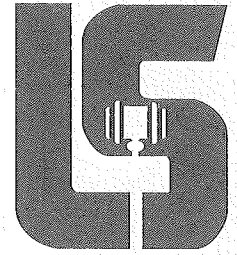


THE LANDRUM & SHOUSE REPORT



Welcome to the Landrum & Shouse Report, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms, practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

Spring 2011

KENTUCKY SUPREME COURT PLACES PRIMARY LIABILITY ON THE INSURER OF THE AUTOMOBILE

KFB v. SHELTER MUT. INS. CO, 326 S.W.3d 803 (Ky. 2010).

BY: JEFF TAYLOR

The loss in this case arose out of an automobile accident caused by one insured while driving a non-owned vehicle. The permissive driver had a personal policy issued by KFB. The owner of the vehicle had a policy issued by Shelter. KFB and Shelter became entangled in a priority dispute as to which insurer, Shelter (insurer of the vehicle) or KFB (insurer of the non-owned-driver), is primary in the accident. Thus, the issue was whether the vehicle owner's insurance is primary over the driver's insurance in an automobile accident when damages are owed to a third party.

The respective policies of Shelter and KFB contained "other insurance" clauses that in essence stated that their respective liability coverage is excess over any other valid and collectible insurance. Based on the language, Shelter contended that the "other insurance" provisions in both policies are mutually repugnant and that, as a result, the two insurers should share liability on a pro rata basis. KFB maintained that primary liability for the accident rests with the insurer of the vehicle.

The Court's analysis focused on a two-step framework that involved examination of each policy's language and the options for pro-rata distribution. Several pages of the

opinion addressed these issues. In the end, the Court relied on the legislative purpose of the Motor Vehicle Reparations Act (MVRA). Specifically, the Court was concerned with the "uncertainty and potential delays" and the possibility that an injured party would not receive prompt payment when two insurance companies become embroiled in a priority dispute.

As such, the Court ruled that where both policies (one covering the vehicle and one covering the driver) claim to provide only excess coverage, the spirit and intent of the Motor Vehicle Reparations Act mandates that the policy covering the vehicle and vehicle owner take priority over that of the permissive driver.

Finally, although this case did not involve the priority of UIM/UM coverages or the priority of applicability of security for payment of PIP/BRB, it is this author's opinion that the Court would reach the same result on those coverages in a non-business and non-commercial setting. In other words, the Court would likely hold that per the policies established in the MVRA, priority lies with the vehicle owner's insurer.

KENTUCKY SUPREME COURT CLARIFIES OBLIGATIONS FOR POST DECISION MEDICAL CARE

By: Mark Hinkel

In two recent decisions, the Kentucky Supreme Court upheld an Unfair Claims Settlement Practice's Act fine and clarified an employer/insurance carrier's obligations in post-settlement/award medical care disputes.

In *Kentucky Associated General Contractors Self-Insurance Fund v. Sheila Lowther*, Ky., ___ S.W.3d ___, 2010 (2010-SC-000114-DG), the claimant suffered a work-related back injury and reached a settlement with future medicals intact.

