Franklin County Legal Journal

Volume 19, Issue 22, Pages 54-62

Sharpe v. Hussain, et al, v. Utica National Insurance Co., et al

JENNIFER LEA SHARPE and EDWARD SHARPE, Her Husband, Plaintiffs,

v. SHABBAR HUSSAIN, M.D., ORTHOPAEDIC ASSOCIATES OF CHAMBERSBURG,

and THE CHAMBERSBURG HOSPITAL, Defendants,

v. UTICA NATIONAL INSURANCE COMPANY and WILSON COLLEGE, Interveners
Court of Common Pleas of the 39th Judicial District of Pennsylvania,

Franklin County Branch
Civil Action - Law, No. A.D. 1996-351, Jury Trial Demanded

Pennsylvania Property and Casualty Insurance Association Act, 40 P.S. Section 991.1801 et seq.; Offset under Section 1817(a); Non-Duplication of Recovery; Workers' Compensation Act, 77 P.S. Section 671; Subrogation

(1) PIGA, a statutory, unincorporated association of all Pennsylvania property and casualty insurers, was created by the legislature for the express purpose of providing a limited benefit of last resort for claimants whenever there is a covered claim arising under the insurance policy of an insolvent member insurer.

(2) Section 1817(a) of the Guaranty Act titled "Non-duplication of recovery" requires claimants to exhaust their right to recover under all other kinds of insurance, including workers' compensation, before PIGA must pay a claim on behalf of the insolvent insurer.

(3) Subrogation allows the subrogee to step into the precise position as the one whose rights they are subrogated to. Under the Workers' Compensation Act, an employer shall be subrogated to the right of the employee against a negligent third party where that party caused the employee to suffer a compensable injury.

(4) Where an employer's compensation carrier began paying benefits to an employee for a workplace injury to her left hand, and the employee brings a malpractice action against the physician who later performed surgery to correct that hand's problems, and the physician's malpractice insurer becomes insolvent, the carrier's normal right to subrogation for the benefits it paid dating from before the surgery must yield to PIGA's right to offset those amounts from what it is required to pay under the Guaranty Act, and the carrier as the solvent insurer remains responsible for paying the worker's compensation benefits.

Appearances:

Gerard C. Kramer, Esq.

Paul K. Paterson, Esq.

Mark T. Riley, Esq.

OPINION

Herman, J., June 30, 2001

Introduction

Before the court is the question of the proper interpretation of section 991.1817(a) of the Pennsylvania Property and Casualty Insurance Guaranty Association Act, 40 P.S. section 991.1801 et seq. ("the Act").[1] The parties submitted briefs and argument was held. This matter is ready for decision.

Background

Plaintiff Jennifer Sharpe developed bilateral carpal tunnel syndrome as a result of her employment as a secretary at Wilson College. Dr. Shabbar Hussain, M.D. operated on Mrs. Sharpe's right hand in February 1993. The operation was successful. Mrs. Sharpe also developed symptoms in her left wrist and hand. Wilson College's workers' compensation carrier, Utica Mutual Insurance Company ("Utica") filed a Notice of Compensation Payable on April 27, 1993

acknowledging Mrs. Sharpe had a left wrist and hand injury as of February 24, 1993 and began paying her medical bills and wage loss benefits. Mrs. Sharpe and Wilson College later reached a settlement for payment of a lump sum and an annuity as to the loss of use of her left hand.[2]

Dr. Hussain operated on Mrs. Sharpe's left hand on September 16, 1994. The plaintiffs filed an action against Dr. Hussain alleging negligence in connection with the surgery during which a nerve in Mrs. Sharpe's left hand was cut.[3] Despite two corrective surgeries, Mrs. Sharpe has permanent damage to her left hand. Shortly before trial the parties reached a settlement agreement for $300,000 and the plaintiffs filed a petition to approve the settlement. The petition included a request that the court preclude Utica from pursuing any lien or subrogation claim on the settlement proceeds. Utica filed an answer to the petition, opposing the petition and asserting a subrogation interest against the settlement.[4] Pursuant to court Order, the parties filed a stipulation of facts. As of the date of the stipulation, Utica had paid a total of $89,227.25 in indemnification for lost wages due to the left hand injury and medical expenses in the amount of $30,115.80 from the date of the second surgery, for total benefit payments of $119,343.05. These expenses are ongoing.[5]

