

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

WESTCHESTER MEDICAL CENTER, a/a/o
ERNEST CRETARA, GARY DONECKER,
WYCKOFF HEIGHTS MEDICAL CENTER
CARITAS HEALTH CARE, a/a/o EMIN
HUREMOVIC; THE NEW YORK HOSPITAL
MEDICAL CENTER OF QUEENS, a/a/o SYED ALI,

MOTION DATE: 12/12/2007
MOTION SEQ. NO.: 001

Plaintiffs,

-against-

INDEX NO.: 14882/2007

PROGRESSIVE CASUALTY INSURANCE
COMPANY,

Defendant.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion for Summary Judgment.....1
Reply Affirmation.....2
Notice of Cross Motion for Summary Judgment.....3
Reply and Opposition to Cross Motion.....4

Motion by plaintiff for summary judgment is **denied**. Cross-motion by defendant for summary judgment dismissing the complaint is **granted** as to Donecker's claim but **denied** as to the claim for treatment of Cretara.

This is an action by a health care provider to recover no fault benefits payable under automobile insurance policies issued by defendant. Plaintiff Westchester Medical Center asserts claims for medical treatment provided to Ernest Cretara and Gary Donecker.¹

Ernest Cretara

¹The complaint also contains a no fault claim asserted by Wyckoff Medical Center for treatment of Emin Huremovic and a claim by New York Medical Center of Queens for treatment of Syed Ali. Since the claims of Wyckoff and New York Medical have been paid, those claims have been withdrawn.

On April 21, 2007, Ernest Cretara was involved in an automobile accident. Cretara was transported to Westchester Medical Center, where he suffered a cardiac arrest. Cretara expired in the emergency room about four hours after being admitted to the hospital. An autopsy was performed by the medical examiner. Cretara had an automobile insurance policy issued by Progressive, and the insurer received notification of the accident the following day.

On April 24, 2007, Progressive received a copy of the MV-104A, or police accident report, pertaining to the incident(See defendant's ex. 2A). Under "accident description," the officer stated that Cretara was "uncertain how accident occurred." The MV-104A contains 30 boxes along the sides and lower portion of the form for the officer to enter various "response codes," which correspond to information concerning the accident.² Box 16 indicates that the other driver was conscious, but Cretara was "semiconscious" following the accident. Box 19 indicates that Cretara's disregard of a traffic control device was an "apparent contributing factor" which led to the accident.

On the same date which it received the accident report, Progressive sent Westchester Medical a form letter, requesting certified copies of Cretara's admission history, discharge summary, radiology reports, laboratory test results, pathology reports, consult reports, nurse's notes, and emergency room records. The letter contained a type-written notation stating, "Specifically, blood alcohol/drugs including any serum toxicology test results." On April 24, Progressive also sent a letter to Cretara's estate, requesting "complete" emergency room records, all laboratory test results, and the police report "to determine eligibility for benefits." On May 1, 2007, Progressive sent Westchester Medical another copy of the April 24 letter, requesting the same documents. On May 1, Progressive also sent another letter to the estate, requesting an authorization to obtain the autopsy report.

On May 10, 2007, Progressive received a UB-92 form from Westchester Medical, itemizing various services and showing an estimated amount due of \$17,022. The UB-92 form states that it is supplied as a "courtesy," for use in determining the treatment and diagnosis "via

²Defendant has not supplied MV-104AC, the form which explains the response codes. However, the form is available at the Dept. of Motor Vehicles website, www.nydmv.state.ny.us.

the ICD-9 codes.” The UB-92 form states that it is not a “no fault bill,” but the NF-5 form is the “authorized no fault bill...with the proper DRG rate.” On that date, Progressive also received an NF-5 hospital facility form, requesting payment in the reduced amount of \$3,730.59 for various procedures performed for Cretara. The NF-5 form also contained an assignment of benefits to the health care provider and stated that the patient’s signature was “on file.”

