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By Christopher W. Goode and Kate Barnes

## The Growing Trend of Peer Review by Kentucky PIP Providers: What it Means for Personal Injury Attorneys

Plaintiffs' attorneys are noticing a frustrating trend in their practice of representing parties injured in motor vehicle accidents—the peer review. These remote paper reviews are requested with increasing frequency by insurance companies providing basic reparations benefits to injured parties (PIP providers). As a personal injury attorney, it is important to know what you are up against in the ongoing battle to fight the denial of PIP benefits that frequently results from these reviews.

### The Letter

A boilerplate letter that is not plaintiff-specific typically initiates the process of the peer review. The letter contains a brief statement that the PIP provider has requested an “Independent Medical Records Review,” “Utilization Review,” “Peer Review,” or some other terminology indicative of a records review by a medical professional. Generally, identifying information about the reviewer is not provided; nor does the letter extend the courtesies of disclosing what records were sent to the unnamed reviewer. Frequently, the letter fails to mention why the PIP provider has sought a review. Usually, however, the letter states that payment will be considered for outstanding bills once the review is received and examined by the PIP provider. This brings us to stage two, “the wait.”

### The Wait

Unfortunately, while the initial letter tends to be clear that payment will not continue until the review is received; it is atypical for it to state a period for completion. Therefore, plaintiffs' attorneys have the challenging task of advising their clients while PIP benefits are stalled indefinitely during the pendency of review. Does the client continue to treat, and run the risk of having an unfavorable review? Is necessary treatment discontinued until the review is complete? As a plaintiff's attorney, there is no favorable answer to give a client in this stressful situation. Instead, clients must anxiously await their fates and make treatment decisions based on the outcome of a third-party review instead of the medical

opinions of their treatment providers.

### The Review

Finally, a letter from the PIP provider arrives with the enclosed review. Generally, if a denial letter accompanies the review, it is brief and vague, simply stating that based on the enclosed report the insurance company is unable to consider any treatment from a certain date forward, a specific treatment provider, or even at all. Sometimes the letter states that the reviewer believes the treatment received wasn't related, medically necessary or reasonable. Each explanation yields a similar result: the injured party is denied PIP benefits.

Often, the reviews are composed of brief answers provided in response to form questions sent to the reviewer by the PIP provider. A brief introduction outlining the accident and treatment received is typically included. The reviewer then gives an opinion as to the relatedness, medical necessity and/or reasonableness of the treatment received by the injured party. All of this information is ascertained by medical records provided to the reviewer by the PIP provider without any form of physical examination or contact with the injured party. Ultimately, the denial of PIP benefits frequently necessitates discontinuation of treatment by the plaintiff.

The reviewer often recommends an Independent Medical Examination (IME), if prompted by the PIP provider to determine whether an IME is appropriate. In many cases, PIP providers ignore this recommendation and simply deny further benefits based on statements found in other parts of the review. However, if one examines the Kentucky Motor Vehicle Reparations Act (MVRA), it appears that the proper means to challenge the payment of PIP benefits is to petition the court for an IME.

### Statutory Framework

The MVRA was enacted in 1974 and became effective July 1, 1975.<sup>1</sup> Subsequent case law shaped the MVRA according to the intent stated in KRS 304.39-010 and gave the plaintiff the power of recourse to challenge non-payment

of PIP benefits. “[T]he MVRA originally contained a provision allowing an insured to assign no-fault benefits to a medical provider, thereby giving the provider a right of action against a reparations obligor. The legislature, however, amended the Act in 1998 and removed the insured’s ability to assign benefits under the MVRA.”<sup>2</sup> In *Neurodiagnostics, Inc. v. Farm Bureau Mut. Ins. Co.*, the court expressly held: “[t]he repeal of the assignment provision took away any direct cause of action by the medical provider, and no other current provision of the MVRA can be construed to afford a direct cause of action to medical providers.”<sup>3</sup> The court found that “the control rests with the insured to direct payment of his or her benefits among the different elements of loss.”<sup>4</sup> Therefore, the MVRA has put the power in the plaintiff’s hands

to challenge denial of PIP benefits by giving the plaintiff explicit standing to bring a cause of action against their insurer.

