

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

FREEDOM MEDICAL SUPPLY, INC.,	:	APRIL TERM, 2008	
	:		
	:		
Plaintiffs,	:	NO. 003874	RECEIVED
	:		<i>OCT 20 2011</i>
v.	:	COMMERCE PROGRAM	
	:		
ACE USA, INC., et al	:	Control No. 10063909	ROOM 521
	:		
Defendants.	:		

FREEDOM MEDICAL SUPPLY, INC.,	:	APRIL TERM, 2010	
	:		
	:		
Plaintiffs,	:	NO. 00916	DOCKETED
	:		<i>OCT 20 2011</i>
v.	:	COMMERCE PROGRAM	C. HART CIVIL ADMINISTRATION
	:		
ACE USA, et al,	:		
	:		
Defendants.	:		

ORDER

AND NOW, this 13th day of October, 2011, upon consideration of plaintiffs’ Motion for Class Certification, the responses thereto, and all other matters of record, after oral argument, and in accord with the Opinion issued simultaneously, it is **ORDERED** that the class is **CERTIFIED** as follows:

All providers who submitted bills and reports under the Pennsylvania Workers Compensation Act, 77 P.S. §1, *et seq.*, as amended (the “Act”), to one or more defendants, and who received a payment which was issued more than thirty (30) days after receipt of the bill and report by defendant(s), but which payment did

Freedom Medical Supply -ORDOP



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not include interest earned on or after the applicable statute of limitations deadline or included less than the amount of interest provided for in the Act.

BY THE COURT:



ARNOLD L. NEW, J.

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FINDINGS OF FACT

1. Plaintiff, Freedom Medical Supply, Inc. (“Freedom”) provides durable medical equipment to patients, including those who are insured under the Pennsylvania Workers’ Compensation Act, 77 P.S. §1, *et seq.*, as amended (the “Act”).

2. Defendants, ACE USA, Inc., Indemnity Insurance Company of North America, ACE American Insurance Company, ACE Fire Underwriters Insurance Company, ACE Indemnity Insurance Company, ACE Property and Casualty Insurance Company, Bankers Standard Fire and Marine Insurance Company, Bankers Standard Insurance Company, Century Indemnity Company, Insurance Company of North America, Pacific Employers Insurance Company, Westchester Fire Insurance Company, and ESIS, Inc. (collectively, “ACE”) are Workers’ Compensation insurers or third party administrators for such insurers in Pennsylvania.

3. The Act requires Workers' Compensation insurers, such as ACE, to reimburse medical providers, such as Freedom, within thirty days of the insurer's receipt of a bill and supporting documentation ("report") from the provider.¹

4. The Act requires an insurer to pay a provider ten percent interest on any bill paid more than thirty days after receipt.²

5. Freedom submitted at least 15 bills and reports to ACE for goods and services provided under the Act.

6. Freedom was paid by ACE more than thirty days after ACE received each such bill.

7. Freedom was not paid some or all of the interest due on each bill as required by the Act. On one of those bills, the amount of interest due to Freedom from ACE was over \$180.00. On another, it was more than \$110.00.

8. Based on the information produced in discovery, Freedom claims there are at least 1,723 other persons and entities like Freedom who submitted bills to ACE in the six years prior to the filing of these consolidated lawsuits, who were not timely paid by ACE, and who did not receive appropriate interest from ACE.

CONCLUSIONS OF LAW

1. The class is so numerous that joinder of all members is impracticable.
2. There are questions of law and fact common to the class.
3. Freedom's claims, and ACE's defenses to them, are typical of the class.
4. Freedom will adequately represent the class.

¹ 77 P. S. § 531(5); 34 Pa. Code § 127.208.

² 77 P. S. § 717.1(a); 34 Pa. Code § 127.210.

