STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR THE COUNTY OF KENT

ADVISACARE HEALTHCARE SOLUTIONS, INC. D/B/A ADVISACARE, a Michigan corporation (Randy Baldwin)

Plaintiff,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

Case No. 21-00490-NF

Hon. Paul J. Denenfeld

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OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

I. Introduction

Before the Court in this no-fault action is Plaintiff AdvisaCare's Motion for Summary Disposition pursuant to MCR 2.116(C)(10). This case arises out of medical treatment provided to Randy Baldwin by AdvisaCare after he was seriously injured in a motor vehicle accident while operating a motorcycle. Defendant State Farm does not dispute that it is responsible for paying Baldwin's no-fault benefits and, therefore, AdvisaCare for the care it provides Baldwin. Thus, the only issue in the current motion is the amount AdvisaCare may charge and State Farm must pay for AdvisaCare's care of Baldwin.

AdvisaCare claims, and State Farm does not appear to dispute, that prior to amended MCL 500.3157 taking effect, State Farm agreed that the rates AdvisaCare charged for Baldwin's care—$29.95/hour for high-tech-aide care and $55/hour for LPN skilled nursing care—were

reasonable.[1] The parties dispute, however, the rate State Farm must pay for AdvisaCare's services after July 1, 2021, when the new "fee schedules" went into effect under MCL 500.3157.

The new fee schedules of MCL 500.3157 set the ceilings of a medical provider's reimbursement rates, while amended MCL 500.3107 still requires that the charges be "reasonable." Under the fee schedules, if a medicare rate is applicable, the ceiling is 200% of the medicare rate. If a medicare rate does not apply and the provider had a charge description master in effect on January 1, 2019, the ceiling is 55% of the charge description master rate. Finally, if there is no applicable medicare rate and the provider did not have a charge description master, the ceiling is 55% of the average amount the provider charged for the treatment as of January 1, 2019.

State Farm explains that when the fee schedules took effect on July 1, 2021 it began paying 55% of the average amount the provider charged for the treatment as of January 1, 2019. AdvisaCare now argues that this was improper, claiming that medicare rates apply and, in the alternative, it has a charge description master (CDM) that was in effect on January 1, 2019. AdvisaCare thus claims that either the medicare rate or its CDM sets the ceiling of the reimbursement rate.

State Farm responds by arguing that whether AdvisaCare's charges are reasonable is a question of fact for the jury. State Farm also argues that AdvisaCare has waived its right to recovery based on medicare rates because AdvisaCare affirmatively stated to State Farm that it was basing its post-amendment rates on its CDM. Finally, State Farm argues that there is a genuine issue of material fact as to the proper rate under AdvisaCare's CDM because its CDM is inconsistent and incomplete.[2]

II. Legal Standard

AdvisaCare now moves pursuant to MCR 2.116(C)(10). Summary disposition under MCR 2.116(C)(10) is available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A genuine issue of material fact exists when the record, giving the benefit of

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[1] Byron Nickens, the State Farm adjuster handling Baldwin's case, testified at his deposition that State Farm did not dispute that $29.95/hour for high tech home health aide care and $55.00/hour for LPN care were reasonable rates prior to the effective date of amended MCL 500.3157.

[2] State Farm states, however that once AdvisaCare submits a proper and complete CDM, it would be willing to reconsider its position.

reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. *Attorney Gen v PowerPick Players' Club of Michigan, LLC*, 287 Mich App 13, 26–27, 783 NW2d 515 (2010).

In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. MCR 2.116(G)(5). The moving party must specifically identify the undisputed facts and has the initial burden of supporting its position with documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28, 33 (1999). The responding party must then present legally admissible evidence to demonstrate that a genuine issue of material fact remains for trial. *Id.*

III. Analysis

1. MCL 500.3157

MCL 500.3157 provides in relevant part as follows:

> (2) Subject to subsections (3) to (14), a physician, hospital, clinic, or other person that renders treatment or rehabilitative occupational training to an injured person for an accidental bodily injury covered by personal protection insurance is not eligible for payment or reimbursement under this chapter for more than the following:
>
> > (a) For treatment or training rendered after July 1, 2021 and before July 2, 2022, 200% of the amount payable to the person for the treatment or training under Medicare.
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> ***
>
> (7) If Medicare does not provide an amount payable for a treatment or rehabilitative occupational training under subsection (2), (3), (5), or (6), the physician, hospital, clinic, or other person that renders the treatment or training is not eligible for payment or reimbursement under this chapter of more than the following, as applicable:
>
> > (a) For a person to which subsection (2) applies, the applicable following percentage of the amount payable for the treatment or training under the person's charge description master in effect on January 1, 2019 or, if the person did not have a charge description master on that date, the applicable following percentage of the average amount the person charged for the treatment on January 1, 2019:
> >
> > > (i) For treatment or training rendered after July 1, 2021 and before July 2, 2022, 55%.

Therefore, in determining the maximum rate a no-fault insurer may charge under MCL 500.3157, the Court must first determine whether there is an applicable Medicare rate, then to the

provider's charge description master if in effect as of January 1, 2019, and, finally, to the average amount the provider charged for the treatment on January 1, 2019.

2. Medicare

AdvisaCare first argues that medicare has both billings codes and amounts payable for home-health-aide care and skilled nursing care, the types of care provided to Baldwin. AdvisaCare explains that the Centers for Medicare and Medicaid Services ("CMS"), the federal agency that administers Medicare, uses the Code G0156 for home health aide care and G0299 and G0300 for RN and LPN skilled nursing care. Moreover, AdvisaCare has provided to the Court the rates CMS has published for these types of care. 200% of the published home health aide care rate is approximately $130/hour and 200% of the published skilled nursing care rate is $400/hour. Because these hourly rates exceed the rates AdvisaCare has previously charged and State Farm previously agreed were reasonable, AdvisaCare requests that the Court rule that State Farm continue to pay those rates, or $29.95/hour for home health aide care, $55/hour for LPN care, and $70/hour for RN care.