On May 16, 2007, Progressive sent Westchester Medical a verification request form, stating that “all benefits remain delayed pending receipt of complete emergency room records, and/or all laboratory test results, (which we have requested) to determine eligibility for benefits.” On May 23, 2007, Progressive received from Westchester Medical documents purporting to be the “complete medical record” of Ernest Cretara. The EMS report indicates that the patient stated that he had “a lot to drink” and there was an odor of alcoholic beverage on his breath. Based upon a review of the EMS report and emergency room records, Progressive determined that Cretara may have been intoxicated at the time of the accident.

On May 29, 2007, despite having received the “complete record,” Progressive sent Westchester Medical a duplicate copy of its April 24 letter, requesting certified copies of the documents. The letter was stamped, “Second Notice.” On the same date, Progressive also sent Cretara’s estate a duplicate copy of its prior letter, requesting emergency room records, lab tests, and the police report. The letter was similarly stamped “Second Notice.” On June 4, 2007, Progressive sent Westchester Medical a duplicate copy of the May 1 letter, requesting certified copies of the records and marked “Second Notice.” On June 4, Progressive also sent Cretara’s estate a duplicate copy of the May 1 letter, requesting an authorization for the autopsy report.

On June 8, 2007, Progressive sent Westchester Medical a separate verification request, stating that “all benefits remain delayed” pending receipt of an authorization for the autopsy report. On the same date, Progressive sent Cretara’s estate a letter, stating that the no fault claim was being considered under a “reservation of rights” because the insurer’s investigation indicated that alcohol or drug use may have been a factor contributing to the accident.³ On July 9, 2007, counsel for the estate wrote to Progressive, promising to forward a copy of the autopsy report

³The letter stated that, unlike no fault coverage, “medical payments coverage” did not contain an exclusion for alcohol or drug use.

“upon receipt.” On July 10, 2007, Progressive sent Westchester Medical a duplicate copy of the June 8 verification request which had requested an authorization for the autopsy report. The verification report was stamped, “Second Notice.” Neither Westchester Medical nor the estate has ever submitted an authorization for the autopsy report. Progressive has never paid or formally denied the claim.⁴

Gary Donecker

Gary Donecker was involved in an automobile accident on July 25, 2006. Donecker does not appear to have received any medical treatment immediately after the accident. On December 29, 2006, five months after the car accident, Donecker fell down a flight of stairs. Donecker was transported to Westchester Medical after he was found unconscious by EMS. The patient was diagnosed as having suffered a sub-dural hemorrhage and remained in the hospital until he died on January 7, 2007. Donecker had an automobile insurance policy issued by Progressive.

On March 12, 2007, Progressive received a UB-92 form from Westchester Medical, showing an occurrence date of December 29, 2006 and an estimated amount due of \$109,555.60. The UB-92 form refers to treatment rendered to Donecker on December 29 and 31, 2006. Nevertheless, Progressive concedes that on March 12, it received notification that Donecker had been treated at Westchester Medical through January 7, 2007.

On March 15, 2007, Progressive sent Westchester Medical a verification request, stating that “all benefits remain delayed pending receipt of complete emergency room records, including all laboratory test results, to determine eligibility for benefits.” Among the ICD9 diagnosis codes listed on the verification request is 303.90, which refers to “unspecified drinking behavior, other and unspecified alcohol dependence.” On April 17, 2007, Progressive sent Westchester Medical a duplicate copy of the verification request, marked “Second Notice.”

On April 27, 2007, Westchester Medical mailed an NF-5 form to Progressive in the reduced amount of \$13,357.28. The certified mail receipt indicates that the NF-5 was received by Progressive on April 30, 2007. The NF-5 form referred to an accident date of July 25, 2006

⁴The “reservation of rights” letter does not constitute a denial of the claim(See *Blee v. State Farm Mutual Automobile Ins. Co.*, 168 AD2d 615 [2d Dep’t 1990]).

and an admission date of December 29, 2006. The form stated that the charges were for "treatment and observation for injuries due to motor vehicle accident." The form also contained an assignment of benefits stating that the patient's signature was "on file."

Progressive received Donecker's complete medical record from Westchester Medical on June 28, 2007. The court notes that under "history of present illness," the discharge summary states that the patient had a "long history of alcohol abuse" and was a "victim of a fall down stairs."

