

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH WALDMAN, by her attorneys : CIVIL ACTION  
in fact, Harry and Nadine :  
Waldman :  
 :  
v. :  
 :  
PEDIATRIC SERVICES OF AMERICA, : NO. 97-7257  
INC. d/b/a PREMIER NURSE :  
STAFFING, INC. and FIREMAN'S :  
FUND INSURANCE COMPANY d/b/a THE :  
AMERICAN INSURANCE COMPANY :

**MEMORANDUM AND ORDER**

BECHTLE, J.

APRIL , 1999

Presently before the court are defendant Fireman's Fund Insurance Company's ("Fireman's Fund") motion for summary judgment and plaintiff Ruth Waldman's ("Plaintiff") response thereto. For the reasons set forth below, the court will deny the motion.

**I. BACKGROUND**

The facts of this case are well-documented and set forth in the court's Order of November 5, 1998. Waldman v. Pediatric Servs. of Am., Inc., No. 97-7257, 1998 WL 770629, at \*1-3 (E.D. Pa. Nov. 5, 1998). In that Order, the court entered judgment in favor of one defendant, PSA, and against Plaintiff. Id. at \*9. In addition, the court dismissed all claims against Fireman's Fund, except for Plaintiff's bad faith claim brought under 42 Pa. Con. Stat. Ann. § 8371. Id. Presently before the

court is Fireman's Fund's second motion for summary judgment.

**II. LEGAL STANDARD**

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

On a motion for summary judgment, the non-moving party has the burden to produce evidence to establish prima facie each element of its claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Such evidence and all justifiable inferences that can be drawn from it are to be taken as true. Anderson, 477 U.S. at 255. However, if the non-moving party fails to establish an essential element of its claim, the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 322-23.

**III. DISCUSSION**

Fireman's Fund's instant motion for summary judgment is based on its assertion that Plaintiff cannot meet her burden to show bad faith on the part of Fireman's Fund. The court disagrees. By statute, Pennsylvania law allows a bad faith action against an insurer. 42 Pa. Con. Stat. Ann. § 8371

("section 8371"). To prevail on a claim of bad faith under section 8371, Plaintiff must show by clear and convincing evidence: "(1) that the insurer lacked a reasonable basis for denying benefits; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis." Klinger v. State Farm Mut. Auto Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997); see Terletsky v. Prudential Property & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994) (stating bad faith standard under section 8371).

Fireman's Fund asserts that there is no clear and convincing evidence of bad faith on their part, and instead, assert that they conducted a good faith investigation of Plaintiff's claim and denied it on proper grounds. (Summ. J. Mem. at 8.) Fireman's Fund argues that their "denials were based upon plaintiff's failure to comply with the one year limitation of suit provision and due to late reporting. In [partially] granting [Fireman's Fund's first motion for] summary judgment, [the court] held that Fireman's Fund's denial was properly based, i.e., that plaintiff did fail to comply with the suit limitation provision. Therefore, Fireman's Fund's denial was reasonable and in good faith." Id.

Fireman's Fund misreads the court's first summary judgment ruling. In that decision, the court ruled that the limitation of suit provision barred Plaintiff's claims based upon the insurance policy itself. Waldman, 1998 WL 770629, at \*7-8. However, the court also ruled that an action for bad faith under

section 8371 was separate and independent of an action on an insurance policy. Id. at \*9. The court also ruled that under Pennsylvania law, a limitation of suit provision is inapplicable to a claim of bad faith under section 8371. Id. Thus, Fireman's Fund cannot now rebut Plaintiff's bad faith claim by asserting the limitation of suit provision as a reasonable basis for denying her claim.

Fireman's Fund also denied Plaintiff's claim due to late reporting. Plaintiff argues that in denying her claim based on late reporting, Fireman's Fund "applied an unreasonable judgment" to the basis of her claim that constituted bad faith. (Pl.'s Opp. at 10-13.) Under Pennsylvania law, "[i]n order to prevail on a late notice defense, an insurer must prove that notice was untimely and that the delay caused prejudice to the insurer."<sup>1</sup> Hyde Athletic Indus., Inc. v. Continental Cas. Co., 969 F. Supp. 289, 300 (E.D. Pa. 1997) (citing Brakeman v. Potomac Ins. Co., 371 A.2d 193, 198 (Pa. 1977)). Under this standard, Fireman's Fund's decision to deny Plaintiff's claims due to late reporting cannot be construed as reasonable under section 8371's bad faith standard unless it can show that the late reporting caused it prejudice. Here, Fireman's Fund has pointed to no evidence that it was prejudiced by Plaintiff's alleged late

---

<sup>1</sup> "Late notice is an affirmative defense to coverage, for which the insurer bears the burden of proof." Hyde, 969 F. Supp. at 300; see Brakeman, 371 A.2d at 196. To date, no court applying Pennsylvania law has addressed an insurer's denial of an insured's claim due to late notice in the context of a bad faith claim under section 8371.

reporting.<sup>2</sup> Consequently, a genuine issue of material fact exists as to whether Fireman's Fund reasonably denied Plaintiff's claims due to late reporting.

**IV. CONCLUSION**

For the foregoing reasons, the court will deny Fireman's Fund's motion for summary judgment.

---

<sup>2</sup> In addition, Fireman's Fund makes no argument, and the court does not find, that Plaintiff's delay in reporting her loss constitutes prejudice as a matter of law. See Hyde, 969 F. Supp. at 300-01 (discussing cases under Pennsylvania law ruling on whether and under what circumstances prejudice can be found as matter of law) (citations omitted).

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH WALDMAN, by her attorneys	:	CIVIL ACTION
in fact, Harry and Nadine	:	
Waldman	:	
	:	
v.	:	
	:	
PEDIATRIC SERVICES OF AMERICA,	:	NO. 97-7257
INC. d/b/a PREMIER NURSE	:	
STAFFING, INC. and FIREMAN'S	:	
FUND INSURANCE COMPANY d/b/a THE	:	
AMERICAN INSURANCE COMPANY	:	

ORDER

AND NOW, TO WIT, this            day of April, 1999, upon  
consideration of defendant Fireman's Fund Insurance Company's  
Motion for Summary Judgment and Plaintiff's response thereto, IT  
IS ORDERED that said motion is DENIED.

---

LOUIS C. BECHTLE, J.