

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RICHARD KEIPER, INDIVIDUALLY AND	:	IN THE SUPERIOR COURT OF
ON BEHALF OF ALL OTHERS	:	PENNSYLVANIA
SIMILARY SITUATED	:	
	:	
v.	:	
	:	
PROGRESSIVE CASUALTY INSURANCE	:	
COMPANY	:	
	:	
APPEAL OF: RICHARD KEIPER	:	No. 2409 EDA 2007

Appeal from the Order entered September 11, 2007
In the Court of Common Pleas of PHILADELPHIA County
Civil at No(s): March Term, 2007 - No. 000035

BEFORE: FORD ELLIOTT, P.J., PANELLA and KELLY, JJ.

MEMORANDUM: **FILED JANUARY 9, 2009**

Appellant, Richard Keiper, appeals from the order entered on September 11, 2007, by the Honorable Gary DiVito, Court of Common Pleas of Philadelphia County, which sustained preliminary objections in the nature of a demurrer of Appellee, Progressive Casualty Insurance Company (hereinafter "Progressive"). After careful review, we affirm.

Keiper is an unlicensed massage therapist who performs therapeutic massages at his own place of business, without direct onsite supervision of a doctor or other prescribing medical practitioner. In the fall of 2005, a patient was referred to Keiper by a medical practitioner for therapeutic massage sessions to treat injuries she sustained in a motor vehicle accident

a few months prior. Keiper was to perform manual therapy techniques to alleviate her pain in the right neck and shoulder.

After performing four of the prescribed therapeutic massage sessions, pursuant to the Motor Vehicle Financial Responsibility Law ("MVFRL"),¹ Keiper submitted his bill to Progressive, the patient's automobile insurer. He sought payment for four manual therapy sessions (at \$30 per session), as well for a physical therapy evaluation (\$100). Progressive denied payment on the grounds that under the MVFRL and the Physical Therapy Practice Act ("PT Act"),² Keiper, an unlicensed massage therapist, is not entitled to payment for therapeutic massages to treat injuries sustained by an insured following a motor vehicle accident

Subsequently, on March 5, 2007, Keiper brought an action against Progressive on behalf of a class of unlicensed massage therapists, seeking relief from Progressive's policy of denying payments to unlicensed massage therapists. On July 16, 2007, Progressive filed preliminary objections in the nature of a demurrer to Keiper's class action complaint, arguing that under the MVFRL and the PT Act, unlicensed massage therapists are not entitled to payment for therapeutic treatments under any circumstances.

¹ 75 PA.CON.S.TAT.ANN. § 1701, et seq.

² 63 PA.STAT. § 1301, et seq.

In an order dated September 5, 2007, the trial court sustained Progressive's preliminary objections and dismissed Keiper's complaint with prejudice. The trial court concluded that under Pennsylvania law, if a massage is being performed as part of therapy to recover from injuries sustained in a motor vehicle accident, the therapist must be licensed under the PT Act. Thus, it held that because Keiper was unlawfully performing therapeutic massages on his patients without a license, he may not receive compensation and is not entitled to relief from the court. **See** Trial Court Opinion, 9/5/07, at 2-3. This timely appeal followed.

On appeal, Keiper presents the following issue for our review:

Was it an error, in an action for recovery by massage therapists, pursuant to 75 Pa. C.S.A. 1701 et seq. (MVFRL), from an automobile insurance carrier, for the trial judge to grant preliminary objections when presented with the legal issue as to whether as a uniform policy Progressive Casualty Insurance Co. (Progressive) may reject payments submitted by massage therapists solely because they are not a licensed medical provider.

Appellant's Brief, at 3.

Keiper asserts that the trial court misconstrued the MVFRL and the PT Act to preclude unlicensed massage therapists from receiving payment from automobile insurance carriers under all circumstances; rather, the insurance carrier should evaluate each bill on an individual case-by-case basis to determine whether payment is warranted. **See** Appellant's Brief, at 14-15. Thus, he claims that the trial court erred in dismissing the complaint without

first considering whether the therapeutic massages performed on the patient were necessary and supervised by a medical doctor. **See id.** We disagree as a plain reading of the relevant statutes necessitates affirmance of the trial court order.

Our standard of review where there is a challenge to the sustaining of preliminary objections in the nature of a demurrer is well-settled: The material facts set forth in the complaint and all inferences reasonably deducible therefrom are admitted as true. **See Toney v. Chester County Hospital**, --- A.2d ----, ----, 2008 WL 4867930, *3 (Pa. Super., filed November 12, 2008) (citations omitted). The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. **See id.**, ----, 2008 WL 4867930, *3. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. **See id.**, ----, 2008 WL 2867930, *3.