The Pennsylvania Property and Casualty Insurance Guaranty Association ("PIGA"), an entity created under the Act, filed a petition to intervene as an additional defendant.[6] PIGA had assumed the defense of Dr. Hussain after the malpractice carrier with whom Dr. Hussain had $200,000 of primary coverage became insolvent during the litigation.[7] The settlement release between the plaintiffs and Dr. Hussain provided that PIGA's obligation to pay the plaintiffs $200,000 would be reduced by the amount which Utica had already paid in workers' compensation benefits. The remaining $100,000 would be paid by the Medical Professional Liability Catastrophic Loss Fund ("the CAT Fund"). The court granted PIGA's petition to intervene.

Utica contends the malpractice claim against Dr. Hussain precipitated by the negligent 1994 surgery is not the type of claim for which PIGA is entitled to an offset and that Utica is entitled to recover through subrogation those compensation benefits it has paid to Mrs. Sharpe since February 1993. We find Utica is not entitled to subrogation and we grant the petition to approve the settlement.

Discussion

PIGA is a statutory unincorporated association of all entities conducting property and casualty insurance business in Pennsylvania. Every such insurer must be a member of PIGA as a condition of its authority to write such policies. 40 P.S. section 991.1803(a). PIGA was created by the legislature for the express purpose of providing a limited benefit of last resort for claimants whenever there is a covered claim arising under the insurance policy of an insolvent insurer. Section 1801(1). PIGA is funded by assessing a fee against all member insurers but is limited to 2% of its member insurers' premiums for the preceding calendar year. Section 1808(d).

Since payment of any claim by PIGA places an additional financial burden on insurers doing business in the Commonwealth, the Act seeks to prevent double recovery by claimants. To that end, section 1817(a) entitled "Non-duplication of recovery" provides:

Any person having a claim under an insurance policy shall be required to exhaust first his right under such policy. For purposes of this section, a claim under an insurance policy shall include a claim under any kind of insurance, whether it is a first-party or third-party claim, and shall include, without limitation, accident and health insurance, workers' compensation, Blue Cross and Blue Shield and all other coverages except for policies of an insolvent insurer. Any amount [payable by PIGA] on a covered claim under this Act shall be reduced by the amount of any recovery under other insurance.

(Emphasis supplied). "Exhaust" is defined in the Act as "obtaining the maximum limit under the [insurance] policy..." The language in these sections makes it clear that a claimant must recover from all other sources of insurance before he can seek recovery from PIGA, and any amount otherwise payable by PIGA will be reduced by the amount paid from those other sources. Through this mechanism the risk of loss caused by the insolvency of any one insurer is spread over all member insurance companies and in turn their policyholders. Panea v. Isdaner, 2001 WL 347831 (Pa.Super. April 10, 2001); McCarthy v. Bainbridge, 739 A.2d 200 (Pa.Super. 1999), appeal granted, 758 A.2d 1200. PIGA has a duty to pay covered claims up to $300,000 per claimant. Section 1803(b). This cap conserves PIGA's limited funding for all claimants, reduces the impact on policyholders and shows the legislature's intent that solvent insurers should be the primary source of claims payments. Bethea v. Forbes, 548 A.2d 1215 (Pa. 1988); Cullen v. Pennsylvania Property and Casualty Insurance Guaranty Association, 760 A.2d 1198 (Pa.Cmwlth. 2000). It is in light of the foregoing that we address Utica's arguments.

I.

Utica contends Mrs. Sharpe's malpractice claim is not a "covered claim" and therefore section 1817(a) does not entitle PIGA to offset the amount already paid by Utica in workers' compensation benefits. The basis for this argument is that Utica was already paying those benefits to Mrs. Sharpe beginning in February 1993, approximately 19 months before the surgery which prompted the malpractice action. The claim which PIGA seeks to offset is for the injury caused by the malpractice, not the workplace injury for which Mrs. Sharpe has received compensation benefits since February 1993. Insofar as these constitute two distinct injuries, Mrs. Sharpe has no rights under Dr. Hussain's malpractice policy, has no malpractice coverage to "exhaust" and therefore PIGA is not entitled to an offset based on such nonexistent coverage. We disagree.

