

IN THE COUNTY COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA IN AND FOR PINELLAS COUNTY
CIVIL DIVISION

STEVEN J. MELILLI, D.C., P.A.,
Plaintiff,

CASE NO.: 14-002459-SC
UCN: 522014SC002459XXSCSC

v.

PROGRESSIVE AMERICAN INSURANCE
COMPANY,
Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT;
ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court on Defendant, Progressive American Insurance Company's, Motion for Summary Final Judgment, filed July 17, 2014, and Amended Motion for Summary Final Judgment, filed July 7, 2015, and Plaintiff, Steven J. Melilli, D.C., P.A.'s, Motion for Summary Judgment,¹ filed May 25, 2015, pursuant to Florida Rule of Civil Procedure 1.510, and Plaintiff's Response to Defendant's Amended Motion for Summary Final Judgment, filed July 20, 2015. Having reviewed the motions, the exhibits attached thereto, the record, the argument of the parties, and applicable law, the Court finds as follows:

This matter involves an action for breach of contract arising out of a Personal Injury Protection (PIP) policy of insurance issued by Defendant, wherein Mary Carroll was a named insured. Plaintiff, as assignee of Mary Carroll, filed its complaint on April 9, 2014, alleging that Defendant breached the PIP insurance contract by failing to make payment for all reasonable expenses for necessary medical care provided to Ms. Carroll. Defendant filed its answer and affirmative defenses to Webster's complaint for declaratory relief on May 5, 2014, asserting that Defendant properly reimbursed Plaintiff for all services provided on behalf of Ms. Carroll pursuant to the insurance policy and section 627.736, Florida Statutes. On July 17, 2014, Defendant filed its motion for summary judgment. On May 25, 2015, Plaintiff filed its motion for summary judgment. On July 7, 2015, Defendant filed its amended motion for summary

¹ Plaintiff clarified at the hearing held on July 31, 2015, that its motion is for partial summary judgment.

judgment. On July 20, 2015, Plaintiff filed its response to Defendant's amended motion for summary judgment.

Summary judgment is proper only when the pleadings and summary judgment evidence on file, including any supporting affidavits, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510. The burden is upon the moving party to prove the nonexistence of any genuine issue of material fact. *Id.* When both parties move for summary judgment, the Court is not obligated to grant summary judgment in favor of one party or the other. *See Gen. Dev. Utils., Inc. v. Davis*, 375 So. 2d 20, 22 (Fla. 2d DCA 1979) (citing *Shaffran v. Holness*, 93 So. 2d 94 (Fla. 1957); *First Mortg. Corp. v. deGive*, 177 So. 2d 741 (Fla. 2d DCA 1965)).

I. Plaintiff's Motion for Partial Summary Judgment

Plaintiff argues that it is entitled to partial summary judgment as to the Defendant's payment of medical expenses pursuant to five CPT codes billed on three dates of service. Specifically, Plaintiff alleges that Defendant allowed less than 200 percent of the participating physicians Medicare Part B fee schedule for CPT codes 99203, 72052-TC, 97750-59, 98941 and 97014 billed for service Plaintiff provided on January 3, 4, and 6, 2012.

In pertinent part, section 627.736, Florida Statutes, states that an insurer may limit reimbursement for necessary medical services, supplies, and care to 80 percent of "200 percent of the allowable amount under the participating physicians fee schedule of Medicare Part B." *See* § 627.736(5)(a)2.f., Fla. Stat. Pursuant to Plaintiff's Request for Judicial Notice filed May 25, 2015, this Court previously took judicial notice of the 200 percent value of the participating physicians fee schedule for the above five CPT codes for the year 2012 in Plaintiff's locality, as follows:

1. 97750 = \$64.78
2. 98941 = \$71.02
3. 99203 = \$212.28
4. 97014 (HCPCS code G0283) = \$26.50
5. 72052-TC = \$99.90

(*See Plaintiff's Motion for Summary Judgment, Exhibit 2*).

The record reflects that on January 3, 2012, among other charges, Plaintiff billed for CPT codes 99203 and 72052-TC. Plaintiff billed \$225.00 for CPT code 99203 and billed \$280.00 for

CPT code 72052-TC. Defendant allowed \$209.54 for CPT code 99203 and allowed \$96.62 for CPT code 72052-TC. (See *Plaintiff's Motion for Summary Judgment, Exhibit 1*). As reflected above, the correct allowed amount for these codes pursuant to the participating physicians fee schedule for the year 2012 was \$212.28 and \$99.90, respectively. Thus, Defendant did not limit reimbursement in accordance with section 627.736, Florida Statutes, with respect to these CPT codes on January 3, 2012. Defendant was only permitted to limit reimbursement to \$212.28 and \$99.90 for these CPT codes, in accordance with the fee schedule.