We find Keiper's argument erroneous following a plain-reading of the above statutory and regulatory provisions. When the words of a statute are clear and free from ambiguity, the letter of the statute is not to be disregarded. 1 PA.CON.S.TAT.ANN. 1921(b). There is nothing in the provisions suggesting that a massage therapist such as Keiper, who is unlicensed under the PT Act, may perform therapeutic treatment of a specific

pathology simply because a medical practitioner referred the patient to him, continued to treat the patient, and supposedly monitored Keiper's treatment of the patient.

The MVFRL provides, in pertinent part, that an automobile insurer "shall make available for purchase first party benefits with respect to injury arising out of the maintenance or use of a motor vehicle as follows: ... coverage to provide for reasonable and necessary medical treatment and rehabilitative services, including but not limited to ... licensed physical therapy." 18 PA.CON.S.STAT.ANN. § 1712.

It is unlawful for any person to practice "physical therapy" in this Commonwealth unless that person is licensed under the PT Act. **See** 63 PA.STAT. § 1304(a). The act defines "physical therapy" as "the evaluation and treatment of any person by the utilization of the effective properties of physical measures such as mechanical stimulation, heat, cold, light, air, water, electricity, sound, **massage**, mobilization and the use of therapeutic exercises and rehabilitative procedures..." 63 PA.STAT. § 1302 (emphasis added).

Regulations promulgated by the State Board of Physical Therapy provide that unlicensed massage therapists may only perform non-therapeutic treatment upon subjects who have no specific pathology upon which the treatment is being performed, and those who perform therapeutic

treatment of a specific pathology are subject to fine and penalty. **See** 49 Pa. Code § 40.3 (Exceptions to requirement of license).³

Here, Keiper billed Progressive for therapeutic massage services rendered according to Medicare fee scheduling code 97140.⁴ **See** Response to Preliminary Objections, Exhibit E – American Medical Association Current Procedural Terminology (2004), “Therapeutic Procedures”. Although there is an exception to the licensing requirement, it only applies to non-therapeutic treatments to persons who are not being treated for a specific pathology. The exception clearly does not apply to Keiper – he acknowledges that he

³ Section 40.3 states the following:

The act continues past law in defining physical therapy and governing its practice in this Commonwealth, and it is not meant to limit or restrict those who are engaged in certain occupations or jobs which do not require a license, such as, but not limited to, physical education directors, health or recreation directors at health clubs or spas, athletic trainers and masseurs. The duties which may be properly undertaken in such occupation or job include the **nontherapeutic** administration of baths, **massage**, normal exercise, normal conditioning, and the like **to normal subjects, that is those persons who have no specific pathology upon which said acts are being administered**; first aid subjects are excluded. If, under their duties, unlicensed individuals perform acts, some of which are described in this section, that are deemed to relate directly or indirectly to the evaluation, treatment or therapeutic management of a specific pathology in the subject, the person administering the acts shall be subject to fine and penalty as provided by law.

⁴ Code 97140 permits payment for services including “manual therapy techniques (e.g., mobilization/manipulation, manual lymphatic drainage, manual traction), one or more regions, each 15 minutes.”

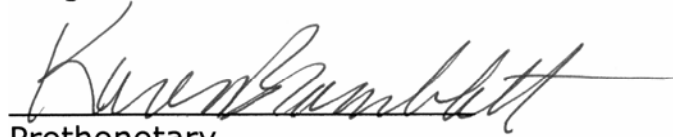
performed therapeutic massages to treat the patient for pain in her right shoulder and neck following the automobile accident. Yet, he claims that he was not violation of the PT Act because those services were prescribed by a medical doctor who continued to treat the patient and monitor Keiper's treatment of the patient. **See** Appellant's Brief, at 15.

We are further persuaded of our conclusion in light of the Commonwealth Court's analysis of a similar case addressing the issue of an insurer's responsibility to pay for physical therapy services performed by unlicensed individuals. **See *Kleinberg v. Southeastern Pennsylvania Transportation Authority***, 765 A.2d 405 (Pa. Cmwlth. 2000). In ***Kleinberg***, the Commonwealth Court held that an unlicensed technician who is supervised by a licensed physical therapist does not perform "licensed physical therapy" within the meaning of a statute requiring medical benefits coverage for licensed physical therapy. **See *id.***, at 408. It stated that the plain language of the statute clearly forbids any person "to hold himself out ... in any manner whatsoever" as being able to practice physical therapy in this Commonwealth unless licensed under the Act. ***Id.*** The court concluded that an insurer is not responsible for paying for such services that are delegated to unlicensed persons, regardless of whether those services are supervised by the delegating physician or not. **See *id.***

Accordingly, we conclude that Keiper may not lawfully perform therapeutic massage services without a license, and therefore, he may not seek protection under the law and be compensated for services provided unlawfully. Progressive properly refused to pay Keiper and owes no duty to pay him as a provider under the MVFRL. The demurrer was proper.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.


Prothonotary

Date: _____