IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

GARY H. DIBLASIO, M.D., P.A.
(a/a/o Cheryl Baumann)

Appellant,

v

PROGRESSIVE EXPRESS
INSURANCE COMPANY,

Appellee.

_____/

APPELLATE DIVISION (CIVIL)
CASE NO.: 502006AP000001XXXXMB
L.T.: 502004SC007775XXXXSBRD
Division: 'AY'

Opinion filed: AUG 13 2007

Appeal from the County Court in and for Palm Beach County, Florida Judge Debra Moses Stephens.

For Appellant: Douglas H. Stein, Esq., 4300 Bank of America Tower, 100 Southeast Second St., Miami, FL 33131 and Joseph G. Murasko, Esq., 884 U.S. Highway One, North Palm Beach, FL 33408.

For Appellee: Glenn E. Siegel, Esq., 4800 N. Federal Highway, Suite 101E, Boca Raton, FL. 33431 and Joseph R. Littman, Esq. 4800 N. Federal Highway, Suite 101E, Boca Raton, FL 33431.

Affirmed in part; reversed and remanded in part.

Progressive Express Insurance Company ("Progressive") appeals a final judgment entered in favor of Gary H. DiBlasio, M.D., P.A. ("DiBlasio"). The final judgment incorporated two summary judgments. We find the trial court's reading of the Physician's Current Procedural Terminology ("CPT") to be proper and affirm as to the first summary judgment order pertaining to March 4, 2004 claims. We disagree on the exclusion of Progressive's physician affidavit, and therefore reverse and remand as to the second summary judgment order.

BACKGROUND

The following facts in this case are undisputed. On January 25, 2004, Cheryl Baumann sustained injuries to her neck and lower back in a car accident. She was insured by Progressive for Florida No-Fault Motor Vehicle insurance benefits. DiBlasio provided medical services to Ms. Baumann from March 4, 2004 to June 17, 2004. Ms. Baumann executed an assignment of benefits to DiBlasio under her insurance coverage with Progressive. DiBlasio timely filed separate claims with Progressive after each patient visit. In total, DiBlasio billed $1,795.00. Of that amount, Progressive paid DiBlasio a total of $788.00 plus 55.32 in interest. In this action, DiBlasio seeks the remainder of the balance against Progressive pursuant to §627.736(4)(b), Fla. Stat. (2004), based on its alleged non-payment of benefits due to him.

Two primary issues arose in this appeal. First, did the trial court err in interpreting a CPT provision as a matter of law? Second, should Progressive's physician affidavit and peer review have been excluded as being untimely and as a position inconsistent with deposition testimony? The standard of review of an order granting final summary judgment is ***de novo. Volusia County v. Aberdeen at Ormond Beach, L.P.,*** 760 So. 2d 126, 130 (Fla. 2000).

ANALYSIS

I. Meaning of the CPT Code provision

Florida's PIP Statute, § 627.736, dictates that PIP claims follow the Physician's Current Procedural Terminology ("CPT")[1] guidelines. Essentially, the CPT is a common billing reference for insurers and providers, enabling both parties to classify, bill for, and pay various medical services accurately and in compliance with the guidelines. Providers identify each medical procedure they perform for each patient by assigning a pre-determined "code" number

[1] The statute also lists the Healthcare Correct Procedural Coding System or ICD-9 as other options for billing. § 627.736 (5)(d), **Fla. Stat. (2004).**

to the procedure. At the heart of DiBlasio's first summary judgment motion is the meaning of a CPT provision. The trial court's ruling was based on two relevant portions of the CPT. First was the CPT's description of billing code "99245", which provides:

> Office consultation for a new or established patient which requires three key components:
>
> -A comprehensive history
> -A comprehensive examination; and
> -Medical decision making of high complexity.
>
> Counseling and/or coordination for care with other providers or agencies are provided consistent with nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate to high severity. Physicians typically spend 80 minutes face-to-face with the patient and/or family.

