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No-Fault trials— MRI cases-*Timing is Everything*

Elke Mirabella, Esq. tried to a dismissal Universal Health Chiropractic, PC a/a/o Andy Fortune v. State Farm (Index #066372/07) in Civil Court, New York County.
The issue was whether chiropractic treatment and diagnostic testing conducted by the provider were medically necessary. A prima facie case was stipulated to at the outset of the trial. Drs. Dureja and Portnoy both testified in defense of the company based on a lack of medical necessity. The court found that the defendant met its burden of proof and therefore shifted the burden to the plaintiff to rebut the evidence. The plaintiff had requested further adjournment or continuance or in the alternative to rely on the medical records in evidence.
The Court denied the plaintiff's application for a continuance to produce a Chiropractor from the facility, and, after review of the evidence and the medical records held that the medical records in evidence failed to establish a medical necessity. The action was dismissed in favor of the defendant.

In a case in Civil Queens, (Buggs, J) ,**Triboro Medical, P.C. a/a/o Jang- Hyun Kwon v. State Farm 101182/04; C/Queens** Elke was also successful, after trial, in getting dismissal of the action. This case involved the medical necessity MRI testing for the cervical spine and lumbar spine. Judge Buggs found that the defendant established its defense of lack of medical necessity through the credible testimony of a review by Dr. Kevin Portnoy. The plaintiff did not present sufficient evidence or testimony to rebut the defendant peer review.

Greta Boldi, Esq. filed motions in each of the following cases seeking summary judgment **Utica Chiropractic a/a/o Patrick Pyle v. AIG**, Civil Court, Bronx County, 013670/09; **Heal Supply, Inc. a/a/o Patrick Pyle v. AIG**, Civil Court, Bronx County, 094575/08; **Green Field Acupuncture, PC Assignee of Patrick Pyle v. AIG**, Civil Court, Bronx County, 111710/08. As a result of these motions the plaintiff has declined to oppose them and provided us with signed stipulation of discontinuance for each matter . Our defenses in these cases, that we raised on our motion papers, was based on an investigation which revealed that the insured that revealed that the insured had engaged in misrepresentation in the procurement of the insurance policy. Each of these cases arose from First Party Claims for the policy claimed to have been procured improperly.

Practical Issues:

We are finding, post LMK that some provider firms, are no longer negotiating on interest in settlements. This is of particular concern since the carrier and the defense attorney for the carrier cannot require a settlement be conditioned upon a waiver of interest. [1] This does not preclude the

[1] *The NYS Ins. Dept. issued an opinion letter dated July 7, 2003 which read as follows:*

With respect to the payment of interest on a settled claim, Section 65-3.9(b) provides that "The insurer shall not suggest or require, as a condition to settlement of a claim, that the interest due be waived." Section 65-3.9(b) is intended to prevent an insurer from exercising economic coercion upon an applicant so that the applicant is pressured into waiving their right to the payment of interest owed them by the insurer, in return for settlement of a disputed claim. However, the regulation does not

parties from discussing, as a full settlement, all terms of the settlement including interest payments. These issues should be addressed up front in the negotiation process so that they are properly reflected in closing papers.

Staff News:

Eileen Selts, a paralegal who worked with us as an intern from Suffolk Community Colleges ABA Accredited Paralegal Degree program will be join us a a full time member of the No-Fault tea, starting in August.

Maryann Cioffi, a paralegal with more than 10 years of litigation experience with Liberty Mutual's house counsel, joined the firm.

Please have a happy and safe summer of 2009.

preclude an applicant from voluntarily and affirmatively offering, upon their own initiative, to waive their statutory right to receive interest upon payment of an overdue claim, so long as the insurer in no way suggests or attempts to influence a decision by the applicant to waive such right.

Any questions or comments please contact Robert P. Sweeney, Esq. @ rpsesq@dslawny.com or (631) 360-7333.