EFiled: Aug 04 2014 12:28PM EDT
Filing ID 55827007
Case Number 242,2014

IN THE SUPREME COURT OF DELAWARE

HOWARD VANVLIET, Claimant Below-Appellant, v. D & B TRANSPORATION, Employer Below-Appellee.	No. 242, 2014 Court Below: The Superior Court of the State of Delaware, in and for Kent County, C.A. No. 13A-06-002 JTV

REPLY BRIEF OF CLAIMANT BELOW-APPELLANT

SCHMITTINGER AND RODRIGUEZ, P.A.

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DATED: August 4, 2014

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Argument

ISSUE 1: The Superior Court erred as a matter of law when it determined that an out of state provider must comply with the Delaware Worker's Compensation Health Care Payment System.

Merits of Argument

Employer first argues that Claimant's jurisdictional argument, that Dr. Sonti did not have minimum contacts with the state of Delaware, was not argued in the Court below. Employer's argument is inaccurate. Claimant argued in his Answering Brief below that he relied upon the arguments made in his Opening and Reply Briefs submitted January 27, 2012 and July 9, 2012. Claimant's Answering Brief below at *33. AR-37. Claimant's jurisdictional argument begins at page 7 of Claimant's Opening Brief filed on January 27, 2012. AR-52. The jurisdictional argument was raised below and therefore it is not barred from review by this Court.

Employer then argues that Dr. Sonti treated a patient from Delaware and thus that establishes minimum contacts to satisfy the jurisdictional requirement. The Employer bases this argument on International Shoe Co. v. Washington, 326 U.S. 310 (1945) which is readily distinguishable from the present case. In International Shoe the Court reviewed whether a foreign corporation was "present" in a State such that the state's courts could exercise personal

jurisdiction over the corporation. In International Shoe, the foreign corporation was found to have continuous contacts with a state that employed eleven to thirteen salesmen from that state, whose primary activities were confined to that state, and shipped much of its product to the state. Id. at 13. The Court distinguished a corporation's "presence" from that of an individual's. Id. at 316. A corporation may be found "present" in a state only by activities carried on in its behalf by those who are authorized to act for it. Id. The Court went on to hold that to the extent a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and the protection of the laws of that state. Id. at *319.

> The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. Id. (emphasis added)

In the present case, Dr. Sonti had no contacts within the state of Delaware. She conducts no activities within the state. She is not licensed to practice in Delaware, she does not have an office in Delaware and she does not treat patients within the state of Delaware. International Shoe does not stand for the proposition that if your customers are coming from a state that means you have sufficient contacts with that state to be considered "present." In fact the Court held that "casual presence of the corporate agent or even his conduct of single or

isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." Id. at *317. Dr. Sonti did not have a single activity occurring within the state of Delaware and she should not be held to the regulations of the Delaware Health Care Payment System.

Employer argues that Dr. Sonti has not been named as a defendant and therefore Delaware need not establish personal nor general jurisdiction over Dr. Sonti. However, the Health Care Payment System places responsibilities on physicians, not Claimant's. Physicians are the ones who must review the guidelines and request certification and physicians are the ones who may be fined for not following the regulations. Additionally, it is Dr. Sonti's bill that is at issue and thus she has an interest in the case. Accordingly, Dr. Sonti's interest are very much at issue in all cases related to the Delaware Health Care Payment System as Delaware is attempting to exercise its rules and regulations over physicians from outside of the State whom conduct no activities within the State of Delaware.

The Employer argues that the Board has found no distinction between in state and out of state physicians following this Court's ruling in Wyatt v. Rescare Home Care, 81 A.3d 1253 (Del. 2013). Employer's Opening Brief at *17, *citing* Pope v. Delaware, I.A.B. Hearing No. 1305408 (February 18, 2014).

However, the Board's decision is not binding on this Court and thus the Court need not follow the ruling in Pope.

The physician in this case is not bound by the Delaware Healthcare Payment System as she has no contacts with the state of Delaware and did not elect to become a certified provider under the Healthcare Payment Statute. Claimant requests that this Court reverse and remand the Superior Court's decision in regards to the out of state treatment.

Conclusion

WHEREFORE, based on the foregoing, the Claimant Below Appellant, Howard VanVliet, by and through his attorneys, Schmittinger & Rodriguez, P.A., hereby respectfully requests that the Court reverse the decision of the Superior Court as to the denial of treatment performed by Dr. Sonti, and remand this matter for an award of worker's compensation benefits consistent with the statutes and case law referenced above.

Respectfully submitted,

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DATED: August 4, 2014

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

LINDA POPE,

Employee,

v.

Hearing No. 1305408

STATE OF DELAWARE
(COLONIAL SCHOOL DISTRICT),

Employer.

ORDER

This matter came before the Board on February 6, 2014. Pending is a Petition to Determine Additional Compensation Due filed by Linda Pope ("Claimant") on October 24, 2013. Claimant seeks a recurrence of total disability, payment of medical expenses and compensability of a right shoulder condition. Part of this claim includes medical expenses for shoulder surgeries performed on February 20 and October 30, 2013, by Dr. Matthew Kelly at the Orthopedic Institute of Pennsylvania.

