IN THE COUNTY COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO: 14-012222 COCE 50

DOC TONY WESTSIDE CHIROPRACTIC, LLC.
(PAULA CLOUD)

Plaintiff,

vs.

PROGRESSIVE SELECT INSURANCE
COMPANY,

Defendant,

_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on October 26, 2016, for hearing on Plaintiff's Motion for Final Summary Judgment, and the Court having reviewed the motion, the entire court file, and the relevant legal authorities; having heard arguments; having made a thorough review of the matters filed of record; and having been sufficiently advised in the premises, the Court finds as follows:

At the hearing, the Court determined that the pleadings, affidavits, and discovery responses were sufficient to establish that Paula Cloud was involved in an automobile accident on November 22, 2013, and was insured for PIP benefits under an automobile insurance policy issued by the Defendant which was in full force and effect at the time of the accident. Accordingly, Ms. Cloud is entitled to PIP benefits from the Defendant for said loss. It is further undisputed that the services at issue were medically necessary. Reasonableness of the charges are not an issue because the Plaintiff – for the purposes of this case only – is not challenging the Defendant's contention that it properly limited reimbursement to 80% of 200% of the allowable amount under the participating

physician's fee schedule of Medicare Part B. The affirmative defenses regarding medical necessity and standing were withdrawn at the hearing.

The only remaining issue is whether Paula Cloud suffered an "emergency medical condition" (commonly called an "EMC") due to the accident. If so, as the Plaintiff argues, then Ms. Cloud has $10,000 in benefits under the policy. If not, as the defense argues, Ms. Cloud only has $2,500 in PIP benefits under the policy. The Plaintiff contends that since Dr. Scott Weidenmann, a qualified medical provider under Fla. Stat. §627.736(1)(a)(3), properly determined that Ms. Cloud suffered an EMC, then Ms. Cloud had an "EMC" and no further analysis is necessary; the full $10,000 in PIP benefits are available. The Defendant, on the other hand, contends that benefits are properly capped at $2,500 because Dr. Weidenmann's EMC determination is invalid and can properly be challenged by a determination from a third-party doctor the defense hired to review Ms. Cloud's medical records that suggests there was no EMC. For the reasons discussed below, the Court agrees with the Plaintiff and finds that it has properly established an EMC, which cannot now be challenged by the Defendant.

The Plaintiff presented the medical reports of Dr. Scott Wiedenmann, M.D., a radiologist, who interpreted and reported on Ms. Cloud's magnetic resonance imaging. Dr. Wiedenmann determined that Ms. Cloud suffered an EMC, which the Plaintiff contends was proper pursuant to Fla. Stat. § 627.736(1)(a)(3). Fla. Stat. § 627.736(1)(a)(3) allows any medical provider to make a determination that there is an EMC as long as the medical provider is a physician licensed under chapter 458 or chapter 459, a dentist licensed under chapter 466, a physician assistant licensed under chapter 458 or chapter 459, or an advanced registered nurse practitioner licensed under chapter 464.

The Defendant does not contest that Dr. Wiedenmann's reports contain an EMC determination; rather, it argues that the EMC determination is merely a "rubber stamp" of the

opinion of the chiropractor that referred Ms. Cloud for the MRIs and not based on sufficient underlying data.. The Defendant also argues that it has properly challenged the EMC determination through the affidavit of Martin W. Spiegler, M.D., a doctor hired by the Defendant to conduct a peer review who opined that no EMC existed. These arguments are unpersuasive.

The first issue presented to the Court is whether or not Dr. Wiedenmann can properly make a determination that an EMC exists. The Florida PIP statute expressly states how an EMC is determined:

> Reimbursement for services and care provided in subparagraph 1. or subparagraph 2. **up to $ 10,000 if a physician licensed under** chapter 458 or chapter 459, a dentist licensed under chapter 466, a physician assistant licensed under chapter 458 or chapter 459, or an advanced registered nurse practitioner licensed under chapter 464 **has determined that the injured person had an emergency medical condition.**

Fla. Stat. § 627.736(1)(a)3 (Emphasis added).

