IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

GEORGE E. TUNNELL,	)
	) C.A. No. K13C-02-042 JTV
Plaintiff,	)
	)
v.	)
	)
PHILADELPHIA INDEMNITY INSURANCE COMPANY, a foreign Insurance company,	)
	)
	)
Defendant.	)

Submitted:September 26, 2014
Decided: November 26, 2015

Nicholas H. Rodriguez, Schmittinger & Rodriguez, Dover, Delaware. Attorney for Plaintiff.

William J. Cattie, Esq, Rawle & Henderson, Wilmington, Delaware 19899. Attorney for Defendant.

Upon Consideration of Defendant's
Motion for Summary Judgment
DENIED

VAUGHN, Judge

Tunnell v. Philadelphia Indemnity
C.A. No. K13C-02-042 JTV
November 26, 2014

ORDER

Upon consideration of the defendant's Motion for Summary Judgment, the plaintiff's opposition, and the record of the case, it appears that:

1. This is an auto accident, personal injury case, in which the plaintiff seeks PIP benefits from his insurance carrier. The plaintiff was acting within the scope of his employment at the time of the accident. Therefore, he was also entitled to workers' compensation benefits under a policy issued to his employer.

2. The case of *Cicchini v. State of Delaware* held that personal injury protection benefits were primary over workers' compensation benefits.[1] The defendant contends that subsequent amendments to the workers' compensation statute have changed this. Specifically, it discusses a subsequent amendment to 19 *Del. C.* § 2363(e), which added the following language:

> . . . except that for items of expense which are precluded from being introduced into evidence at trial by § 2118 of Title 21, reimbursement shall be had only from the third-party liability insurer and shall be limited to the maximum amounts of the third party's liability insurance coverage available for the injured party, after the injured party's claim has been settled or otherwise resolved.

Both parties agree that this amendment put the personal injury protection carrier and the workers' compensation carrier in the same position where an automobile accident was involved, i.e., for items of expense described in 21 *Del. C.* § 2118, the insurer's

[1] 640 A.2d 650 (Del. Super. 1993).

maximum recovery is any funds remaining on the tortfeasor's liability policy after the injured party has made a full recovery.

3. The defendant further contends that more recent amendments to Title 19 make it clear that payment of medical expenses must be made by the workers' compensation carrier or the no-fault carrier will be unable to obtain the full subrogation which is given by § 2118(g); that charges for medical treatment are no longer paid at the stated fee of the healthcare provider as long as they are reasonable and necessary, but are paid in accordance with schedules adopted pursuant to 19 *Del. C.* § 2322, *et seq.*; that 19 *Del. C.* § 2322D specifically provides that healthcare providers shall be certified only upon meeting the following minimum requirements: "h. agreement not to balance bill any employee or employer. Employee shall not be required to contribute a co-payment or meet any deductibles"; that this evidences the General Assembly's wish to control healthcare costs involving injured employees; and that calculation of the appropriate payment under the workers' compensation statute now makes workers' compensation the superior form of insurance.

4. The plaintiff contends that the amendments deal exclusively with workers' compensation and have no application to personal injury protection coverage.

5. I agree with the plaintiff. I find that the amendments deal exclusively with workers' compensation and have no application to personal injury protection coverage.

6. Therefore, the defendant's Motion for Summary Judgment is ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
Judge

cc: Order Distribution
File