The second provision, located under the heading, "Levels of E/M [Evaluation and Management] Services," states:

> The actual performance and/or interpretation of diagnostic tests/studies ordered during a patient encounter are not included in the levels of E/M services. Physician performance of diagnostic tests/studies for which specific CPT codes are available may be reported separately, in addition to the appropriate E/M code. The physician's interpretation of the results of diagnostic testslstudies (ie, professional component) with preparation of a separate distinctly identifiable signed written report may also be reported separately, using the appropriate CPT code with the modifier '-26' appended.

The parties dispute the meaning of the first sentence, which states that "[t]he actual performance and/or interpretation of diagnostic tests/studies ordered during a patient encounter are not included in the levels of E/M services." According to DiBlasio, the paragraph, when read as a whole, clearly allows for interpretations of test results to be billed separately, with a -26 modifier. According to Progressive, the first sentence requires the test interpretation to be made ***by the same physician who originally ordered if,*** in order to bill for that interpretation. The trial court, agreeing with DiBlasio, and in reading the two CPT provisions together, found as a matter

of law that the provisions clearly provided for the interpretation of diagnostic tests to be a separate charge, and not "bundled" within the 99245 billing code.

On appeal, Progressive sets forth two grounds on which the trial court impermissibly entered summary judgment. First, the interpretation of the CPT provision was subject to conflicting inferences, thereby precluding summary judgment on an issue of fact. Second, the trial judge failed to weigh the affidavit of Dr. Zeide, Progressive's expert, in determining the meaning of the CPT provisions. Because Dr. Zeide's affidavit created a question of fact, summary judgment was precluded. We find both arguments to be lacking in merit.

Florida's PIP statute states: "In determining compliance with applicable CPT and HCPCS coding, guidance shall be provided by the Physicians' Current Procedural Terminology (CPT) …and other **authoritative treatises** designated by the Agency for Health Care Administration" (emphasis added). §627.736(5)(d), Fla. Stat. (2004). Progressive argues the trial court erred in following statutory construction principles, because the legislature refers to the CPT as an "authoritative treatise," and by definition, a treatise is not law.

Case law pertaining to CPT interpretation is not yet well defined. In Advanced Diagnostic Testing, Inc. v. *Allstate* Insurance *Company*, No. 2002-4740-SP-05, 2003 WL 23868672 (___Fla.Cir.Ct. 2003), plaintiff medical provider submitted a claim pursuant to the relevant CPT code for a diagnostic MRI. Defendant Allstate applied its interpretation of the newly enacted MRI fee schedule pursuant to Florida Statute 627.736(5)(b)(5), which was in conflict with plaintiffs interpretation. The dispute in that CPT code concerned the sentence: "...of the allowable amount under Medicare Part B...," where it was unclear as to whether it referred to Medicare's "participating fee schedule" or "limiting charge." The court found that *an* issue *of* statutory construction *was* raised, to be decided as a matter of law. Id, at 2.

Guidance fiom other jurisdictions points us to the same result. For example, California's Medi-Cal regulations also incorporate the CPT guidelines. In Family Planning Associates Medical Group, Inc. v. Belshe, 62 Cal.App.4th 999, 1008 (Cal.App. 2 Dist. 1998), the court resolved a CPT interpretation issue by determining that in reading "every part of the CPT Guidelines to harmonize the entire scheme," the administrative agency's interpretation was reasonable and not arbitrary. Similarly, a Montana court upheld an administrative agency's CPT interpretation where it was reasonable and not inconsistent with the spirit of the rule. Kirchner *v.* State Dept, *Of Public* Health and Human Services, 328 Mont. 203, 119 P.3d 82, Med & Med GD (CCH) P 301,678,2005 MT 202, Mont., August 16,2005 (No. 04-579).

Although Progressive is correct in that a treatise is not law, it appears that when statutes contemplate these authoritative writings as guidelines, Florida follows statutory construction principles with the end-goal of bridging legislative intent. The trial court below found a clear and unambiguous reading of the CPT provisions in question. The 99245 billing code specifically lists as part of its "bundle": (1) a comprehensive history; (2) a comprehensive examination; and (3) highly complex medical decision-making. A second, completely separate provision of the CPT speaks specifically of separate billing for interpretation of diagnostic tests, implying that interpretation of diagnostic tests was not intended to be included in the 99245 billing code bundle. A basic principle of statutory construction is that courts are not at liberty to add words to statutes that were not placed there by the Legislature. *Seagrave v.* State, 802 So. 2d 281, 287 (Fla. 2001). The trial court properly declined to add diagnostic test interpretation to the 99245 billing code, where that service was already clearly contemplated in a different billing provision. In reviewing the two CPT provisions in question, we agree with the trial court's clear and unambiguous reading of the CPT.

