IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Upper Bucks Orthopedic Associates, Petitioner	:	
	:	
v.	:	No. 2218 C.D. 2007
	:	
Insurance Commissioner of the Commonwealth of Pennsylvania, Respondent	:	Argued: June 11, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: August 18, 2008**

Upper Bucks Orthopedic Associates (Provider) filed a Petition for Review of the Adjudication and Order of the Insurance Commissioner of the Commonwealth of Pennsylvania (Commissioner) affirming the decision of the Insurance Department, Medical Care Availability and Reduction of Error (MCARE) Fund (Department), to

deny defense and first-dollar indemnity insurance coverage under Section 715 of the MCARE Act,[1] 40 P.S. §1303.715(a), to Provider in connection with a medical malpractice lawsuit that was filed against it. The lawsuit regarded treatment performed by one of Provider's physicians, Dr. Ernest E. Cope, III. In a companion case, this Court addressed Dr. Cope's Petition for Review of the Adjudication and Order of the Commissioner, which affirmed the decision of the Insurance Department based on the same facts and arguments, but focused only on Dr. Cope and not on Provider, the practice for whom Dr. Cope provided medical services. Ernest E. Cope, M.D. v. Insurance Commissioner, ___ A.2d ___, No. 2217 C.D. 2007 (Pa. Cmwlth. Aug. 18, 2008).

We first briefly summarize Section 715 of the MCARE Act. Section 715 provides an exception to the Department's general role as a secondary insurer, requiring the Department to act as a primary insurer and provide first-dollar indemnity and defense to health care providers for eligible claims. In order to be eligible for coverage, Section 715 requires that the claim be made against an eligible health care provider more than four years after the alleged malpractice occurred, and filed within the applicable statute of limitations. Additionally, the Department must receive a written request for Section 715 coverage within 180 days of a health care provider's first notice of the claim. At issue here is whether Provider had notice of the claim for purposes of Section 715 when it received a writ of summons that contained no factual information.

[1] Act of March 20, 2002, P.L. 154, No. 13, as amended, 40 P.S. §§ 1303.101 – 1303.1115.

The facts of the present case are identical to those found by the Commissioner in Cope, although the Commissioner issued a separate Adjudication and Order (A & O) on November 5, 2007.[2] As in Cope, Provider was a licensed health care provider in Pennsylvania and a participating health care provider in the Medical Professional Liability Catastrophe Loss Fund (CAT Fund) and its successor, the MCARE Fund.[3] (Joint Stipulation of Facts before the Insurance Commissioner (Stipulation) ¶ 1.) Provider was subject to the provisions of the Health Care Services Malpractice Act[4] and the MCARE Act. (Stipulation ¶ 1.) On May 24, 2004, a Praecipe for Writ of Summons (Summons) was filed in the Court of Common Pleas of Bucks County captioned "Morton Kayser v. Ernest E. Cope, III, M.D. and Upper Bucks Orthopedic Associates, Docket No. 0403364-29-2." (Kayser Case), which is the same Summons at issue in Cope. The writ of summons was served on Provider on May 25, 2004. (Stipulation ¶ 3.) On June 17, 2004, an Amended Praecipe for Writ of Summons (Amended Summons) was filed in the Kayser Case, adding Joanne Kayser as a plaintiff. (Amended Summons dated June 17, 2004, Exhibit 2 to Stipulation.) The Amended Summons was served on Provider on June 22, 2004. (Stipulation ¶ 5.) The Amended Summons stated in its entirety the following:

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[2] The parties in the present appeal filed a Joint Stipulation of Facts, which resolved all factual issues and was submitted in lieu of a hearing. (A & O at 2.)

[3] "The MCARE fund assumed [the CAT Fund's] money, rights, liabilities and obligations. See Section 712(b) of the MCARE Act, 40 P.S. §1303.712(b)." Allen v. Insurance Department, 903 A.2d 65, 66 n.2 (Pa. Cmwlth. 2006).

[4] Act of October 15, 1975, P.L. 390, No. 111 (Act 111), as amended, 40 P.S. §§ 1301.101 – 1303.1116 (superseded.)

To: Ernest E. Cope, III, M.D. and Upper Bucks Orthopedic Associates

You are notified that the above-named plaintiff(s) has/have commenced an action against you.[5]

(Amended Summons.) The Commissioner stated that "[a]s is customary for writs of summons, neither the original writ nor the amended writ contained details about the Kayser claim." (A & O at 6.) Approximately nineteen months later, the Kaysers filed and served a Civil-Action Complaint (Exhibit 3 to Stipulation (Complaint)) in the Kayser Case on January 27, 2006. (Stipulation ¶ 6.) Provider received, by mail, a copy of the Complaint on February 1, 2006. (Stipulation ¶ 7.) The Complaint contained factual allegations of Provider's alleged professional negligence and specified that the claims against it were for medical malpractice, lack of informed consent, and loss of consortium. The parties to the present appeal stipulated that the starting date of the alleged malpractice by Provider was April 24, 2000 and the ending date was June 22, 2000. (Stipulation ¶ 9.)