After reviewing the medical records, Progressive undertook to have the claim reviewed by an "independent peer reviewer," Dr. Maria De Jesus, a neurologist. Dr. DeJesus reasoned that if Donecker had sustained a head injury severe enough to cause to a sub-dural hemorrhage, "it would have been addressed" at the time of the automobile accident. On July 23, 2007, Dr. De Jesus submitted a report to Crossland Medical Review Services, which was undertaking review of the claim on behalf of Progressive. Dr. DeJesus concluded that the hospitalization and treatment received from December 29, 2006 to January 7, 2007 was "not in any way causally related to the [motor vehicle] accident." On July 27, 2007, Progressive denied Westchester Medical's claim on the ground that Donecker's treatment was not related to an automobile accident.

This action was commenced on August 22, 2007. Plaintiff seeks to recover the no fault claims as well as statutory attorney's fees and interest at the rate of 2% per month(See Insurance Law § 5106[a]). Plaintiff is moving for summary judgment on the ground that the claims are overdue because Progressive failed to pay or deny the claims within 30 days of having received the required verification. Defendant cross moves for summary judgment dismissing the complaint, arguing that it has not received sufficient verification as to Cretara's claim and Donecker's claim was properly denied.

The no-fault reform law provides for prompt, uncontested first-party insurance benefits in order to partially eliminate common law personal injury suits arising from automobile accidents(Insurance Law § 5103[a]; *Presbyterian Hospital v. Maryland Cas. Co.*, 90 N.Y.2d 274, 285 [1997]). Under the statutory scheme, an insurer may exclude from coverage a person who is injured as a result of operating a motor vehicle while in an intoxicated condition or while his

ability to operate the vehicle is impaired by the use of a drug(Insurance Law § 5103[b]).

To further the legislative objective of prompt payment, Insurance Law § 5106(a) provides Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of the loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied.

Insurance Department regulations prescribe the method by which the insured is to supply proof as to the fact and amount of loss.

In lieu of a prescribed application for motor vehicle no-fault benefits submitted by an applicant and a verification of hospital treatment (NYS Form N-F 4), an insurer shall accept a completed hospital facility form (NYS Form N-F 5) (or an N-F 5 and Uniform Billing Form (UBF-1) which together supply all the information requested by the N-F 5) submitted by a provider of health services with respect to the claim of such provider.

(11 NYCRR § 65-3.5[g]). Thus, a completed NF-5 form is sufficient proof as to the fact and amount of loss in order to submit a no fault claim.

After a completed NF-5, or other prescribed verification form, is received, an insurer may require additional verification to establish proof of claim. However, “any additional verification...shall be requested within 15 business days of receipt of the prescribed verification forms”(Id § 65-3.5[b]). The insurer is entitled to receive all items necessary to verify the claim “directly from the parties from whom such verification is requested”(Id § 65-3.5[c]). A timely request for additional verification extends the 30-day period in which the insurer must pay or deny the claim(*Hospital for Joint Diseases v. Central Mutual Fire Ins. Co.*, 44 AD3d 903 [2d Dep’t 2007]).

If an insurer has reason to believe that the applicant was operating a motor vehicle while intoxicated or impaired by the use of a drug, and such intoxication or impairment was a

contributing cause of the automobile accident, “the insurer shall be entitled to all available information relating to the applicant’s condition at the time of the accident. Proof of claim shall not be complete until the information...has been furnished to the insurer by the applicant or the authorized representative”(11 NYCRR § 65-3.8[g]). If the insurance company neither denies a claim within 30 days after receiving it nor extends the time by requesting verification, the insurer will be precluded from asserting the statutory exclusion defense of intoxication(*Presbyterian Hospital v. Maryland Cas. Co.*, supra, 90 N.Y.2d 283).