The State of Delaware ("State") seeks partial dismissal of Claimant's petition with respect to Dr. Kelly's medical bills. The State asserts that Dr. Kelly is not a certified provider under title 19, section 2322D of the Delaware Code. In addition, the treatment in question was not preauthorized by the State or its insurance carrier. The State argues that non-emergency care by a non-certified provider and that is not preauthorized is not compensable, citing *Wyatt v. Rescare Home Care*, Del. Supr., No. 112, 2013, Holland, J., 2013 WL 6097901 (November 20, 2013).

Claimant does not dispute that Dr. Kelly was not a certified provider under section 2322D. Claimant also does not dispute that the treatment in question was not preauthorized. Claimant, however, does argue that *Wyatt* is distinguishable. Claimant observes that the medical provider in *Wyatt* was located in Delaware. Dr. Kelly, however, is not based in Delaware. As such, he has no incentive to become a certified provider pursuant to Delaware law. Claimant also argues that the failure to seek preauthorization should not be held against her.

Analysis: "Certification *shall be required* for a health care provider to provide treatment to an employee, pursuant to this chapter, *without the requirement that the health care provider first preauthorize each health care procedure, office visit or health care service to be provided to the employee with the employer or insurance carrier.*" DEL. CODE ANN. tit. 19, § 2322D(a)(1) (emphasis added). Thus, the statute sets up a clear requirement that, with certain limited exceptions, a health care provider must be either a certified provider under the Delaware system or obtain preauthorization before rendering compensable services. As Employer observes, the Delaware Supreme Court reviewed this issue in *Wyatt*. The Court was clear:

> We hold that the statutory framework is unambiguous when all of the provisions are read *in pari materia*. The statute requires that providers be either certified or preauthorized and that the treatments provided are reasonable and necessary to treat a work-related injury. When the provider is either certified or preauthorized, the claimant is entitled to the *presumption* that treatments provided were both "reasonable and necessary." This presumption is rebuttable, however, meaning that an employer could attempt to rebut it by showing evidence to the contrary.
>
> Where, however, the provider is neither certified nor preauthorized, compensation for medical treatment is generally not available, with narrow exceptions for care provided on the first visit to the provider and for care provided in the emergency unit of a hospital or in a pre-hospital setting.

Wyatt, 2013 WL 6097901 at *7 (footnotes omitted; emphasis in original).

Neither the statutory provisions nor the *Wyatt* decision contain any exception to the application of the law with respect to out-of-state providers. As the Court observes, the statutory scheme is unambiguous. As long as the treatment is reasonable, necessary and related to the work accident, a first visit to *any* health care provider is compensable. DEL. CODE ANN. tit. 19, § 2322D(b). After that initial visit, however, in order for the treatment to be deemed compensable under the Workers' Compensation Act, the medical provider must either be a certified provider (under section 2322D) or the medical provider must "first preauthorize each health care procedure, office visit or health care service" with the employer or insurance carrier. DEL. CODE ANN. tit. 19, § 2322D(a)(1). Otherwise, compensation for the medical treatment is "generally not available." *Wyatt*, 2013 WL 6097901 at *7

As the *Wyatt* Court observed, there are only two other statutory exceptions to the requirement of certification or preauthorization. Both are contained in title 19, section 2322B(8)b. The first is healthcare services "provided in an emergency department of a hospital, or any other facility subject to the Federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd." The other is "any emergency medical services provided in a pre-hospital setting by ambulance attendants and/or paramedics." There is no statutory exception for the fact that the medical provider is based in another state.[1]

[1] The Board understands Claimant's point that an out-of-state provider who only sees an occasional patient from Delaware has little incentive to become a certified provider under Delaware law (even though the certification process is not unduly burdensome and can be done online). As such, the application of the certification-or-preauthorization standard essentially forces a claimant who happens to be out-of-state to always seeks preauthorization for all treatment apart from the first visit. This seems harsh but the Board cannot create statutory language. That is for the General Assembly to do. The Supreme Court has declared the statutory framework to be "unambiguous." As such, the Board has no basis to read in to the law an exception for out-of-state providers that does not appear in the statutory language. "When no ambiguity exists, and the intent is clear from the language of the statute, there is no room for statutory interpretation or construction." *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982)(en banc). When a statute is unambiguous, a reviewing court or board's task is "to apply the literal

In the present case, there is no allegation that the treatment in question was not provided in an emergency department or in an emergency pre-hospital setting. It is also undisputed that Dr. Kelly is not a certified provider under Section 2322D, and that the treatment he provided was not preauthorized by Employer or its insurance carrier. Therefore, as a matter of law, his medical bills are not compensable under the Workers' Compensation Act with the sole exception of Claimant's first visit with the doctor. With that one exception, Claimant's claim with respect to payment of Dr. Kelly's medical bills is dismissed. The remainder of Claimant's petition is unaffected by this and is to proceed as scheduled.

IT IS SO ORDERED this 18th day of February, 2014.

INDUSTRIAL ACCIDENT BOARD

Marilyn J. Dotts for John D. Daniello
JOHN D. DANIELLO

Alice M. Mitchell
ALICE M. MITCHELL

Karen Duffy
OWC Staff

Mailed Date: 2-19-14

Christopher F. Baum, Hearing Officer for the Board
Samuel D. Pratcher, III, Esquire, for Claimant
Andrew M. Lukashunas, Esquire, for Employer

meaning of the words in the statute to the facts which were before it." *DiStefano v. Watson*, 566 A.2d 1, 4 (Del. 1989).