On February 13, 2006, the Department received a MCARE claim reporting form (MCARE Fund Claim Report by Insurer or Self-Insurer (C-416), Exhibit 4 to Stipulation) from Provider requesting Section 715 coverage for the Kayser Case. (Stipulation ¶ 8.) Provider noted on the C-416 both the dates of receipt of the Amended Summons and the Complaint. As in Cope, the Department denied Section

[5] Pennsylvania Rule of Civil Procedure No. 1351 requires that a writ of summons include the county the action is brought in, a caption, language similar to that contained in the Summons in this case, and a dated signature line for the Prothonotary and clerk, with room for the Seal of the Court.

715 coverage to Provider for the Kayser Case on the basis that Provider had not notified it of the claim in the timeframe required by Section 715. (Letter to Provider from MCARE Fund Claims Manager Carole Z. Strickland, dated February 23, 2006, Exhibit 5 to Stipulation.) In determining whether Provider timely made its written request for Section 715 coverage, the Department considered Provider's first notice of the claim to be the date Provider was served with the Amended Summons in June 2004, rather than the date Provider received the Complaint in February 2006. Provider timely appealed the Department's denial of Section 715 coverage. The Commissioner appointed the same presiding officer as in Cope, who similarly directed the parties to file a joint stipulation of facts by June 30, 2006.

On November 5, 2007, the Commissioner issued his A & O affirming the Department's determination to deny benefits to Provider for the same reasons as in Cope.[6] The Commissioner found that Provider was aware that the Amended Summons was a claim for professional liability since it notified its primary medical malpractice carrier one day after being served with the Amended Summons, and the Amended Summons named as defendants only Provider and Dr. Cope.[7] (A & O at 10.) The Commissioner further determined that Provider should have notified the Department of the claim when it received the Amended Summons, since the language of Section 715 requires a provider "to report the claim to Mcare promptly after

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[6] This case was adjudicated concurrently with Ernest E. Cope, M.D. v. Insurance Commissioner, ___ A.2d ___, No. 2217 C.D. 2007 (Pa. Cmwlth. Aug. 18, 2008). (A & O at 2.)

[7] We believe that the references to "the writ of summons" made throughout the Commissioner's A & O and the Department's Brief refer to the Amended Summons, since the date of the Amended Summons was used by the Department to deny Section 715 coverage to Provider.

receiving first notice of a claim for professional liability." (A & O at 11.) The Commissioner also noted that the reporting period allows a provider to confirm that Section 715 applies by reviewing the plaintiff's medical records, pursuing discovery, or obtaining a rule upon the plaintiff to file a complaint.[8] (A & O at 13.) Thus, the Commissioner concluded that the Department did not receive a written request for Section 715 benefits within 180 days from when notice of the claim was first given to Provider. (A & O at 13.)

On appeal, Provider raises the same arguments raised by Dr. Cope in his appeal: that the Commissioner erred as a matter of law in finding that a medical provider's 180-day statutory time period to request Section 715 benefits begins to run upon service of a bare writ of summons; and that there is no substantial evidence in the record to enable the Commissioner to find that Provider knew that Kayser's claim was for medical malpractice at the time it was served with the Amended Summons.

In Cope, we held that the 180-day reporting period under Section 715 does not begin to run until a health care provider receives notice that a claim asserted against him is eligible for Section 715 coverage, and that the bare writ of summons received in that case does not, by itself, provide such notice. Accordingly, we reversed the Commissioner's decision that essentially concluded otherwise. Because the facts in this case are the same as in Cope, and the arguments raised by the parties in this case are the same as those raised in Cope, we rely on our Cope decision and reverse the

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[8] Pennsylvania Rule of Civil Procedure No. 1037(a) provides, in relevant part: "If an action is not commenced by a complaint, the prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint."

order of the Commissioner in the present case for the same reasons we set forth in Cope.

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RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Upper Bucks Orthopedic Associates, Petitioner	:	
	:	
v.	:	No. 2218 C.D. 2007
	:	
Insurance Commissioner of the Commonwealth of Pennsylvania, Respondent	:	

O R D E R

NOW, August 18, 2008, the order of the Insurance Commissioner of the Commonwealth of Pennsylvania in the above-captioned matter is hereby **REVERSED**.

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RENÉE COHN JUBELIRER, Judge

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Upper Bucks Orthopedic Associates,	:
Petitioner	:
	:
v.	: No. 2218 C.D. 2007
	: Argued: June 11, 2008
Insurance Commissioner of the	:
Commonwealth of Pennsylvania,	:
Respondent	:

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
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HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: August 18, 2008

I respectfully dissent for the same reasons set forth in my dissenting opinion in *Ernest E. Cope, M.D. v. Insurance Commissioner of the Commonwealth of Pennsylvania*, No. 2217 C.D. 2007.

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DAN PELLEGRINI, JUDGE

Judge Simpson joins in this dissenting opinion.

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OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE SIMPSON **FILED: August 18, 2008**

I respectfully dissent for the same reasons set forth in my dissenting opinion in Ernest E. Cope, M.D. v. Insurance Commissioner of the Commonwealth of Pennsylvania, ___ A.2d ___ (Pa. Cmwlth.) (Filed August 18, 2008, No. 2217 C.D. 2007).

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ROBERT SIMPSON, Judge

Judge Pellegrini joins in this dissent.