Cretara

Progressive sent its initial verification form concerning Cretara’s claim to Westchester Medical on May 16. The verification request was timely because it was sent within 15 business days of receipt of the NF-5 form on May 10, 2007. However, the initial verification form did not request an authorization for the autopsy report. The June 8 verification form did request an authorization for the autopsy report, but this verification request was not sent within 15 business days of receipt of the NF-5 form. Nevertheless, when Progressive received the complete medical record on May 23, 2007, it had reason to believe that Cretara was operating a motor vehicle while intoxicated and his intoxication was a contributing cause of the accident. Thus, the insurer was entitled to “all available information” relating to Cretara’s condition, provided the information had been timely requested from either the insured or the health care provider.

§ 65-3.8(g) provides that proof of claim is not complete until the insurer is furnished with “all available information” relating to the insured’s condition at the time of the accident. However, “available information” includes only information within the control of the health care provider or the insured, or information obtainable by those parties through reasonable effort. Thus, proof of claim is not complete until the insurer has received the records of a health care provider who rendered treatment which preceded that of the plaintiff(*Westchester Medical Center v. Progressive Casualty Ins. Co.*, 46 AD3d 675 [2d Dep’t 2007]). However, analysis of the data bearing upon intoxication by the insurer’s own experts should not extend the time in which the insurer is required to process the claim(*LaHendro v. Travelers Ins. Co.*, 220 AD2d 971 [3d Dep’t 1995]; But see *Mirza v. Allstate Ins. Co.*, 185 AD2d 303 [2d Dep’t 1992]).

The court concludes that the autopsy report was “available information” which

Progressive had timely requested from the insured's estate. Thus, Progressive was entitled to the autopsy report before paying or denying Cretara's claim. When medical examiners perform autopsies, their function is to impart objective information to "the appropriate authorities for the benefit of the public at large" (*Lauer v. New York*, 95 NY2d 95, 103 [2000]). While the office of the medical examiner is an independent agency (*People v. Washington*, 86 NY2d 189, 192 [1995]), its autopsy reports and other records are open to inspection by the district attorney of the county and may be obtained by other parties (County Law § 677 [3](b) and [4]).⁵

The autopsy is available to the personal representative, spouse, or next of kin of the deceased upon an application to the medical examiner (County Law § 677(3)[b]). Upon proper application of any person who may be affected by the autopsy in a civil or criminal action, or upon application of any person having a substantial interest therein, an order may be made by a justice of supreme court that the autopsy be made available for inspection (*Id.*). A hospital may have a substantial interest in obtaining the autopsy reports of patients who died at the hospital in order to improve the quality of care (*Central General Hospital v. Lukash*, 140 AD2d 113 [2d Dep't 1988]).

A hospital which has a no fault claim for treatment of a deceased may have a substantial interest in obtaining the patient's autopsy report, if no other forensic evidence of blood alcohol content is available. Since the affidavit of Sharon Shafi, a hospital billing clerk, establishes that Westchester Medical did not test Cretara's blood alcohol content, the hospital had standing to seek an order for inspection of the autopsy report pursuant to County Law § 677.

As the no fault insurer, Progressive also has a substantial interest in the autopsy report and is entitled to apply for an order of inspection. Nevertheless, under Insurance regulation § 65-3.5[c], Progressive was entitled to receive the autopsy report directly from the parties from whom it was requested, either Cretara's estate or Westchester Medical. The court notes that while Cretara's personal representative could have obtained the autopsy report from the medical examiner, the personal representative may have been reluctant to do so for fear of jeopardizing the no fault claim. Nonetheless, Westchester Medical might have encouraged the personal representative to

⁵The records of the medical examiner must be delivered to the district attorney, if there is any indication that a crime had been committed (County Law § 677[4]).

obtain the autopsy report by seeking reimbursement for medical services from the estate. In any event, the court concludes that because Progressive has not received all available information relating to Cretara's condition, it is not yet required to pay or deny the claim.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law with respect to Cretara's claim by establishing defendant's receipt of the requisite no fault billing forms and that neither payment nor a timely denial were made(*Westchester Medical Center v. Progressive Casualty Ins. Co.*, supra, 46 AD3d at 675). However, since defendant has shown a triable issue as to whether Westchester Medical's proof of claim as to Cretara is complete, plaintiff's motion for summary judgment as to Cretara's claim is **denied**.