The MVRA is designed to protect Kentuckians injured in car wrecks, in part by encouraging “prompt medical treatment and rehabilitation of the motor vehicle accident victim by providing for prompt payment of needed medical care and rehabilitation.”<sup>5</sup> PIP benefits are a significant means in which an victim receives prompt payment of needed medical care and rehabilitation. The right to these benefits is codified in KRS 304.39-030. This right does not extend to “injuries arising out of the maintenance or use of such a motorcycle unless such reparation benefits have been purchased as optional coverage for the motorcycle or by the individual so injured.”<sup>6</sup> Also, “[n]o person

who has rejected the tort limitations under this section, except as provided in subsection (9) of this section or KRS 304.39-140(5), may collect basic reparation benefits.”<sup>7</sup> Despite these notable exceptions, it is clear that the MVRA requires the payment of PIP benefits to those who fall under the protection of the statute.

Further, the MVRA provides a means in which a PIP provider may challenge payment of benefits. Despite the trend to base denial on peer reviews, the MVRA clearly states:

If the mental or physical condition of a person is material to a claim for past or future basic or added reparation benefits, the reparation obligor may petition the circuit court for an order directing the person to submit to a mental

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Importantly, the MVRA also provides the plaintiff with remedies for an unreasonable denial of PIP benefits. If a delay in payment occurs according to KRS § 304.39-210(1), and it is made without reasonable foundation, the MVRA provides the plaintiff with the remedy of imposing an 18 percent per annum interest rate on all overdue payments.<sup>9</sup> Additionally, "... a reasonable attorney's fee for advising and representing a claimant on a claim or in an action for basic or added reparation benefits may be awarded by the court if the denial or delay was without reasonable foundation."<sup>10</sup> These statutory remedies provide a means of recourse for plaintiffs against their insurance companies for wrongful denial of PIP benefits, demonstrating the intent of the MVRA.

### Kentucky Case Law

Kentucky trial courts are also demonstrating support for the plaintiff wrongfully denied PIP benefits. Notably, case law supports a presumption that any medical bill submitted is reasonable.<sup>11</sup> Two recent opinions out of the Jefferson County Circuit Court upheld the requirement of an IME to rebut this presumption, particularly with regard to quantitative reasonableness. In *Hameedawi v. Mok*, GEICO denied PIP benefits following a records review by Dr. Sheridan, who concluded that the plaintiff's treatment beyond a

certain date was not reasonably necessary.<sup>12</sup> The court held, "GEICO's failure to petition for an independent medical examination (IME) under KRS 304.39-270 removes any claim of reasonable foundation in their denial of plaintiff's claim, regardless of Dr. Sheridan's qualifications."<sup>13</sup> The court further stated: "[f]or this court to allow an insurer to ignore the IME procedure would result in judicially subtracting statutes from legislative enactment."<sup>14</sup> It is important to note that the *Hameedawi* court did make an important distinction between qualitative and quantitative review by explaining, "[i]t is the court's view that a doctor acting solely on the basis of document review could come to a competent opinion that certain types of treatments are unrelated to the diagnosis and unnecessary... a paper review was insufficient to provide a reasonable basis to conclude incurred expenses for approved treatment modalities were not reasonably needed by reason of being excessive."<sup>15</sup>

Additional trial court support for the plaintiff came from *Carrazana v. State Farm* in which the court stated: "... a paper review was insufficient to provide a reasonable basis to conclude incurred expenses for approved treatment modalities were not reasonably needed by reason of being excessive. Generally, only a personal examination suffices..."<sup>16</sup> The *Hameedawi* and *Carrazana* opinions demonstrate a movement toward requiring PIP providers to petition for an IME according to the MVRA to rebut the presumption of reasonableness, particularly regarding allegations of excessive treatment.

