleges a bad faith claim upon which relief can be granted. Taking what had been presented to Travelers when it set-up the DME, e.g.

Davidson had worked for over two months and he saw the doctor only after having been fired, and what happened after that, e.g. the insurance arbitration panel sided with Travelers, no juror could conclude that Travelers denied coverage in bad faith. Again, the court emphasizes the difference between a wrongful denial of benefits and a denial made in bad faith.

IV.

For the foregoing reasons, Travelers's motion for partial judgment on the pleadings on Davidson's bad faith claim is **GRANTED.**

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
pc: Gary H. Kaplan, Esquire
Samuel D. Pratcher, III, Esquire
Robert J. Leoni, Esquire