Progressive also introduced Dr. Zeide's affidavit, whose peer opinion states that DiBlasio's billing practices were unreasonable and constituted impermissible unbundling. Dr. Zeide's affidavit, according to Progressive, creates a genuine issue of material fact because it contradicts those of the other physicians and, furthermore, it conveys his expert opinion on the CPT. We disagree. In ***Devin v. City of Hollywood,*** *351* So.2d. 1022 (Fla. 4th DCA 1976), the Fourth District Court of Appeal held that the trial court erred in relying upon expert testimony to determine the meaning of terms which were questions of law to be decided by the trial court. The Second District Court of Appeal followed in ***Seibert v. Bayport Beach and Tennis Club Association, Inc.,*** holding that an expert should not be allowed to testify concerning questions of law, and the interpretation of a building code presented a question of law. 573 So.2d 889 (Fla. 2d DCA 1990). In fact, the court held, it was the duty of the trial judge to interpret the meaning of the code and resolution of any conflicts in interpretation was not a jury issue. ***Id.*** Furthermore, we do not find evidence that Dr. Zeide is an expert for the purposes of interpreting a CPT Code provision. Therefore, Progressive's argument that Dr. Zeide's affidavit creates a genuine issue of material fact that precludes summary judgment is without merit.

In addition to the foregoing legal analysis, we find factual support for affirming the trial court's reading of the CPT. First, billing records show that Progressive once paid for the same service it now denies. On April 12, 2004, DiBlasio submitted an identical claim with a -26 modifier for the review and re-read of a previously taken test film. The same claims with a -26 modifier were submitted on March 4, 2004 and denied. By paying the April 12, 2004 claim, Progressive, at least on one separate occasion, approved the reviewhe-read line item as a separate and distinct charge. It is unclear to us why Progressive approved test re-reads on April 12, 2004, but not on March 4, 2004. Second, DiBlasio offers a compelling cost-savings policy

argument to which we agree with the trial court. Assuming, *arguendo*, DiBlasio was to conform to Progressive's bundled reading of the CPT, patients would no longer receive the benefit of re-using previously-taken test x-rays and films. Since Progressive's stance is to allow test reading/interpretation charges only when it comes from the same physician who ordered them, physicians would likely order an entirely new set of x-rays and films for the time and expertise involved in re-reads and interpretation. DiBlasio estimated a $100.00-$400.00 cost to his patients for re-ordering a new set of tests, compared to the $50.00-$75.00 he billed for re-reading tests which were functional, but ordered by another doctor. Progressive's position, therefore, is inconsistent both in practice and in policy.

II. Admissibility of Physician's Affidavit and Peer Review

Progressive's claims adjuster, Miriam Jimenez, confirmed in deposition that she used Mitchell's medical billing analysis system to apply reductions to DiBlasio's claims (Jimenez authorized $93.00 for office visits billed at $220.00). Progressive then offered the affidavit of Dr. Zeide, attesting to the unreasonableness of DiBlasio's bills. As a result, DiBlasio challenged the admissibility of Dr. Zeide's affidavit and Peer Review report on the following three grounds. First, Dr. Zeide's affidavit and report are untimely because they were filed one year after he sent his bills to Progressive, and cannot be introduced today merely for litigation purposes. Second, since Ms. Jimenez's basis for reducing the bills was Mitchell's system, he argues. that Progressive impermissibly altered its position from previous pleadings by later relying on Dr. Zeide's affidavit and Peer Review report. Third, Dr. Zeide's affidavit was insufficient pursuant to § 627.736(7). We find DiBlasio's arguments to be misplaced, and therefore reverse as to the admissibility of Dr. Zeide's affidavit on the issues of timeliness, conflict and sufficiency.