Section 1817(a) clearly lists workers' compensation as one of the types of insurance sources which a claimant must exhaust before PIGA's obligation to pay is triggered. A "covered claim" is "[a]n unpaid claim...which arises out of

and is within the coverage and is subject to the applicable limits of an insurance policy to which this articles applies, issued by an insurer if such insurer becomes an insolvent insurer after the effective date of this article..." Section 1802. The proposed settlement includes all the claims and demands asserted by the plaintiffs in the malpractice action. The malpractice claim is a covered claim payable by PIGA because it is "within the coverage of the insolvent insurer," i.e., within its policy limit of $200,000. Section 1802(1).[8]

Utica states in its brief that the cases cited by the plaintiff involved medical benefits paid by the insurance carrier as a direct result of the defendants' malpractice and that none involved workers' compensation benefits paid because of a work injury which occurred before the negligence. Since we held oral argument, however, the case of Cullen v. Pennsylvania Property and Casualty Insurance Guaranty Association, supra, was decided by the Commonwealth Court which addresses the interplay between section 1817(a) and section 319 of the Workers' Compensation Act, 77 P.S. section 671.[9] Our discussion of this case leads into Utica's second main contention -- that it is entitled under the equitable principle of subrogation to recover from the settlement the sum which it has already paid to Mrs. Sharpe in compensation benefits.

II.

The purpose of subrogation is (1) to prevent a plaintiff from receiving a double recovery, (2) to ensure that the employer is not making payments occasioned by the negligence of a third party, and (3) to prevent the third party from escaping liability. Kaiser v. Old Republic Insurance Co., 741 A.2d 748 (Pa.Super. 1999); Allstate Insurance Co. v. Clark, 527 A.2d 1021 (Pa.Super. 1987). Subrogation allows the subrogee to step into the precise position as the one whose rights they are subrogated to. Id. In addition to case authority, the right to subrogation in workers' compensation matters is generally found in section 319 of the Workers' Compensation Act: "Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe...against such third party to the extent of the compensation payable under this article by the employer..."

The plaintiff in Cullen was injured at work and received benefits from her employer's compensation carrier. She later sued her physician, whose insurer had become insolvent, causing PIGA to assume his defense. A settlement was reached whereby the amount payable by PIGA was reduced by the amount the plaintiff had received in compensation benefits. The compensation carrier then sought to recover from the settlement payout the amount it paid in benefits pursuant to section 319. The court found that section 319 and section 1817(a) could not both be given effect because that would force the plaintiff to deduct the amount she received in compensation benefits twice from the settlement even though she had only received them once. Guided by the well-established principle of statutory construction whereby the provisions of a later statute prevail over those of an earlier statute should they conflict, the court concluded the legislature intended section 1817(a), enacted December 12, 1994 and effective February 10, 1995, to take precedence over an employer's usual subrogation rights under section 319 of the Workers' Compensation Act, which was last amended in 1972. 1 Pa.C.S. section 1936. "Where the third-party tortfeasor's insurance carrier becomes insolvent, requiring [PIGA] to act as guarantor, the statutory scheme shifts the normal burden of loss and requires the solvent insurer to remain responsible for the payment of workers' compensation benefits." Id. at 1202 (emphasis supplied). This approach is consistent with the purpose for which PIGA was created -- as a payment source of last resort for persons who would otherwise not be able to receive any compensation for their injuries as a result of the insolvency of an insurer, and that solvent member insurers should be the primary source of payment to such persons.

The Cullen court also concluded that allowing a claimant's third-party recovery to be reduced twice would be inconsistent with section 319 itself which states "the employer shall be subrogated to the right of the employee." Allowing a double reduction would result in the employer having greater rights than the employee, a violation of a basic equitable principle underlying subrogation. Republic Insurance Co. v. Paul Davis Systems of Pittsburgh South, Inc., 670 A.2d 614 (Pa. 1995); Hagans v. Constitution State Service Co., 687 A.2d 1145 (Pa.Super. 1997). Because Mrs. Sharpe herself would not have been permitted to seek and recover any workers' compensation benefits already paid by Utica, Utica cannot recover that amount either. "Since under section 1817(a), Cullen had no right in the medical malpractice action to recover for the losses compensated by U.S. Fire [her employer's compensation carrier], U.S. Fire has no right to subrogation for her recovery, which was necessarily for other losses." Id. at 1200. Under this approach Utica has no subrogation right against Mrs. Sharpe's recovery under the proposed settlement.[10]

