IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joel S. Ario, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff	:	
v.	:	
Reliance Insurance Company, Defendant	:	No. 269 M.D. 2001

IN RE: Order Approving Referee Finkelstein's Order in POC Nos. 1505780 and 1666979, the matter of Claude J. Wilson

ORDER

AND NOW, this 13th day of June 2008, the Court has given consideration to the decision of Referee Finkelstein issued in the above-captioned matter. The Court notes that no objection to the recommended decision has been received, and the Court does CONFIRM and ACCEPT the decision of Referee Finkelstein attached hereto and marked as "Referee Decision Exhibit A."

A copy of this Order shall be served by the Liquidator upon all listed on the Master Service List. Thereafter, an affidavit of service shall be filed with the Court.

By the Court:

James Gardner Colins

JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOEL S. ARIO, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff	:	
v.	:	Docket No. 269 M.D. 2001
RELIANCE INSURANCE COMPANY, Defendant	:	
	:	Assigned to Referee Edward S. Finkelstein, Esq.

IN RE: Claude J. Wilson
Proof of Claim Nos. 1505780 and 1666979

ORDER

AND NOW, this day of _____, 2008, the Court notes that no party has filed any exceptions to the Recommendation of the Referee, therefore, the Court hereby adopts the Referee's Recommendation attached hereto and it is hereby

ORDERED, that the Liquidator's Notices of Determination on Proof of Claim Nos. 1505780 and 1666979 are hereby confirmed. The Plaintiff shall, however, be entitled to a class (e) claim for a refund of his premiums paid in the amount of $5,743.00.

"Referee Decision Exhibit A"

It is further **ORDERED** that the Liquidator shall not pursue a claim against Wilson for any monies Reliance paid out on his behalf under the policy as the policy is now considered void and Reliance should not have paid out monies on behalf of Wilson.

The Liquidator shall serve this Order upon all counsel for the parties associated with this matter.

BY THE COURT:

_____

J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOEL S. ARIO, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff	:	
	:	Docket No. 269 M.D. 2001
vi.	:	
RELIANCE INSURANCE COMPANY, Defendant	:	
	:	Assigned to Referee Edward S. Finkelstein, Esq.

IN RE: Claude J. Wilson
Proof of Claim Nos. 1505780 and 166979

REFEREE'S RECOMMENDATION TO THE COURT

FINDINGS OF FACT

1. Claude J. Wilson (hereinafter referred to as "Wilson") filed his first Proof of Claim ("POC") dated February 15, 2002, which is No. 1505780 in the amount of $7,162.32.

2. With this first Proof of Claim, Wilson enclosed the following:

a. A copy of a February 29, 2001 letter from a company manager who denied this claim;

b. A copy of the Explanation of Benefits ("EOB") representing a check from United Pacific to the Hospital in the amount of $16,404.20.

c. One invoice from Pee Dee Orthopaedic Associates in the amount due of $5,718. This document also shows that a payment of $100 was made on March 25, 2001; therefore, leaving a balance of $5,618; and

d. 8 EOB's denying benefits to various providers for a total of $1,444.32; however, among these 8 EOB's there are two for services rendered by Pee Dee Orthopaedic Associates on August 17, 2000 for $83 and August 7, 2000 for a total of $915, respectively; both of these charges; however, are already included in the two individual invoices for $5,718 dated February 8, 2001 and March 1, 2001 which Wilson submitted with his POC's; therefore, the claim for the 8 EOB's is $446.32.

3. A second POC dated March 27, 2002 and No. 1666979 was submitted for $5,718. This invoice is duplicative of the invoice submitted with POC 1505780.

4. The Liquidator filed Notices of Determination ("NOD") to both Proof of Claims assigning a value of zero to those claims.