Timeliness

Florida law is clear that the insurer may defend itself even after the 30-day statutory payment period has expired. Section 627.736(4)(b) (2004) provides in relevant part:

> This paragraph does not preclude or limit the ability of the insurer to assert that the claim was unrelated, was not medically necessary, or was unreasonable or that the amount of the charge was in excess of that permitted under, or in violation of, subsection (5). Such assertion by the insurer ***may be made at any time, including after payment of the claim or after the 30-day time period for payment set forth in this paragraph*** (emphasis added).

In ***United Automobile Insurance Co.,*** v. ***Rodriguez,*** 808 So. 2d 82 (Fla. 2002), a significant case in Florida PIP law, the Supreme Court held that under "the language of the Florida No-Fault law, an insurer is subject to specific penalties once a payment becomes 'overdue'; the penalties include ten percent interest and attorneys' fees. The insurer, however, is not forever barred from contesting the claim." *Id.* at 87. ***Rodriguez*** made clear that even when a claim reaches "overdue" status, the defense still remains. Therefore, Dr. Zeide's affidavit and Peer Review are not statutorily time-barred.

Conflict

In Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc., 902 So. 2d 901 (Fla. 4th DCA 2005), the trial court was found to be in error when it struck two witness affidavits. The Appellate Court held that the affidavits did not contradict the deposition testimony of the witnesses, but rather, when viewed in the light most favorable to appellant, constituted sufficient evidence of damages to support its claim as a matter of law. ***Id.*** at 902. In the case at bar, Progressive argues that the trial court similarly erred in striking Dr. Zeide's affidavit, because it is being introduced alongside with, and not in contradiction to, the testimony of Ms. Jimenez.

Florida Rules of Civil Procedure 1.510 provides that:

> Summary judgment may be granted if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show

> that there is no genuine issue as to any material fact and that the moving part is entitled to judgment as a matter of law.

The party moving for summary judgment has the burden to prove the absence of any genuine issue of material fact. ***Holl v. Talcott,*** 191 So. 2d 40, 43 (Fla. 1996). The trial court should not enter summary judgment unless the facts are so crystallized that nothing remains but questions of law. ***Id.*** The Court must draw every possible inference in favor of the party against whom a summary judgment is sought. ***Gonzalez v.*** B ***& B Cash Grocery Stores,*** 692 So. 2d 297 (Fla. 4th DCA 1997).

When viewed in the light most favorable to Progressive, the non-moving party, we find that the deposition testimony of Ms. Jimenez can be read together with Dr. Zeide's affidavit, where both stand for the proposition that Dr. DiBlasio's charges are not reasonable. Therefore, the affidavit creates an issue of fact precluding summary judgment.

We recognize that the admission of evidence is generally within the sound discretion of the trial court, ***Stewart & Stevenson Servs., Inc. v. Westchester Fire Ins. Co.,*** 804 So. 2d 485, 587 (Fla. 5th DCA 2002). A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion, ***Blanco v. State,*** 452 So. 2d 520 (Fla. 1984). Although the exclusion of Dr. Zeide's affidavit was not an abuse of discretion per se, ***Rodriguez*** compels us to reverse where Progressive's defenses as to reasonableness, relatedness and necessity have not been time-barred by §627.736(4)(b), Fla. Stat. (2004).

Sufficiency

DiBlasio also argues against the sufficiency of Dr. Zeide's affidavit by citing § 627.736(7), Fla. Stat. (2004), which provides:

> An insurer may not **withdraw** payment of a treating physician without the consent of the injured person covered by the personal injury protection, unless the insurer first obtains a valid report by a Florida physician licensed under the same

> chapter as the treating physician whose treatment authorization is sought to be withdrawn, stating that treatment was not reasonable, related, or necessary. A valid report is one that is prepared and signed by the physician examining the injured person **or reviewing the treatment records of the injured person and is factually supported by the examination and treatment records** if reviewed and that has not been modified by anyone other than the physician (emphasis added).

In opposition, Progressive argues that §627.736(7) does not apply to *reductions* in benefits, as was the case with DiBlasio's claims, because the statute specifically uses the term "withdraw." We agree.

In *Allstate* Indemnity Co. v. *Derius*, the Fourth District Court of Appeal answered a certified question of great public importance.

