Bernhard J. Sengstock, DC, PC v Travelers Home & Mar. Ins. Co.

2017 NY Slip Op 32204(U)

October 19, 2017

Civil Court of the City of New York, Bronx County

Docket Number: CV-702131/15

Judge: Sabrina B. Kraus

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This opinion is uncorrected and not selected for official publication.

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART 15

____X

BERNHARD J. SENGSTOCK, DC, PC as assignee of JUDE NEWTON

Plaintiff,

-against-

TRAVELERS HOME AND MARINE INSURANCE COMPANY

Defendant

____X

DECISION & ORDER

Index No.: CV-702131/15

HON. SABRINA B. KRAUS

PROCEDURAL HISTORY

Plaintiff commenced this action to recover assigned first-party no fault benefits, pursuant to a summons and complaint filed March 10, 2015.

Defendant appeared, by counsel, and filed an answer with discovery demands on April 20, 2016.

On November 19, 2015, Plaintiff moved for an order striking Defendant's answer pursuant to CPLR §2106. On July 6, 2016, the motion was withdrawn.

Notice of Trial was filed on November 23, 2015.

Trial was initially scheduled for April 27, 2016, and was adjourned, by the parties, over three dates to October 19, 2017.

On October 19, 2017, the court held a bench trial and reserved decision.

TRIAL

The parties stipulated to the elements of each *prima facie* case, and to the expertise of the Doctor who testified for Defendant at trial. Parties further stipulated that two of the denials were untimely and that the amount in controversy was $5208.43.

DOCUMENTS STIPULATED INTO EVIDENCE

The parties stipulated to the admission of the following documents in evidence:

Exhibit 1- Denial of Claim Form

Exhibit 2 - July 11, 2013 ICE of Ariel Goldin

Exhibit 3 - Verification of Treatment Form

Exhibit 4 - Document from Stand Up MRI

FACTS BASED ON A REVIEW OF THE DOCUMENTS STIPULATED INTO EVIDENCE

Jude Newton (Assignor) was a pedestrian injured by a motor vehicle in an accident on March 23, 2013. The car hit her left hip, her back and she landed on the ground on her right side. Assignor was injured in her lower back, but did not lose consciousness or suffer from lacerations. She was taken by ambulance to the emergency room, where x-rays were taken of her back and pelvis, and she was released the same day.

Afterwards she received physical therapy, chiropractic care , and medical supplies including a Transcutaneous Electrical Nerve Stimulation (TENS) Unit.

On April 26, 2013, Assignor has an MRI of her lumbar spine which revealed a compression fracture.

On July 11, 2013, an ICE was conducted by Defendant's Chiropractor, Dr. Ariel Goldin.

At that time, she was receiving physical therapy three times per week. At the time of the ICE, Assignor complained of pain in her lower back.

Dr. Goldin reviewed Assignor's MRI records.

Dr. Goldin performed an examination of Assignor's cervical spine, thoracic spine, and lumbar spine.

Assignor advised that as of the time of the ICE she was not receiving chiropractic treatment, and that she had been advised by her orthopedist not to receive chiropractic treatment because of her fracture.

Based on the records reviewed, and his examination Dr. Goldin concluded that as of July 11, 2013, no further chiropractic treatment was necessary.

Notwithstanding said determination, Assignor received chiropractic treatment from Dr. Bernhard Sengstock, from December 5, 2013 through May 5, 2014. The charges were primarily for chiropractic manipulation and electrical stimulation, but also included a charge for $1700.64 for EMG/NCV testing on April 4, 2014.

TESTIMONY OF DR. ARIEL E. GOLDIN

Dr. Goldin was called by the Defendant to testify. Dr. Goldin is a Chiropractor and is also licensed in acupuncture. In addition to a private practice, Dr. Goldinn conducts ICEs and Peer Reviews for insurance companies.

Dr. Goldin testified that a chiropractor is appropriate when a patient needs manipulation, and that while a chiropractor may perform adjunct services like massage or electrical stimulation, these would only be appropriately performed by the Chiropractor in connection with manipulation.

Dr. Goldin testified that manipulation would be inappropriate for Assignor based on the physical exam he conducted and Assignor's fracture, and that the services rendered were not chiropractically necessary. All chiropractic treatment should have been suspended and the appropriate physician to be treating Assignor was an orthopedist.

The court found Dr. Goldin's testimony to be credible.

Plaintiff called no witness in rebuttal.

DISCUSSION

The issue before the court is whether the chiropractic treatment subsequent to the ICE was medically necessary.

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)."

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).

If Defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, than the burden would shifts to Plaintiff to 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).

Defendant must establish a factual basis and a medical rationale to support its claim of lack of medical necessity (*Nir v Allstate Insurance Company* 7 Misc3d 544).

To sustain a defense of lack of medical necessity, Defendant must also show that the services were inconsistent with generally accepted medical/professional practices, an expert opinion alone is insufficient to carry the burden [(*A.R. Med. Art, P.C. v State Farm Mut. Auto. Ins. Co.* 11 Misc3d 1057(A)].

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Education Law §6551(1) provides:

> The practice of the profession of chiropractic is defined as detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations in the human body for the purpose of removing nerve interference and the effects thereof where such interference is the result of or related to distortion, misalignment or subluxation of or in the vertebral column.

In New York chiropractic care is not considered medicine, nor is a chiropractor a physician [*Willets Point Chiropractic PC v Allstate Insurance* 36 Misc3d 1235(A)].

12 NYCRR § 346.1 provides

> When care is required for a compensable injury, an injured employee may select to treat him or her any duly registered and licensed chiropractor authorized by the chair to render chiropractic care only if said injury consists solely of a condition which may lawfully be treated by a chiropractor as defined in section 6551 of the Education Law. If the injury does not consist solely of a condition which may lawfully be treated by a chiropractor or consists of multiple conditions, any one of which is outside the limits prescribed by the Education Law for chiropractic care and treatment, the chiropractor may not initially treat such employee for any condition but must so advise the injured employee and instruct him or her to consult a physician of the employee's choice for appropriate care and treatment. Such physician shall supervise the treatment of said condition, including the future treatment to be administered to the patient by the chiropractor.

(N.Y. Comp. Codes R. & Regs. tit. 12, § 346.1).

These statutory provisions support Dr. Goldin's testimony that the treatments at issue were not chiropractically necessary under the No Fault Laws. The court finds that Defendant met its burden in establishing lack of medical necessity and that Plaintiff failed to rebut same. Plaintiff has not shown that Assignor's injuries could not and should not have been treated by an orthopedist.

This holding extends to the $1700 charge for testing, as Defendant established that it was not medically necessary for Assignor to be under the care of a chiropractor based on the fracture. Additionally such tests are diagnostic in nature, and the court notes that Chiropractors are not

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authorized by law in New York to diagnose or treat patients for disease (*Riddett v Allen* 23 AD2d 458).

Based on the foregoing, the action is dismissed.

This constitutes the decision and order of this court.

Dated: October 19, 2017
Bronx, New York

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Hon. Sabrina B. Kraus
JCC

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