5. A class action is a fair and representative method for adjudication of the controversy between the parties.

DISCUSSION

The court may certify this action as a class action only if the following requirements are met:

- (1) The class is so numerous that joinder of all members is impracticable;
- (2) There are questions of law or fact common to the class;
- (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) The representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in [Pa. R. Civ. P.] 1709; and
- (5) A class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in [Pa. R. Civ. P.] 1708.³

Freedom bears the burden of proving all five of these class certification requirements.⁴ To meet its burden of proof, Freedom must establish sufficient underlying facts from which the court can conclude that each of the certification requirements is met.⁵

I. The Numerosity Requirement Is Satisfied

Whether the number [of potential class members] is so large as to make joinder impracticable is dependent not upon an arbitrary limit, but rather upon the circumstances surrounding each case. . . . The class representative need not plead or prove the number of class members so long as [it] is able to define the class with some precision and affords the court with sufficient indicia that more members exist than it would be practicable to join.⁶

Freedom's expert has identified at least 1,753 persons and entities who did not receive the required interest from Ace. Joinder of so many plaintiffs would clearly be impracticable.

³ Pa. R. Civ. P. 1702.

⁴ See Janicik v. Prudential Insurance Co. of America, 305 Pa. Super. 120, 128, 451 A.2d 451, 454 (1982).

⁵ *Id.*, 305 Pa. Super. at 130, 451 A.2d at 455.

⁶ *Id.*, 305 Pa. Super. at 131, 451 A.2d at 456.

II. The Common Questions Requirement Is Satisfied.

“Common questions will generally exist if the class members’ legal grievances arise out of the same practice or course of conduct on the part of the class opponent.”⁷ The questions relating to ACE’s liability to the class members are common questions, namely whether ACE failed to pay interest or paid too little interest on claims paid more than 30 days after receipt, whether such failure violated the Act, and whether the class members were damaged thereby.

III. The Typicality Requirement Is Satisfied.

“The typicality requirement[’s] . . . purpose is to determine whether the class representative’s overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that [its] pursuit of [its] own interests will advance those of the proposed class members.”⁸ “Typicality might not be satisfied . . . when the class representative has or is pursuing some other interest divergent from or adverse to the interests of the absent class members.”⁹ Freedom’s claims are typical of those of the class. Freedom is a medical provider, and it submitted bills to ACE for reimbursement. ACE allegedly paid Freedom’s bills more than 30 days after receipt and did not pay all the interest due to Freedom. Freedom asserts it is the victim of the same pattern and practice of non-payment of interest inflicted by ACE on all class members.

ACE argues that Freedom is not typical of the class because Freedom filed for administrative fee review with respect to its bills and other members of the class did not. ACE claims the filing of a fee review is a prerequisite to recovery of interest, so the providers who did

⁷ *Janicik*, 305 Pa. Super. at 133, 451 A.2d at 457.

⁸ *Id.*, 305 Pa. Super. at 134, 451 A.2d at 458.

⁹ *Id.*

not file fee reviews must be excluded from the class. The right to receive interest is unconditional and the insurer is obligated to pay it with or without a fee review.¹⁰ Therefore, Freedom's filing of such fee reviews and the class members failure to do so are both irrelevant to the issue of whether the proposed class should be certified with Freedom as named plaintiff.

IV. The Adequacy of Representation Requirement Is Satisfied.

Freedom must show it "will fairly and adequately assert and protect the interests of the absent class members."¹¹ In order to make this determination, the court must consider:

- 1) whether the attorney for the representative parties will adequately represent the interests of the class;
- 2) whether the representative parties have a conflict of interest in the maintenance of the class action; and
- 3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.¹²

In this case, class counsel are experienced class action attorneys who will continue to represent the class more than adequately. There is no evidence Freedom has a conflict of interest with the other class members. Freedom, through its arrangements with counsel, has adequate financial resources to represent the class.

¹⁰ (a) If an insurer fails to pay the entire bill within 30 days of receipt of the required bills and medical reports, interest shall accrue on the due and unpaid balance at 10% per annum under section 406.1(a) of the act (77 P. S. § 717.1).

(b) If an insurer fails to pay any portion of a bill, interest shall accrue at 10% per annum on the unpaid balance.

(c) Interest shall accrue on unpaid medical bills even if an insurer initially denies liability for the bills if liability is later admitted or determined.

(d) Interest shall accrue on unpaid medical bills even if an insurer has filed a request for UR under Subchapter C (relating to medical treatment review) if a later determination is made that the insurer was liable for paying the bills.