When PIP payment is wrongfully delayed or denied, the MVRA provides an exclusive remedy.<sup>17</sup> The "MVRA is a comprehensive act which not only relates to certain tort remedies, but also establishes the terms under which

insurers pay no-fault benefits, and provides for the penalties to which insurers are subjected if they fail to properly pay no-fault benefits."<sup>18</sup> Consequently, the remedies established in KRS 304.39-210-20 are the exclusive remedies available to a plaintiff wrongfully denied of PIP benefits. Kentucky courts have held that the Unfair Claims Settlement Practices Act does not apply to wrongful denial of PIP as the MVRA provides a statutory remedy.<sup>19</sup> This reasoning is consistent with the argument that the MVRA provides the exclusive remedy for both the insured and insurer when it comes to PIP coverage.

There have also been trial court opinions that are not favorable to the plaintiff and contain noteworthy distinctions. In *McClure v. Down*, the court addressed the issue of whether GEICO's denial of PIP benefits following a records review was based on a reasonable foundation.<sup>20</sup> The reviewer stated that the plaintiff returned to pre-accident status on a certain date and that any subsequent treatment he needed did not arise from the accident.<sup>21</sup> The court found that a medical records review forms a reasonable foundation upon which benefits may be denied.<sup>22</sup> It is unclear from *McClure* whether the court addressed the issue of an IME; however, the court's opinion that a records review can create a reasonable foundation to deny PIP benefits contradicts the language in *Hameedawi* and *Carrazana*.

In *Appau v. State Farm Casualty Co.*, State Farm obtained an independent review of the plaintiff's records that concluded the treatment for the plaintiff's injury was necessitated by a different motor vehicle accident.<sup>23</sup> According to the *Appau* court, it is possible for a medical records review to create a factual dispute over the reasonableness and necessity of the insured's medical bills and treatment

so as to overcome summary judgment.<sup>24</sup> Fortunately, denial of summary judgment does not leave the plaintiff empty-handed. A jury may still find the treatment and bills to be necessary and related, and the denial of PIP benefits to be unreasonable.

### Protecting the Injured Party

“The public policy of a state is to be found: first, in the Constitution; second, in the Acts of the Legislature; and third, in its Judicial Decisions. Where the Constitution is silent, the public policy of the State is to be determined by the Legislature on subjects which it has seen fit to speak.”<sup>25</sup> Public policy for providing PIP benefits is set forth in KRS 304.39-010:

It is clear to us that in enacting no-fault legislation, the intent was to provide a remedy

to automobile accident victims that could not be impinged upon by any means whatsoever. This was the victim’s reward for sacrificing traditional tort rights. No-fault is specie of compulsory insurance. It is remedial in nature and thus will be broadly construed to carry out its beneficial purpose of providing compensation for persons injured by automobiles. [Citation omitted]<sup>26</sup>

The MVRA is consistently interpreted in favor of the victim by Kentucky courts, which reflects the public policy codified in KRS 304.39-010. In fact, Kentucky courts have expressly stated that the “MVRA is to be liberally interpreted in favor of the accident victim.”<sup>27</sup> Also, “[t]he significant

changes brought about by the MVRA were aimed at a specific objective: to insure continuous liability insurance coverage in order to protect the *victims* of motor vehicle wrecks and to insure that one who suffers a loss as the result of an automobile accident would have a source and means of recovery.”<sup>28</sup> It is clear that the MVRA is intended to protect the plaintiff; therefore, it follows that Kentucky courts should defer to legislative intent and view these disputes in consideration of public policy.

### The Future of the PIP Suit

PIP providers have demonstrated a growing trend to deny benefits based on record reviews; thus, an increase in litigation is likely to occur. This is the exact situation the MVRA was enacted to avoid.<sup>29</sup> Nevertheless, interpretation of the MVRA at the trial court level has

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been inconsistent and leaves the plaintiff with few options other than pursuing litigation in hopes of retaining the statutory right to PIP benefits granted by the MVRA. There is a definite need for judicial guidance on this issue.

The peer review has placed the plaintiff's attorney in the difficult position of considering conflicting guidance when representing injured parties who have been denied PIP benefits. Certainly, it is in the plaintiff's best interest for the court to look to the MVRA as the exclusive remedy upon which a PIP provider may deny benefits and require a petition for an IME as the sole means to rebut the presumption of reasonableness. Ultimately, it is the injured party who will suffer if any other conclusion is drawn, as the power will be placed in the hands of the insurer, defeating the intent of the MVRA.