5. In a submission by Wilson dated January 15, 2008 (hereinafter the "1/15/08 submission"), he stated:

"In 1999 I purchased insurance through Reliance Insurance Company due to the cancellation of my previous insurance. I paid my premiums and monthly payments which were upwards of $500 per month, for about two years. After which time I started experiencing problems with my back. I consulted my physician and together we decided that the best thing for me to do was to start with physical therapy sessions. I was re-examined and my physician determined that there was no change in my situation. As a last result he recommended surgery."

6. In his Objection to the Notices of Determination, received by Reliance on December 27, 2005, Wilson stated "In 1998, I purchased health insurance through United Pacific."

7. Mr. Wilson purchased a United Pacific[1] policy, which incepted on March 1, 2000, which is actually the subject of this proceeding.

8. Wilson was injured while working for the railroad on July 2, 1992. (N.T. 4[2])

9. As a result of the injuries received on July 2, 1992, Wilson had surgery in 1992 and 1994. (N.T. 40)

[1] United Pacific is a subsidiary of Reliance.
[2] A telephonic hearing took place regarding this matter on October 10, 2007 and all Notes of Testimony references are to the transcript from that telephonic hearing.

10. Wilson reached a settlement with the railroad on or about January 30, 1995 after which he was no longer an employee of the railroad nor entitled to any further benefits as a result of his employment with the railroad or related to the injury he received while working for the railroad. The amount of the settlement was not disclosed. (N.T. 5, 10, 40)

11. At least one of the 1992 or 1994 surgeries on Wilson was on his lower back and the other a little higher. (N.T. 41)

12. Wilson asserts that he is on the Board of Directors of a non-profit day care run by his wife. (N.T. 11)

13. Wilson had health insurance with Travelers and the record is not clear whether the Travelers policy was terminated by Travelers, lapsed or was canceled by Wilson as Wilson first indicated that Travelers canceled him and then later asserted that he canceled the Travelers policy because it was more expensive. (N.T. 12-13)

14. Wilson completed and signed the Application for insurance with United Pacific on January 31, 2000.

15. Wilson consulted Pee Dee Orthopaedic Associates about on-going back pain on 3/9/99, 3/18/99, 3/23/99,

8/9/99, and 9/27/99 - all prior to purchasing the insurance from United Pacific. (Exhibit C to Liquidator's Response)

16. On the Application for insurance dated January 31, 2000 (Exhibit A to Liquidator's Response) which Wilson acknowledges signing (N.T. 19) he answered "No" to the following question:

> Question 1. "Have you or any member of your family applying for coverage ever had a diagnosis of or received consultation, been treated or taken medication for or been examined by a physician or other practitioner for any of the following: (k) Any musculoskeletal disorder including muscular dystrophy, arthritis, gout, back, spine or joint disorder?"

17. Wilson acknowledged that he had been consulting medical providers about back problems during the year preceding his enrollment and had surgery prior to 1/31/00. (N.T. 21, 27)

18. As to the Application, Wilson also answered "no" to the following question on the Application:

> Question 6. "Has anyone applying for coverage been told that testing, treatment, surgery or hospitalization might be needed or will be needed in the future or has anyone applying for coverage

contemplating any elective surgery?"

19. Wilson was referred to Pee Dee Orthopaedic Associates by Dr. Trefny for further evaluation of symptoms that had been bothering him since 1994 when he had a work-related injury that worsened over the past six months. This was noted in the records of Pee Dee Orthopaedic Associates regarding a visit by Wilson on March 9, 1999. Wilson also told the doctor that he did well after his surgery but then his back just started to bother him again. (N.T. 14, 19)

20. At his visit to the doctor on September 27, 1999, Wilson told the doctor that he had to make arrangements so that he could have the surgery that was to be one level above his previous surgery. (N.T. 15)

21. Wilson asserts that his statement "make arrangements" was for Medicare coverage but not surgery. He acknowledges that he was having problems in September 1999 with his back but he was not contemplating surgery because he had not made up his mind to have surgery even though he was undergoing testing and treatment. (N.T. 27-29)