The court now considers whether defendant has made a prima facie showing that Cretara was operating a motor vehicle while intoxicated and his intoxication was a contributing cause of the accident. An ambulance report may be admissible as a business record, and statements in the report taken as evidence of intoxication(*Mercedes v. Amusements of America*, 160 AD2d 630 [1st Dep't 1990]). However, the statements in the ambulance report must be relevant to diagnosis and treatment of the patient's condition, and the report must indicate that it was the patient who made the statements(Id). The statements in the EMS report about having a lot to drink were relevant to diagnosis and treatment of the injury which Cretara sustained in the accident. Since the statements were clearly made by Cretara, the EMS report is admissible on the issue of intoxication.

A police accident report describing the circumstances of the accident is also admissible as a business record to the extent that it is based upon the personal observations of the police officer present at the scene who was under a business duty to report accurately(*Westchester Medical Center v. Progressive Casualty Ins. Co.*, supra, 46 AD3d at 675). The statement in the police report concerning Cretara's state of semiconsciousness after the accident appears to have been based upon the personal observations of the officer. However, the statement that Cretara disregarded a traffic control device was apparently made by the other driver who had no business duty to make it. The statement that Cretara was semiconscious is consistent with the EMS report that Cretara had been drinking. However, because Cretara may have been rendered semiconscious by the collision, the statement does not of itself establish that his intoxication was

a substantial factor contributing to the accident. Accordingly, defendant's motion for summary judgment dismissing plaintiff's no fault claim as to Cretara is **denied**. The claim will be held in abeyance pending an application by plaintiff to inspect the autopsy report.

Donecker

Since the verification request for Donecker's claim was issued even before the NF-5 form was received on April 30, the verification request was clearly timely. When the complete medical record was received on June 28, Progressive had reason to believe that the medical treatment for which reimbursement was sought was related to Donecker's fall rather than an automobile accident. While Donecker may indeed have been intoxicated when he fell down the stairs, there was no reason to believe that the injury arose out of negligence in the use or operation of a motor vehicle(Insurance Law § 5104[a]). Thus, Progressive was not entitled to "all available information" concerning Donecker's condition either at the time of the fall or the motor vehicle accident(11 NYCRR § 65-3.8[g]). Although Progressive nonetheless sent the claim for independent peer review, it denied the claim 29 days after the medical records were received. As the 30-day period does not begin to run until the hospital responds to the verification request, the court concludes that the denial of the claim was timely(*New York & Presbyterian Hospital v. Progressive Casualty Ins. Co.*, 5 AD3d 568 [2d Dep't 2004]). Since plaintiff has not established prima facie entitlement to judgment as a matter of law, plaintiff's motion for summary judgment as to Donecker's claim is **denied**.

Where a person's injuries are produced by an instrumentality other than an insured motor vehicle, no fault first-party benefits are not available(*Walton v. Lumbermen's Mutual Casualty Ins. Co.*, 88 NY2d 211 [1996]). Based on the report of Dr. DeJesus, defendant has established prima facie that Donecker's injuries were produced by his fall down the stairs. Thus, the burden shifts to plaintiff to establish a triable issue as to whether a motor vehicle was the instrumentality which caused Donecker's injury(*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In response, plaintiff has submitted a conclusory affidavit from a hospital billing clerk that, "The patient's treatment was related to injuries sustained in a motor vehicle accident on July 25, 2006." When taking a medical history from a patient who has sustained head injury, it may

be proper medical practice to inquire as to prior instances of trauma. Thus, the doctor who was treating Donecker's sub-dural hemorrhage may in fact have been aware that he had been in an automobile accident. Nevertheless, absent evidence as to the circumstances of the prior accident and expert testimony relating it to the patient's condition, there is no basis for the court to infer that the motor vehicle accident may have been a substantial factor contributing to Donecker's injury. Defendant's motion for summary judgment dismissing the no fault claim as to Donecker's treatment is **granted**.

This constituted the Order of the Court.

Dated: 2/28, 2008

ENTER:

[Handwritten signature]
J.S.C.

ENTERED

MAR 25 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**