In its Response, State Farm does not dispute that the above medicare rates are applicable or that they are correct. Rather, State Farm argues that the doctrine of waiver applies because AdvisaCare affirmatively stated to State Farm that it was not relying on medicare rates but, instead, was claiming recovery based on the rates in its CDM. "[W]aiver is the intentional relinquishment of a known right" that "may be shown by express declarations or by declarations that manifest the parties' intent and purpose." *Reed Estate v Reed*, 293 Mich App 168, 176; 810 NW2d 284, 290 (2011).

> The recognized definition of the term "waiver" is "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage.... The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." To effectuate a valid waiver, "no magic language" need be used. "Rather ... a waiver must simply be explicit, voluntary, and made in good faith." In order to ascertain whether a waiver exists, a court must determine if a reasonable person would have understood that he or she was waiving the interest in question. [*Id.* (internal citations omitted).]

In support of this claim, State Farm has provided to the Court an email sent from AdvisaCare's billing representative to State Farm that indicates that AdvisaCare requested State Farm pay 55% of the rate in its CDM, or $33/hour.

In its Reply, AdvisaCare argues that the doctrine of waiver is inapplicable in the current case for several reasons. First, waiver is an affirmative defense that must be raised in a party's

responsive pleadings, either as originally filed or as amended in accordance with MCR 2.118. See *Kheder Homes at Charleston Park, Inc v Charleston Park Singh, LLC*, unpublished opinion of the Court of Appeals, issued January 2, 2014 (Docket No. 307207), 2014 WL 60326, p *6 citing *Burke v River Rouge*, 240 Mich 12, 14; 215 NW 18 (1927); see also MCR 2.111(F)(3). Second, even if State Farm could raise waiver as a defense, the Court is nevertheless required to enforce the plain language of MCL 500.3157. Third, a statement in an email that $33/hour should be paid pursuant to AdvisaCare's CDM cannot be deemed an "intentional relinquishment of a known right."

The Court agrees that the doctrine of waiver does not apply in this case. Although an old case, the Michigan Supreme Court's decision in *Burke v River Rouge*, 240 Mich 12, 14; 215 NW 18 (1927) appears to still be good law.[3] In that case, the Supreme Court held that waiver is an affirmative defense. And pursuant to MCR 2.111(F)(3), "affirmative defenses must be stated in a party's responsive pleading." State Farm did not raise waiver as an affirmative defense in its Answer.

Even if State Farm had raised waiver as an affirmative defense, or the Court excuses State Farm's failure to assert waiver as an affirmative defense, the Court believes it still improper to apply the doctrine in the current no-fault case. "PIP benefits are mandated by statute under the no-fault act, MCL 500.3105 . . . and, therefore, the statute is the "rule book" for deciding the issues involved in questions regarding awarding those benefits. *Rohlman v Hawkeye-Sec Ins Co*, 442 Mich 520, 524–25; 502 NW2d 310, 313 (1993). The no-fault act does not indicate that if medicare provides an amount payable, AdvisaCare has a legal right to 200% of that rate. Rather, it indicates that if a medicare rate applies, 200% of that rate sets the maximum reimbursement rate. In other words, the Court is unconvinced that the fee schedules of MCL 500.3157 contain legal rights that AdvisaCare may waive. AdvisaCare has the right to be reimbursed at a a reasonable rate, and in order to determine whether the amount is reasonable, the parties and this Court look to a medicare rate, if applicable, as the maximum of what is reasonable.

Moreover, if AdvisaCare does have "waivers of statutory rights must be clear and unambiguous." *Saginaw Ed Assn v Eady-Miskiewicz*, 319 Mich App 422, 449; 902 NW2d 1, 16

[3] A panel of the Michigan Court of Appeals cited *Burke* for the relevant proposition as recently as 2014. See *Kheder Homes at Charleston Park, Inc v Charleston Park Singh, LLC*, unpublished opinion of the Court of Appeals, issued January 2, 2014 (Docket No. 307207), 2014 WL 60326, p *6.

(2017). Here, the Court cannot conclude that an email from one of AdvisaCare's employees indicating that AdvisaCare bases its charges on its CDM is a clear and unambiguous waiver of its right to base its charges off medicare rates. Therefore, the Court now declines to apply the doctrine of waiver in this case. Moreover, because the Court now finds that AdvisaCare has presented sufficient documentary evidence that medicare rates apply—and State Farm neither disputes that those rates apply or provides documentary evidence to establish a genuine issue of material fact as to their applicability—the Court concludes that medicare provides an amount payable for the treatment Baldwin receives.

IV. Conclusion

For these reasons, the Court hereby GRANTS AdvisaCare's Motion for Summary Disposition to the extent it requests this Court hold that medicare provides rates payable for Baldwin's care. These medicare rates set the maximum amount AdvisaCare may charge and State Farm is obligated to pay in this case. Pursuant to MCL 500.3107, the rates must still be reasonable. Because a State Farm representative testified at his deposition that $29.95/hour was a reasonable rate for high tech home health aide care and $55.00/hour was a reasonable rate for LPN care, the Court hereby orders that State Farm resume paying those rates.

IT IS SO ORDERED.

Dated: April 21, 2022

PAUL J. DENENFELD

Hon. Paul J. Denenfeld, Circuit Judge