22. On February 14, 2000, Wilson was contacted by an underwriter for United Pacific who asked him questions regarding his Application and correctly had his Social Security Number and date of birth although Wilson did not remember the telephone call. (N.T. 30) During the

interview with the underwriter, Wilson advised the underwriter that his last consultation with a doctor was on August 1999 for a stomach virus and his wife's last consultation was for a "Pap" in January 1999 and did not mention his visits with Pee Dee Orthopaedic Associates throughout 1999. (N.T. 30-31)

23. Wilson has a letter stating "according to our records, you are not qualified for benefits under the Railroad Unemployment Insurance Act" which letter is dated October 22, 1994. (N.T. 39)

24. Although Wilson applied for Medicare after his surgeries of 1992 and 1994, he did not receive Medicare coverage until February 2004. (N.T. 40)

25. The hospital and physician received Pre Certification approval for Wilson's surgery from PEECH Street, a Pre-Certification Review Company. (Melvin Affidavit, Paragraph 7)

26. The Pre-Certification approval letter indicates only that the surgery is approved but does not indicate that the services will, in fact, be covered by the insurance policy. Wilson's insurance card also provides that although Pre-Certification approval may be obtained, that does not indicate that the insurance will actually cover the medical services. The services must be provided in accordance with

the policy provisions. Certification does not guarantee benefits. (Section 7 of the Policy; Exhibit A to Melvin Affidavit)

27. Wilson asserts that a charity paid his hospital bill because the insurance company refused to pay it although United Pacific did in fact pay the hospital bill as well. (N.T. 36)

28. Wilson has not received any recent demands from Pee Dee Orthopaedic Associates to pay any outstanding bill. (N.T. 37)

DISCUSSION

This matter comes before the Court pursuant to two Proofs of Claim (1505780 and 1666979) filed by Wilson asserting that United Pacific Insurance Company, a subsidiary of Reliance, wrongfully refused to pay his orthopedic surgeon's bill for surgery on his back which took place in August 2000.

Mr. Wilson was injured while working for the railroad on July 2, 1992. As a result of those injuries, he had surgery in 1992 and again in 1994. At least one of the 1992 or 1994 surgeries on Wilson was on his lower back and the other a little higher. Mr. Wilson reached a settlement with the railroad on or about January 30, 1995 after which he was no longer an employee of the railroad nor entitled to any

further benefits as a result of his employment with the railroad or related to the injury he received while working for the railroad. The amount of the settlement was not disclosed.

Apparently at some time after Wilson was no longer working for the railroad, he obtained personal medical insurance through Travelers Insurance Company. At some point in time, the Travelers coverage either lapsed or was canceled by Wilson. Wilson then sought medical insurance coverage through United Pacific.

Although Wilson thought that he obtained the United Pacific coverage in 1999, the application for the insurance was not even dated until January 31, 2000. In the application for insurance dated January 31, 2000 that was signed by Wilson, he denied ever having a diagnosis of or received consultation or been examined by a physician or other practitioner for any musculoskeletal disorder including muscular dystrophy, arthritis, gout, back, spine or joint disorder. He also answered "no" to a question on the application as to whether he had been told that testing, treatment or surgery or hospitalization might be needed in the future or that he was contemplating any elective surgery.

As part of its underwriting procedures, an individual representing United Pacific contacted Wilson and Wilson advised the underwriter that his last consultation with a doctor was in August 1999 for a stomach virus and his wife's last consultation was for a PAP test in January 1999 and he never mentioned his visits with Pee Dee Orthopedic Associates. In fact, Wilson had consulted with Pee Dee Orthopedic Associates about on-going back pain on 3/9/99, 3/18/99, 3/23/99, 8/9/99, and 9/27/99. Wilson acknowledged these contacts with Pee Dee Orthopedic Associates in his testimony in this matter. Wilson asserts that although he was seeing the physician for back discomfort, he was not contemplating surgery as he had to make arrangements before he would undergo the surgery. The Referee is not persuaded by Mr. Wilson's explanation. The records of Pee Dee Orthopedic Associates clearly indicate that Wilson was going to be having surgery and he clearly understood this.