When confronted with a request for pre-authorization to perform a series of injections, KAGC's third party administrator submitted the request for utilization review pursuant to 803 KAR 25:190 §5.1(a). Upon a recommended denial of care, and after exhausting the appeal process, the administrator issued a final decision denying pre-authorization. Thereafter, the administrator did not file a medical fee dispute or motion to reopen the claim in order to contest the compensability of the proposed treatment. The claimant then contacted the Office of Workers' Claims which upon investigation and hearing, issued a \$10,000 fine for failing to "attempt in good faith to promptly pay a claim in which liability is clear." The Office of Workers' Claims' Executive Director determined that a final utilization review denying pre-authorization is the same as a "statement for services" that an employer must contest within thirty (30) days or pay. The Kentucky Supreme Court upheld the Office of Workers' Claims' Executive Director's determination in spite of KAGC's argument that nothing in the statute nor any regulations require a carrier to first file a medical fee dispute or motion to reopen based upon a final utilization review concerning a pre-authorization request. They further pointed out that the regulations define a "statement for services" as being a bill for services rendered, not a pre-authorization for medical care. The Court observed that in a pre-authorization, the regulations require the provider to submit for utilization review, "the medical necessity and appropriateness of medical care and services for purposes of recommending payment for a compensable injury or disease". This "UR" tolls the thirty (30) day period for challenging or paying the medical expense until the date of the final utilization review decision. The Court observed the UR process must first be exhausted and, thereafter, the employer or its insurer or third party administrator, must initiate a medical fee dispute and motion to reopen if it wishes to contest the reasonableness and necessity of the proposed medical care. The Court further noted that since 2001, the Board has taken the position that their regulations require an employer to file a medical fee dispute and motion to reopen within thirty (30) days of receiving a final utilization review decision denying pre-authorizations or to pay the proposed procedure. In this case, the third party administrator's failure to comply with the statute

and regulations supports the finding that they committed an unfair claims settlement practice and the imposed fine was appropriate.

In a companion case of *Lawson v. Toyota Motor Mfg.*, Ky. ___ S.W.3d ___, 2010 (2009-SC-000767-WC), the Kentucky Supreme Court affirmed the application of the rationale found in *Kentucky Associated General Contractors v. Lowther*, and ruled that where an employer has failed to invoke an ALJ's jurisdiction by filing a timely medical dispute and motion to reopen, the employer may not circumvent its obligations to pay medicals by engrafting its dispute onto a worker's pending motion for temporary total disability.

In *Lawson*, the claimant settled a 2001 work-related injury and maintained her rights to future medical care. When the claimant's doctor requested pre-authorization for another knee operation, a request for utilization review resulted in the procedure being authorized. The claimant then filed a motion to reopen her claim for purposes of obtaining an order to pay TTD benefits. On the same day, the UR provider informed the treating physician that it had decided to seek an independent medical evaluation which resulted in the surgery being cancelled. The second opinion physician determined that surgery would not be reasonable and necessary. Thereafter, the employer filed a response to the claimant's request for a TTD order which eventually resulted in an ALJ determining that the surgery was non-compensable as it constituted neither reasonable nor necessary medical care.

All seemed well for Toyota at this point, except the workers' compensation Board and ultimately, the Supreme Court, determined that Toyota had waived its right to contest the compensability of the medical care because it did not proceed with a motion to reopen to contest the compensability of the proposed surgery within thirty (30) days of the issuance of the pre-authorization. It further ruled that Toyota could not sit back and wait for the claimant to file a motion to award TTD benefits and then try to add on the reasonableness of the proposed medical care as an additional issue. Once its thirty (30) day window of opportunity to contest the reasonableness and necessity of the medical care passed, it was prohibited from contesting it as part of the claimant's bid for TTD benefits. As the Court ruled:

We determine today in *Kentucky Associated General Contractors Self-Insurance Fund v. Lowther*, *Supra*, that an employer wishing to contest liability for a proposed medical procedure must file a medical fee dispute and motion to reopen within thirty days of a final utilization review decision that recommends refusing pre-

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ANNOUNCEMENTS

Bill Shouse will be moderating an NBI seminar on June 23, 2011 in Lexington on “*What Civil Court Judges Want You to Know*”. There will be seven judges on the panel from Eastern and Central Kentucky. Please contact Bill for more information.

Jeff Taylor and Tyler Smith will be making presentations at the upcoming seminar entitled, “*Litigating to Win Through Advanced Trial Advocacy*” on June 2, 2011 in Lexington. Please contact Jeff or Tyler for more information.

Doug Hoots will be making a presentation at the upcoming seminar entitled, “*Litigating Insurance Coverage Claims: From Start to Finish*” on June 24, 2011 in Lexington. Please contact Doug for more information.