The record reflects that on January 4, 2012, among other charges, Plaintiff billed for CPT codes 97750-59 (two units), 98941, and 97014 (HCPCS code G0283). Plaintiff billed \$350.00 for two units of 97750-59. Plaintiff billed \$70.00 for CPT code 98941 and billed \$30.00 for CPT code 97014. Defendant allowed \$126.20 for CPT code 97750-59 (two units). Defendant allowed \$69.96 for CPT code 98941, and allowed \$25.28 for CPT code 97014. (See *Plaintiff's Motion for Summary Judgment, Exhibit 1*). As reflected above, the correct allowed amount for these CPT codes pursuant to the participating physicians fee schedule for the year 2012 was \$129.56 (for two units), \$71.02, and \$26.50, respectively. Thus, Defendant did not limit reimbursement in accordance with section 627.736, Florida Statutes, with respect to these CPT codes on January 4, 2012. Defendant was only allowed to limit reimbursement to \$129.56, \$70.00 (Plaintiff's billed amount), and \$26.50 for these CPT codes, in accordance with the fee schedule.

The record reflects that on January 6, 2012, among other charges, Plaintiff billed for CPT codes 98941 and 97014 (HCPCS code G0283). Plaintiff billed \$70.00 for CPT code 98941 and billed \$30.00 for CPT code 97014. Defendant allowed \$69.96 for CPT code 98941 and allowed \$25.28 for CPT code 97014. (See *Plaintiff's Motion for Summary Judgment, Exhibit 1*). As reflected above, the correct allowed amount for these CPT codes pursuant to the participating physicians fee schedule for the year 2012 was \$71.02 and \$26.50, respectively. Thus, Defendant did not limit reimbursement in accordance with section 627.736, Florida Statutes, with respect to these CPT codes on January 6, 2012. Defendant was only permitted to limit reimbursement to \$70.00 (Plaintiff's billed amount) and \$26.50 for these CPT codes, in accordance with the fee schedule.

The Court finds that Plaintiff is entitled to partial judgment as a matter of law as to Defendant's payment of the above five CPT codes on January 3, 4, and 6, 2012. According to requirements of section 627.736, Florida Statutes, Defendant underpaid Plaintiff a sum of \$11.90

for CPT codes 97750, 98941, 99203, 97014, and 72052-TC for services provided on January 3, 4, and 6, 2012. Accordingly, Plaintiff's motion for partial summary judgment is granted.

II. Defendant's Motion for Summary Judgment

Defendant alleges that it is entitled to judgment as a matter of law on Plaintiff's breach of contract claim because Defendant properly applied the policy deductible and has overpaid Plaintiff for the services rendered to Ms. Carroll. Defendant asserts that, according to Plaintiff's allegations in its motion for partial summary judgment, the most Plaintiff would be entitled to is \$1,754.08; however, Defendant alleges that it paid Plaintiff \$1,796.81 prior to the instant suit. Therefore, Defendant contends that Plaintiff has not suffered any damages and cannot recover for breach of contract.

In its response to Defendant's amended motion for summary judgment, Plaintiff first argues that Defendant has failed to provide proof of the insured's election of a \$1,000 deductible for the insurance policy at issue. Absent such proof, Plaintiff contends that a genuine issue of material fact remains outstanding. This argument is without merit. The insurance policy with coverage beginning on October 29, 2011, carried a deductible of \$1,000 per person. (*See Exhibit A to Defendant's Amended Motion, p. 27: Auto Insurance Coverage Summary - Renewal Declarations Page*).

Alternatively, Plaintiff argues that Defendant has failed to apply the \$1,000 deductible properly in accordance with the insurance policy and section 627.736, Florida Statutes. Specifically, Plaintiff argues that the deductible must be applied to 100% of the charges as billed by the medical provider, prior to any adjustments being made under section 627.736. In response, Defendant argues that the proper application of the deductible is to 100 percent of the charges covered under the PIP statute, section 627.736, Florida Statutes.