> We do not interpret section 627.736(7)(a), Florida Statutes (1999), as requiring a written report as a condition precedent to **reducing** payment of a bill for treatment on the grounds of reasonableness, necessity or relatedness. We distinguish this case from United Auto. Ins. v. Viles, 726 So. 2d 320 (Fla. 3d DCA 1998), because in that case the insurer **withdrew** all payments for treatment as fraudulent...in the instant case, we deal only with the **reduction** of a physician's bill.

773 So. 2d 1190 (Fla. 4th DCA 2000)(emphasis added). In Rodriguez, the Supreme Court specifically distinguishes the term "withdrawal." The Court noted that a medical report is not required for § 627.736(4), but it is required for "the non-consensual *withdrawal* of PIP benefits." Rodriguez at 87 n.lO. Justice Pariente, in her concurrence, clarified that "[a]s for section 627(7)(a), this statute deals exclusively with the requirements for withdrawal of payment..." Id. at 89.

In opposition, DiBlasio points the court to the 2001 legislative changes to the PIP statute, which were introduced to help remedy the problem of "paper IMEs[2]". DiBlasio contends that Dr. Zeide's affidavit falls under this category of a paper IME, and is therefore insufficient to be

[2] A paper Independent Medical Examination (IME) is so termed when the insurer's physician merely reviews the medical treatment documents of the injured person and writes a report stating that such treatment was not reasonable, related or necessary.

admitted on summary judgment. While §627.736 was revised in 2001, ***Rodriguez*** was determined thereafter in the same year; in fact, the ***Rodriguez*** Court makes reference to those statutory changes. ***Rodriguez*** at 91 n.15. Therefore, ***Rodriguez*** should be controlling in its interpretation of the statute pursuant to legislative intent. ***Derius*** deals with claim reductions. The holding in ***Derius*** has not been disturbed, despite being a 1999 decision and despite the Legislature's subsequent intent to discourage paper IME's, because ***Rodriguez*** reaffirms the § 627.736(7) application to coverage withdrawals.

Based on the foregoing analysis, Progressive's reduction of DiBlasio's claims, since they are not withdrawals, takes Dr. Zeide's affidavit outside the purview and application of §627.736(7). Therefore, DiBlasio's paper IME argument is without merit.

III. CONCLUSION

In sum, the CPT provisions are clear and unambiguous as to the -26 modified diagnostic test interpretation billing, which is not bundled within the 99245 CPT code. Considered in the light most favorable to the non-moving party on summary judgment motion, Progressive's affidavit and peer review may be read together, and not inconsistently, with its claims adjuster's deposition testimony as to the reasonableness of DiBlasio's bills. Although the standard of review for exclusion of evidence is abuse of discretion, Florida statute specifically allows providers to defend on grounds of reasonableness, relatedness and necessity, even after a payment becomes overdue. § 627.736(7) does not apply to the instant action because we have reductions, and not complete withdrawals of coverage. Finally, it is well-established in Florida that on summary judgment, while "the evidentiary matter offered by opponent of motion for summary judgment must be both relevant and competent as to the issues in the cause it need not be in the exact form, or cover all the preliminaries, predicates, and details which would be

required of a witness, particularly an expert witness, if he were on the stand at the trial." Holl *v. Talcott*, 191 So. 2d 40 (Fla. 1966). Given that the burden is on the moving party to show that no genuine issue of fact remains and a conflicting affidavit was introduced, we find the trial court improperly entered summary judgment.

Accordingly, we affirm the judgment in favor of DiBlasio on the May 4, 2004 claims, reverse as to the remaining claims, and remand to the trial court for further proceedings consistent herewith.. Additionally, Progressive's Motion for Appellate Attorney's Fees pursuant to the Offer of Judgment Statute is DENIED as it fails to meet the requirements set forth in § 768.79, Fla. Stat. (2006). DiBlasio's Motion for Appellate Attorney's Fees is GRANTED, in part, as to the portion of the judgment that is affirmed, pursuant to Fla. R. App. P. 9.400(b) and §§ 627.428(1), 627.736(8), Fla. Stat. (2006), and the issue is remanded to the trial court to determine the amount thereof.

KELLEY, STERN and McCARTHY, JJ., concur