Utica cannot recover the amount of benefits it paid for another reason: its subrogation interest does not constitute a "covered claim" under section 1802(2). That term "shall not include any amount...due any reinsurer, insurer, insurance pool or underwriting association as subrogation recoveries or otherwise." Insofar as Utica is a member insurer of PIGA, its subrogation claim is not a covered claim and is therefore not payable by PIGA. American States Insurance Co. v. State Auto Insurance Co., 721 A.2d 56 (Pa.Super. 1998). This is consistent with the Act's purpose which is to protect claimants, not other insurers. Luko v. Lloyd's London, 573 A.2d 1139 (Pa.Super. 1990); Panea v. Isdaner, 2001 WL 347831 (Pa.Super. April 10, 2001). Although Panea addresses different issues surrounding PIGA's payment obligation than those before us here, the case is another indication of the courts' broad interpretation as to what constitutes a "covered claim" under section 1802.[11]

Finally Utica cites workers' compensation cases which stand for the proposition that medical treatment for a work injury which either aggravates that original injury or causes a new injury is considered to be part of the original injury for subrogation purposes. The law deems this to be so because a claimant would not have undergone the later medical procedure had he not first suffered a workplace injury:

To establish an entitlement to subrogation for the negligent conduct of a third party occurring subsequent to the original injury, the employer must show that it was compelled to make payments by reason of the negligence of a third party, and that the fund to which it seeks subrogation was for the same compensable injury for which it is liable under the Act...When a claimant undergoes a negligent surgical procedure to alleviate a condition caused in the course of

employment, the negligence is considered a contributing factor and not a separate event dissociated from the original injury.

Griffin v. Workers' Compensation Appeal Board (Thomas Jefferson University Hospital), 745 A.2d 61, 64 (Pa.Cmwlth. 1999); Dale Manufacturing Co. v. Workers' Compensation Appeal Board (Bressi), 421 A.2d 653 (Pa. 1980). In other words, the negligent exacerbation of a prior work injury and the work injury itself are deemed to be a single injury for purposes of whether the employer is entitled to subrogation for compensation benefits it already paid. Based on the foregoing, Utica contends Dr. Hussain's negligence was a factor which contributed to the prior work injury and as such Utica is entitled to recoup from the proposed settlement the benefit amounts dating back to February 24, 1993. We disagree.

While we take no issue with this case authority per se, we find its application does not lead to the outcome sought by Utica. Those cases do not speak to the interplay between workers' compensation and the PIGA Act, as was the situation in Cullen. We also agree with PIGA that if the benefit amounts paid by Utica are sufficiently related so as to be the subject of a subrogation interest, they are sufficiently related to be the subject of a PIGA offset. It is untenable for Utica to argue the injury caused by the malpractice is a contributing factor to the work injury for subrogation purposes but then also argue they are two separate injuries when the question is whether the malpractice claim is a covered claim under the Act.

Recent litigation has addressed the question of what types of insurance are subject to a setoff under section 1817(a). In McCarthy v. Bainbridge, 739 A.2d 200 (Pa.Super. 1999), appeal granted, 758 A.2d 1200, a Superior Court panel affirmed in a 2-1 decision a trial court ruling that life insurance proceeds are not subject to a PIGA setoff. PIGA could not reduce its liability to pay a covered claim arising out of the negligence of a third party by the amount available to the plaintiff from a life insurance policy. "The only reasonable reading of the offset provision is to require that the claim to be offset must be for the same loss as the claim asserted against the [insolvent insurer]." Id. at 203. Malpractice insurance, the court reasoned, is fundamentally different from life insurance because the two policies protect against different types of risks and provide for different types of losses. Allowing the offset would have resulted in a double recovery for the plaintiff. The vigorous dissent's position was that the majority had ignored the express language of section 1817(a) and the clear purpose of the Act as a whole. Argument was held on January 30, 2001 but our Supreme Court has yet to issue its decision.