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— Kate Barnes is an associate attorney with the Becker Law Office, PLC. Barnes came to the Becker Law Office in the summer of 2013 after working at a general-practice firm in Elizabethtown, where she concentrated on family law and personal injury cases. She received her J.D. in 2011 from the University of Louisville's Louis D. Brandeis School of Law and clerked during her final year at a personal injury firm. While there she became convinced that she wanted to represent injured individuals.

- 1 KRS 304.39-010.
- 2 *Eriksen v. Kentucky Farm Bureau Mut. Ins. Co.*, 336 S.W.3d 909, 912 (Ky. Ct. App. 2010).
- 3 *Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mut. Ins. Co.*, 250 S.W.3d 321, 329-30 (Ky. 2008).
- 4 *Id.* at 325.
- 5 KRS 304.39-010(3).
- 6 KRS 304.39-040(4).
- 7 KRS 304.39-060(8).
- 8 KRS 304.39-270(1).
- 9 KRS 304.39-210(2).
- 10 KRS 304.39-220(1).
- 11 KRS 304.39-020(5)(a)., *Daugherty v. Daugherty*, 609 S.W.2d 127, 128 (Ky. 1980).
- 12 *Hameedawi v. Mok*, Op. and Order, Jefferson Circuit Ct. (April 25, 2013).
- 13 *Id.*
- 14 *Id.*
- 15 *Id.*
- 16 *Carrzana v. State Farm*, Op. and Order, Jefferson Circuit Ct. (April 5, 2013).
- 17 *Foster v. Kentucky Farm Bureau Mut. Ins. Co.*, 189 S.W.3d 553, 557 (Ky. 2006).
- 18 *Id.*
- 19 In *Phoenix Healthcare of Kentucky, L.L.C. v. Kentucky Farm Bureau Mut. Ins. Co.*, 120 S.W.3d 726 (Ky.App. 2003), the Court of Appeals held that KRS §§ 304.39-210 and -220 of the Motor Vehicle Reparations Act (MVRA) provided the "exclusive remedy" for the late payment or failure to pay the insured's basic reparation (PIP) benefits.
- 20 *McClure v. Down, et al.*, Op. and Order, Jefferson Circuit Court (July 27, 2012).
- 21 *Id.*
- 22 *Id.*
- 23 *Id.*
- 24 *Appau v. State Farm Fire & Casualty Co.*, Op. and Order, Jefferson Circuit Court (January 24, 2013).
- 25 *Kentucky State Fair Board v. Fowler*, 310 Ky. 607, 614, 221 S.W. 2d 435, 439 (1949) (internal citations omitted).
- 26 *Blue Cross & Blue Shield, Inc. v. Baxter*, 713 S.W.2d 478, 480 (Ky. Ct. App. 1986)., citing *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975); KRS § 304.39-060(2); KRS § 304.39-030(1); and 7 Am. Jur. 2d Automobile Insurance §§ 20, 28 and 341 (1980) (internal citations omitted).
- 27 *Fields v. BellSouth Telecommunications*, 91 S.W.3d 571, 572 (Ky. 2002) (citing *Lawson v. Helton Sanitation, Inc.*, 34 S.W.3d 52, 62 (Ky. 2000) (The majority in *Fields* adopted the dissent in *Lawson*). See also, *Miller v. United Fidelity & Guaranty Co.*, 909 S.W.2d 339, 343 (Ky. App. 2005) (quoting *Crenshaw v. Weinberg*, 805 S.W.2d 129 (1991) ("[t]he primary purpose of the MVRA is to benefit motor vehicle accident victims . . .")).
- 28 *Nat'l Ins. Ass'n v. Peach*, 926 S.W.2d 859, 861 (Ky. App. 1996)., citing *Crenshaw v. Weinberg*, Ky., 805 S.W.2d 129 (1991).
- 29 KRS 304.39-010(5).

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