Section 627.739, Florida Statutes, states, "The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736." *See* § 627.739(2), Fla. Stat. This is also reflected in the text of the insurance policy at issue, which states, "When a deductible applies, the deductible will be applied to 100% of the expenses and losses covered under Personal Injury Protection Coverage." (*See Exhibit A to Defendant's Amended Motion, Attachment 1, p. 12: Florida Auto Policy*). Section 627.736 provides for benefits for expenses described as "reasonable expenses for medically necessary medical, surgical, X-ray, dental and rehabilitative services" and for losses described as "any loss of gross income and loss of earning

capacity per individual from inability to work proximately caused by the injury sustained.” See § 627.736(1)(a), (1)(b), Fla. Stat. By requiring application of the deductible to “100 percent of the expenses and losses described in s. 627.736,” section 627.739 requires an insurer to apply the deductible to 100 percent of the expenses and losses determined to be reasonable pursuant to section 627.736. See *id.*; see also *Bayfront Health Education and Research Organization Inc. v. Progressive American Insurance Company*, 22 Fla. L. Weekly Supp. 934a (Fla. Pinellas County Ct. 2015); *Garrison Property and Casualty Insurance Company v. New Smyrna Imaging, LLC*, 23 Fla. L. Weekly Supp. 708a (Fla. 18th Cir. Ct. 2015). Thus, section 627.739 requires the insurer to apply the deductible to 100 percent of the reasonable expenses under section 627.736, which are not necessarily the billed expenses, prior to reducing the expenses to 80 percent under section 627.736. To construe section 627.739 otherwise would ignore the plain language of the statute and would not provide for uniform application of the deductible.

The record evidence reflects that the policy at issue had a \$1,000 deductible. A deductible amount of \$919.36 remained after Defendant applied \$80.64 to a prior bill from a different provider.² Plaintiff billed for a total of \$4,290 for the services provided to Ms. Carroll. (See *Exhibit A to Defendant's Amended Motion, Attachment 2: Health Insurance Claim Forms*). Defendant argues that it reduced the billed charges to \$3,111.96 pursuant to the fee schedule in section 627.736(5)(a)2.f., Fla. Stat. Defendant then applied the remaining \$919.36 deductible at 100 percent to the charges, leaving a total of \$2,192.60. (See *Exhibit A to Defendant's Amended Motion, Attachment 3 and 4: Explanations of Benefits, Medical Payments Details*). Defendant states that it then paid Plaintiff 80 percent of that amount; namely, \$1,796.81.³ (See *Exhibit A to Defendant's Amended Motion, Attachment 4: Medical Payments Details*).

Thus, the record reflects that Defendant's method of applying the deductible was proper pursuant to the requirements of section 627.739, Florida Statutes. Defendant applied the deductible to 100 percent of the reasonable expenses and losses for medically necessary services described in section 627.736, prior to reducing the expenses to 80 percent under section 627.736(5)(a). Accordingly, the Court grants Defendant's motion for summary judgment as to the procedure for applying the deductible.

² Plaintiff has not alleged any claims regarding improper payment to another provider. (See *Plaintiff's Complaint*).

³ The Court notes that the paid amount of \$1,796.81 is more than 80 percent of the \$2,192.60 total.

Defendant further argues that it is entitled to final judgment as a matter of law because Plaintiff is not contesting Defendant's application of the fee schedule to the CPT codes and dates of services that Plaintiff has not moved for summary judgment on, and therefore that Defendant has overpaid Plaintiff. This argument is not supported by the record before the Court. Plaintiff moved for summary judgment as to the five CPT codes set forth in its motion as they were billed and paid with respect to the three dates of service set forth in its motion. (*See Plaintiff's Motion for Summary Judgment*). In its motion, Plaintiff merely states that "[on subsequent dates of service Progressive allowed the correct amount for CPT codes 97750, 98941, and 97014." (*See Plaintiff's Motion for Summary Judgment, p. 3*). The motion does not concede that Defendant properly paid all remaining CPT codes on all remaining dates of service. Further, at the hearing held on July 31, 2015, Plaintiff asserted that, despite Defendant's contention that Plaintiff did not dispute the other payments, it was "disputing overall payments that were made." Because a genuine issue of material fact remains as to the proper payment of the remaining CPT codes and all remaining dates of service, Defendant is not entitled to summary final judgment.

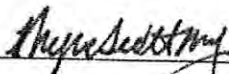
Accordingly, Defendant's motion for summary judgment is granted in part as to the application of the deductible, as set forth above. The motion for summary judgment is denied in all other respects.

Accordingly it is,

ORDERED AND ADJUDGED that Plaintiff's Motion for Partial Summary Judgment is hereby **GRANTED**.

It is further **ORDERED AND ADJUDGED** that Defendant's Motion for Final Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART**, as set forth in the body of this order.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 7th day of July, 2016. A true and correct copy of this order has been furnished to the parties listed below.



Myra Scott McNary, County Judge

cc: Tory Tombs, Esq.
Ellis, Ged & Bodden, P.A.

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