Admittedly Mr. Wilson received a pre-operative certification for his surgery from a representative for United Pacific but this document clearly indicates that United Pacific reserved all rights to review the surgery after the fact before paying for same. As it turned out, when United Pacific reviewed Wilson's surgery, it realized that Wilson had been diagnosed with back problems prior to

the surgery and failed to disclose his need for surgery at the time he completed his application for medical insurance with United Pacific. Therefore, United Pacific denied coverage of his physician bill although it appears that Untied Pacific did pay the hospital bill. Just because United Pacific paid the hospital bill, however, is no basis for Wilson to assert that therefore United Pacific is obligated to pay his physician. In fact, it appears that no one paid the physician and the physician is no longer pursuing any claim against Wilson for payment for the surgery. Mr. Wilson may have paid $100 towards the surgeon's bill but that is all.

Because Wilson made material representations to United Pacific before it granted him coverage he is not entitled to pursue a claim against United Pacific, a subsidiary of Reliance at this time.

Under South Carolina law, an insurer may avoid coverage under the policy when it establishes that: (i) the insured made a false statement in the insurance application; (ii) that the insured knew the statement was false when made; (iii) that the false statements were material to the risk covered in the policy; (iv) that the insurer relied on them; and (v) that the statements were made with intent to

deceive. Floyd v. Ohio General Ins. Co., 701 F. Supp. 1177, 1188 (D.S.C. 1988).

In this case, all five elements are satisfied. Answers to questions one and six were false when they were made and as the testimony during the deposition establishes, Mr. Wilson knew that they were false when he made them.[3] Mr. Wilson was also misleading when interviewed in February 2000 about the latest consultation that he had. It is clear from the deposition, that Mr. Wilson made these false representations with the intent to obtain insurance to cover his upcoming back surgery. Reliance relied on the false statements by issuing a medical benefits policy without properly evaluating the risk involved. Had Mr. Wilson truthfully answered yes to questions 1 and 6 on the application, the policy, as written, would not have been issued to him. The underwriter would have offered him the policy at a much higher premium or would have excluded the particular risk from coverage under the policy. (See Neldon Affidavit at ¶13) It is clear, United Pacific was not given the opportunity to evaluate the risk correctly in light of the material misrepresentations of Wilson. Mr. Wilson knew

[3] Of significance is also the "Applicant's statements" on page 2 of the application. Mr. Wilson understood that there was a pre-existing condition on the policy that would exclude coverage for any pre-existing condition, he understood the Pre-existing Condition, Exclusions and Limitations on the policy, and he understood that if information was misrepresented on the application, the policy may be voided. (Exhibit A to Liquidator's Response).

in September 1999, that he was going to have surgery in 2000 and the delay was only necessary for him to make arrangements for coverage for the surgery.

The policy should, therefore, be voided *ab initio* due to the material misrepresentations in the application of the policy. See, e.g., Government Employees Inc. v. Chavis, 254 S.C. 507, 176 S.E.2d 131 (1970). An action to void the policy *ab initio* is an action to rescind the policy and place the parties in the same position as if the contract never existed. Id. at 516 (avoiding the policy *ab initio* is a claim for rescission which seeks to create the situation as if no contract ever had existed). Consequently, while Reliance would have been required to return all the premiums Mr. Wilson paid for the policy in the amount of $5,743, Wilson will be entitled to a class (e) priority Notice of Determination in the amount of $5,743 for the return of premium. 40 P.S. §221.44.