In Strickler v. DeSai, 768 A.2d 862 (Pa.Super. 2001), the court held PIGA was entitled to a setoff for amounts which the plaintiffs' health insurance carrier had already paid to the plaintiffs who were victims of medical malpractice. Citing McCarthy v. Bainbridge, the plaintiffs argued that health insurance and medical malpractice insurance protect against different risks and losses and therefore PIGA as the stand-in for the physician's insolvent insurer was not entitled to an offset. In a fact-driven opinion, the court disagreed because this particular plaintiffs' complaint specifically sought damages for medical expenses, amounts the plaintiffs had already received. The plaintiffs would have recovered those amounts twice if PIGA was not permitted to offset them, contrary to section 1817(a). Mrs. Sharpe, by contrast, could not recover amounts she received in workers' compensation benefits and therefore to allow Utica to recover those amounts would have the result of double-reducing her award, as well as granting to Utica as subrogee greater rights than enjoyed by Mrs. Sharpe as subrogor.

We find that under the very case authority Utica cites, workers' compensation and medical malpractice insurance do indeed protect against the same type of loss -- a workplace injury and its exacerbation, which are in essence a single injury under general subrogation principles (which, under Cullen, supra, must give way in the face of section 1817) and under the PIGA Act in relation to what constitutes a "covered claim" for which PIGA is entitled to an offset. Based on the foregoing, we will grant the petition to approve the settlement and set aside Utica's subrogation lien.

ORDER OF COURT

Now this 30th day of June, 2001, the petition to approve the proposed settlement is hereby granted. The Pennsylvania Property and Casualty Insurance Guaranty Association is entitled to an offset equal to the amount paid by Utica Mutual Insurance Company, the workers' compensation carrier for plaintiff Jennifer Sharpe's employer, Wilson College. Utica Mutual Insurance Company has no valid subrogation interest in the settlement proceeds and any subrogation lien is set aside.

---

ecember 12, 1994, P.L. 1005, No. 137, section 1, effective February 10, 1995, as amended by the Act of December 21, 1995, fective February 19, 1996, 40 P.S. sections 991.1801-1820.

ment hearing was held before the workers' compensation division board on November 25, 1997.

mbersburg Hospital was also originally named as a defendant but the action was discontinued as to the hospital by stipulat before the pretrial conference. Orthopaedic Associates of Chambersburg is represented by the same counsel as is Dr. Huss

tially asserted this court lacks subject matter jurisdiction but did not pursue this issue in its brief or at argument and has the

ulation was filed February 28, 2000. At that time, the amount payable by PIGA was $80,656.95 ($200,000 minus $119,343.0

fers to itself as "the Association" in accordance with the definition section of the Act (section 1802) but we refer to it as PIGA

e Association is referred to by other courts and in the literature.

ain's original insurer was P.I.E. Mutual Insurance Company. It became insolvent under an Order of Liquidation issued by the
s of Franklin County, Ohio on March 23, 1998.

nploys a misnomer when it interchangeably asserts that PIGA is not entitled to an offset or "subrogation." "Subrogation" do
is not seeking to recover amounts it has already **paid** but seeks a reduction in the amount which is **payable** by PIGA under

915, June 2, P.L. 736, article III, section 319.

same vein, in the memorandum decision Chow v. Rosen, No. 2552 EDA 1999 (Pa.Super.), the Superior Court affirmed the tria
ny Blue Cross's petition to intervene in a medical malpractice action to enforce its subrogation rights. Prior to suit being filed
ical benefits on plaintiff's behalf. Plaintiff agreed to settle with the defendant-physician who had been insured by a then-insc
tlement was approved, Blue Cross petitioned to intervene. The court denied the petition, finding that PIGA was entitled to a
already paid by Blue Cross. Insofar as the plaintiff was never paid this amount, Blue Cross could not recover it insofar as its
than the plaintiff's.

e companion cases in Panea involved medical malpractice claims where the plaintiffs received money either through verdict
ts' insurers were all declared insolvent. PIGA, as the entity stepping into the shoes of the insolvent insurers, argued it was e
health insurance recoveries by the plaintiffs under section 1817(a). That section was held to apply with equal force to settle
court also addressed other matters relating to the application of the Act.