The Legislature expressly authorized any properly licensed medical professional to make determinations that an emergency medical condition exists. Dr. Wiedenmann, a medical doctor, obviously falls within that category. There is no statutory basis to challenge a qualified provider's EMC determination with an opinion by a defense expert who performed a peer review and did not actually provide medical services.

Fla. Stat. § 627.736(1)(a)3 allows **any** medical professional licensed under one of the specified chapters to determine that emergency medical condition **does** in fact exist. Fla. Stat. §627.736(1)(a)4, on the other hand, is substantially more restrictive and limits the class of medical professionals who may properly determine that an EMC **does not** exist to "**provider[s]**." When the Legislature drafts a statute in a clear and unambiguous manner the Court is powerless to extend, modify or limit the express terms provided. Just like the Legislature's **inclusion** of the term "provider" in Fla. Stat. § 627.736(1)(a)4 is presumed to be intentional, so is the **exclusion** of the

term "provider" in Fla. Stat. § 627.736(1)(a)3. *Expressio unius est exclusio alterius* applies here and means that the mention of one thing implies the exclusion of the other. *Young v. Progressive Se. Ins. Co.*, 753 So. 2d 80, 85 (Fla. 2000). This is especially apparent in this case as the statute contains different terminology in subsequent paragraphs of the same subsection. "[T]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." *State v. Mark Marks, P.A.*, 698 So. 2d 533, 541 (Fla. 1997); *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) ("When the legislature has used a term . . . in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded."))). As a result, the class of medical professionals who may make a determination that an emergency medical condition exists, namely those licensed under the enumerated chapters in the Florida Statute §627.736(1)(a)(4), is expressly much broader than the class of medical professionals who may make a determination that no emergency medical condition exists, namely medical professionals who provided initial treatment or follow-up care consistent with the underlying medical diagnosis rendered pursuant to the initial treatment.

The Defendant's second argument, that it has properly challenged the determination of Dr. Wiedenmann, also fails. Throughout the entirety of Florida Statute §627.736 there is no mechanism prescribing or allowing a challenge to the factual or medical basis of a determination of emergency medical condition. *Hess Spinal & Medical Centers, PA (Ton Taja Butler) vs. Progressive Select Insurance Company*, 23 Fla. L. Weekly Supp. 177a (Hillsborough Cty. Ct., July 30, 2015)(Ober, J.), citing: *Dr. Craig Selinger, D.C., P.A., d/b/a Selinger Chiropractic & Acupuncture, a.a.o. Jonathan Grant v. Enterprise Leasing Co. of Florida, LLC*, 22 Fla. L. Weekly Supp. 163a (Broward Cty. Ct., August 8, 2014) (Fry, J.)(there is no express mechanism in the PIP statute to allow an insurer to challenge whether an insured has an emergency medical condition); *First Choice Chiropractic & Rehabilitation Center, Inc., d/b/a First Choice Care Chiropractic,*

a/a/o Ilerta Jean Baptiste v. Progressive American Insurance Company, 22 Fla. L. Weekly Supp. 617a (Polk Cty. Ct., Dec. 9, 2014) (Hill, J.)(the PIP statute does not contain any provision permitting an insurer to challenge a provider's determination that a claimant had an emergency medical condition, and it appears there is no case law permitting such a challenge). "[I]f the legislature wanted an insurer to have the ability to challenge a treating provider's determining of an emergency medical condition it would have expressly provided for this provision in the statute". *Selinger*, 22 Fla. L. Weekly Supp. 163a. This is evident by the fact that the Legislature has provided tools to insurance companies to challenge reasonableness, business and medical necessity, such as Fla. Stat. §§ 627.736 (4)(b) and § (7)(a), but ***not*** the determination of an EMC. Accordingly, neither compulsory medical examinations nor peer reviews can be used to challenge an emergency medical condition because the insurer-hired doctors do not provide any services or treatment to the patient and do not qualify as qualified medical professionals.

For these reasons, it is hereby

ORDERED AND ADJUDGED, that the Plaintiff's Motion for Final Summary judgment is GRANTED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida ____ day of 11-8, 2016.

COUNTY JUDGE

Copies furnished to:
Chris Tadros, Esq.
Eric Polsky, Esq.