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No. 94771-6

IN WASHINGTON STATE SUPREME COURT

BRETT DURANT, on behalf of himself and all other similarly situated,

Plaintiffs,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
a foreign automobile insurance company,

Defendant.

ON QUESTIONS CERTIFIED BY THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
HONORABLE RICHARD A. JONES
CASE NO. 2:15-CV-01710-RAJ

DEFENDANT STATE FARM'S ANSWER TO BRIEF OF *AMICUS CURIAE* WASHINGTON SOCIETY OF INTERVENTIONAL PAIN PHYSICIANS

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The Brief of Amicus Curiae Washington Society of Interventional Pain Physicians ("WSIPP") makes four arguments, which require only brief response.

First, WSIPP argues that defining "necessary" in terms of MMI could deny palliative care to "patients with severe injuries," "advanced illnesses," or "cancer." (WSIPP Brief, p. 9). That argument fails because PIP coverage does not provide benefits for advanced illnesses or cancer. It provides limited coverage for the immediate costs of an automobile accident, including a statutory minimum of $10,000 and maximum of $35,000 in medical expenses. The initial hospital bill for a severely injured insured would likely exhaust any applicable PIP limits. As State Farm explained in its brief, MMI generally becomes an issue only where an insured suffers relatively minor injuries and treats for far longer than expected. (State Farm's Brief, pp. 45-46).

WSIPP's argument also incorrectly assumes that defining necessary in terms of MMI excludes coverage for palliative care. Plaintiff's own claim disproves that assumption. Plaintiff's chiropractor diagnosed him with a soft-tissue back "sprain condition," and State Farm paid all submitted medical expenses for nearly nine months following the automobile accident. (Dkt. 38-2, p. 13; Dkt. 39-1, pp. 80-98; Dkt. 39-2, pp. 1-30). That included at least $9,000 for massage treatment alone, most

of which State Farm later learned was not prescribed. (Dkt. 39-1, pp. 80-98, Dkt. 39-2, pp. 1-30).

In any event, the issue is not how "necessary" should be defined – neither the Legislature nor the Commissioner elected to define it. The issue is whether MMI can be consistent with the term "necessary" in the PIP context. As State Farm explained it is briefing, and even the Commissioner agrees, it clearly can be.

Second, WSIPP argues that State Farm "repeatedly mischaracteriz[es]" WAC 284-30-395(1) as a disclosure regulation. (WSIPP Brief, p. 11). That is precisely what it is, as the Concise Explanatory Statement submitted with the Commissioner's Amicus Brief further supports. (Commissioner's Brief, Appx. A). Other portions of the regulation accomplish other things, but are not at issue here.[1] *See, e.g.*, WAC 284-30-395(3) (setting standards for Independent Medical Examiners); WAC 284-30-395(6) (setting standards for PIP arbitrations).

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[1] WSIPP does correctly point out that the as-promulgated Introductory Statement of WAC 284-30-395 does not reference cost containment. That language appeared in a draft of the regulation published in the Washington State Register, Issue 97-03, p. 57. It was later removed as part of what the Commissioner characterized as an editorial change, not a substantive one. (Commissioner's Brief, Appx. A, p. 3).

Third, State Farm's "necessary" definition does not "unilaterally define the governing law" as WSIPP claims. (WSIPP Brief, p. 13). The undisputed record demonstrates that State Farm only defined "necessary" in its policy form after the Insurance Commissioner compelled it to do so, and that the Insurance Commissioner specifically approved of its definition in terms of MMI. (State Farm's Brief, pp. 7-10 and evidence cited therein). That happened after the Legislature adopted the "necessary" standard in RCW 48.22.005(7). (*Id.*).

Fourth, WSIPP argues that MMI, while relevant to a "necessary" inquiry in the workers' compensation context, should not be relevant to a "necessary" inquiry in the PIP context because "[w]here MMI is intended to be a gateway to benefits in the context of workers' compensation law, State Farm attempts to use it to slam the door on its own insureds." (WSIPP, p. 14). WSIPP is mistaken.

MMI is not a "gateway" to further payment for medical treatment in the workers' compensation context – it is precisely the point at which the Department of Labor & Industries' obligation to pay for medical treatment *ceases*. An injured worker who has reached MMI may be eligible for an award to compensate them for their permanent disability, *not* for further medical treatment. *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 716-717, 213 P.3d 591 (2009); WAC 296-20-19000.

MMI also does not "slam the door" on potential auto insurance benefits, as Plaintiff's own claim shows. After Plaintiff's chiropractor advised that Plaintiff was stable, had no further treatment scheduled, and had reached MMI, State Farm stopped paying PIP benefits for chiropractic and massage treatment. (State Farm's Brief, pp. 14-15; Dkt. 30, p. 29). However, it continued paying PIP benefits for Plaintiff's medical treatment related to other injuries. (State Farm's Brief, p. 16; Dkt. 39-1, pp. 67-68). In addition, Plaintiff received a liability payment of $50,000 from the other driver's insurer, and $5,000 in UIM benefits plus $6,972.00 in *Winters* fees from State Farm. (State Farm's Brief, p. 16; Dkt. 39-1, pp. 70-76). Those payments fully compensated Plaintiff for *all* damages related to the automobile accident, including medical expenses not previously paid under his PIP coverage. *Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn.App. 195, 201-202, 211 P.3d 430 (2009) (affirming grant of summary judgment for insurer on PIP reimbursement claim where insured voluntarily settled his liability claim against the tortfeasor for less than the available policy limits).

DATED this 26th day of February, 2018

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CERTIFICATE OF SERVICE

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Comments:

Defendant State Farm's Answer to Brief of Amicus Curiae Washington Society of Interventional Pain Physicians

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