An additional reason for denial of Wilson's claims is that the back surgery that Wilson underwent in August 2000 was a result of a pre-existing condition which was recurring in 1999 and for which Wilson was seeking treatment in 1999. Therefore, by virtue of the "Preexisting Condition Limitation" in the policy which precludes coverage for any injury or treatment which was "recommended no more than 12

months immediately before the Effective Date of Coverage". As the medical records from Pee Dee Orthopaedics evidence, they had recommended that Wilson undergo surgery from March to September 1999 and, therefore, the pre-existing condition clause of the policy applies to preclude any coverage for Wilson for these medical benefits. See, e.g., Johnson v. Wabash Life Ins. Co., 244 S.C. 95, 135 S.E.2d 620 (1964) (upholding denial of coverage under hospital benefits policy for pre-existing kidney hospitalization).

A review of Wilson's medical records indicates the following:

March 9, 1999 — This 41 year old black male is kindly referred by Dr. Frank Trefny for further evaluation of the above **symptoms that have been bothering him since back in 1994 when he had a work related injury, but worse over the past six months or so. He describes a work-related injury that subsequently led to decompressive procedures being done by Dr. Ferre.** After that he did some better, but apparently medically retired from his job in the railroad. **He has continued to have symptoms over the years, but more recently has developed rather significant discomfort into the buttocks and back of both legs down to the calves and ankles.** . . . Unfortunately, no records are available from Dr. Ferre's care of him. . . . (emphasis added)

X-RAY: — Radiographic studies: Plain films show Degenerative changes in the lumbar spine. Previous decompression at the L3/4 level is suspected based on the interspinous discs between L3 and L4.

	MRI scan done recently show degenerative changes in the lumbar spine associated with what appears to be significant lumbar stenosis at L3/4. No noncontrasted study. . . .
RECOM:	. . .It is not clear exactly what surgical procedure was performed previously, but the patient does believe that he does have some medical records available at home that he will get to me . . . .
3/18/99	Here for orders for CT myelogram of the Lumbar stenosis at the L3/4 level. He has had previous surgery by Dr. Ferre several years ago presumably at the L4/5 level, but this is unclear and no records are available. Recheck and discuss results of same.
3/23/99	. . .He had posterior decompression by Dr. Ferre several years ago that appears to have involved the spinous process and other part of the L3 laminate. He still has significant stenosis at the L3/4 level and down at the L4/5 level, . . . More extensive decompressive surgery could be appropriate if no improvement occurs and we have discussed this today including the potential risks and complications of further decompressive surgery.
8/9/99	Lumbar stenosis at L3/4 above the previously decompressed level by Dr. Ferre. . . . Overall, his level of activity remains low and he is considering surgical treatment. . . He understands the potential risks and complications of decompressive surgery, especially adjacent to a previously operated level which probably has significant epidural fibrosis. . . .

9/27/99

. . .He is on railroad retirement and just **trying to get all of his arrangements made so that he can have decompressive surgery** at this area one level above where he has had previous surgery. . . .Again, **we discussed surgical treatment with him and the fact that this is an elective procedure that is entirely up to him. He feels that since his symptoms have not improved that this would be appropriate and will call if and when he decides to proceed.** He is unable to work at his previous job. . . . (emphasis added)

All of the above referenced medical records are consistent with Wilson's testimony that he knew that he would have back surgery and he failed to disclose this information to United Pacific on his Application nor did he reveal this information to the United Pacific underwriter. He had to know that his failure to disclose this information was material to United Pacific issuing him the Policy and he intended to deceive United Pacific by withholding this information.

RECOMMENDATION

Because Wilson clearly knew that he was going to need surgery on his back in the near future at the time he submitted his application for medical insurance to United Pacific, he intentionally misrepresented his condition to the insurance company and therefore he is not entitled to coverage for the back surgery of August 2000 by United

Pacific; however, he should be entitled to a class (e) Claim for a refund of the premiums he paid as the policy was void *ab initio*.

Dated: 5/15/08

Edward S. Finkelstein,
Referee