Kent Westberry will be making a presentation at the upcoming seminar entitled, “*The Criminal Trial: Voir Dire to Closing*” on June 9, 2011 in Louisville. Please contact Kent if you would like more information.

Landrum & Shouse is pleased to announce that Pierce W. Hamblin, John R. Martin, Jr., Larry C. Deener, Mark J. Hinkel, R. Kent Westberry, John G. McNeill, and Douglas L. Hoots have been selected by their peers to be included in the 2011 edition of *The Best Lawyers in America*.

R. Kent Westberry, Pierce W. Hamblin, Larry C. Deener, Mark J. Hinkel, Douglas L. Hoots, John R. Martin, John G. McNeill and Leslie Vose have been included in the 2010 edition of *Super Lawyers*.

KY Supreme Court Clarifies, Continued from Page 2
authorization. The rationale of *KAGC v. Lowther* applies with even greater force to a utilization review recommendation to grant pre-authorization. We conclude that in either instance an employer, having failed to invoke an ALJ’s jurisdiction by filing a timely medical dispute and motion to reopen, may not circumvent KRS 342.020 and the regulations engrafting such a dispute onto a worker’s pending motion for TTD.

Hence, the Court reasoned that once the window of opportunity to contest the medical care had closed on Toyota, it could not contest it whether it was reasonable or not.

These two cases clearly illustrate that the Supreme Court has accepted the rationale the Board proposed back in 2001 in an unpublished Board opinion, that the decision on a pre-authorization is the same as a “statement for services”, which requires the employer to invoke the jurisdiction of an ALJ by filing a medical fee dispute and motion to reopen once UR process has been exhausted or, waive its right to contest the medical care.

State Farm, Continued from Page 4

bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured [underinsured] motor vehicle.” *Id.* at 322. The Kentucky Supreme Court evaluated this policy language in conjunction with the exclusive remedy provisions of the Workers’ Compensation Act, and found no ambiguity. Basically, there is no construction of the policy language that would support a conclusion that the Plaintiff was entitled to recover any amounts from the employer/owner of the vehicle or the co-employee over and above the available workers’ compensation benefits. *Id.* at 323. The theory is that the employer or co-employee have no legal liability for a work related injury sustained in a motor vehicle accident. Their “liability” is limited to the benefits recoverable under the Workers’ Compensation Act. Therefore, the policy provision is valid and enforceable.

In summary, a person injured in a work related motor vehicle accident caused by a co-employee cannot recover UM or UIM benefits from his own personal automobile policy for uncompensated damages if his policy has the standard language precluding such a recovery.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY vs. ESTATE OF SLUSHER

By: Douglas L. Hoots

In *State Farm v. the Estate of Slusher*, 325 S.W.3d 318 (Ky., 2010) the Supreme Court of Kentucky considered whether a person injured in a work related automobile accident caused by the negligence of a co-worker could recover from his own policy's uninsured (UM) or underinsured (UIM) coverages. The circuit court and the Court of Appeals concluded that State Farm was required to provide UM or UIM coverage to its insureds under these factual circumstances. *Id.* at 321. Essentially, the Court of Appeals determined that an insured is only obligated to prove fault of the uninsured or underinsured motorist and the

damages caused by the uninsured or underinsured motorist to recover from his own personal UM or UIM policy coverage.

On appeal to the Kentucky Supreme Court, State Farm successfully argued that its own unambiguous policy language, the exclusive remedy provision of the Kentucky Workers' Compensation Act, and existing case law prohibited recovery under either the UM or UIM provision of its policy.

State Farm's policy had standard language which stated that the company would only "...pay compensatory damages for
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Assistant Editor: Cheryl Tingle
ctingle@landrumshouse.com
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tsmith@landrumshouse.com

by: Tyler G. Smith

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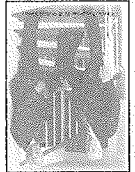
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