34 Pa. Code § 127.210.

¹¹ Pa. R. Civ. P. 1702(4).

¹² *Id.* at 1709.

V. The Fair and Efficient Method Requirement Is Satisfied.

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider:

- 1) whether common questions of law or fact predominate over any question affecting only individual members;
 - 2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
 - 3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
 - i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
- * * *
- 4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
 - 5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
 - 6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
 - 7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.¹³

Ace focuses most of its argument on Consideration 5) because ACE believes this court is not the appropriate forum to hear the class members' claims. ACE argues the Act and the regulations implementing it provide an exclusive administrative procedure which individual class members must utilize in order to recover unpaid interest. ACE is incorrect.

The fee review procedure before the Bureau of Workers' Compensation may be the exclusive means for a provider to dispute an insurer's failure timely to reimburse some or all of

¹³ Pa. R. Civ. P. 1708.

the provider's compensation for services rendered.¹⁴ However, it is not the exclusive forum in which a provider may challenge an insurer's non-payment of interest on such compensation.

It is apparent that the fee review process has a very narrow scope within the broader legislative and regulatory scheme of compensating claimants for work-related injuries. Understandably, the General Assembly directed that the most disputed compensation issues [e.g., whether a treatment was reasonable or necessary] be litigated between claimants and insurers before skilled worker's compensation judges in the first instance, and reserved [a] few narrow issues to be litigated by the medical care provider before a fee review hearing officer.

* * *

[T]he fee review process is administered by nurses who determine whether employers' payments are timely paid or properly calculated under the workers' compensation fee schedule and medical billing protocols.¹⁵

Notably absent from this description of the nurses' duties is the calculation of interest awards on untimely payments, even though interest on late payments is guaranteed by the Act and its implementing regulations.¹⁶

It appears the nurses at the Bureau sometimes make findings of untimeliness without any award of interest.¹⁷ A finding of untimeliness without an enforceable award of the amount of interest due is of little use to the provider. Even an award of interest is not much good if there is

¹⁴ 77 P.S. § 531("A provider who has submitted the reports and bills required by this section and who disputes the amount or timeliness of the payment from the employer or insurer shall file an application for fee review with the department no more than thirty (30) days following notification of a disputed treatment or ninety (90) days following the original billing date of treatment."); 34 Pa. Code § 127.251("A provider who has submitted the required bills and reports to an insurer and who disputes the amount or timeliness of the payment made by an insurer, shall have standing to seek review of the fee dispute by the Bureau.")

¹⁵ Crozer Chester Medical Center v. Department of Labor and Industry, Bureau of Workers' Compensation, 22 A.2d 189, 196 (Pa. 2011) . In Crozer, the Supreme Court held the Bureau properly dismissed a provider's fee review request as premature where the insurer had refused to pay the bill. The Court found the failure to pay was "essentially a denial of liability for treatment." *Id.* at 197 .

¹⁶ 77 P. S. § 717.1(a); 34 Pa. Code § 127.210.

¹⁷ See Allen v. Proto Home Improvement, 847 A.2d 225 (Pa. Commw. 2004). In the Allen case, a provider obtained a fee review decision against the insurer from the Bureau. The Bureau found the insurer "had not made timely payment" but "did not order the insurers to make timely payments to [the provider] or pay the balance of the bills," nor did it order the payment of interest. 847 A.2d at 227-8. *But see* Yablon v. Bureau of Worker's Compensation, 20 A.3d 600 (Pa. Commw. 2011) (Bureau awarded interest to provider as penalty for insurer's late downcoding of provider's bill).

no way to enforce such an award. Freedom apparently obtained several such awards of interest against Ace, but Ace did not pay the interest until this court action was filed.

Even when the Bureau awards interest, it does not calculate the amount due. The fee review awards Freedom obtained contain the following language:

In addition [to the amount awarded for services rendered], interest is GRANTED on all unpaid sums due to the provider at the rate of 10% per annum, calculated from the date payment on each bill was due (*i.e.*, 30 days after the bill and medical report were submitted for payment.)

If the insurer simply pays the amount the Bureau awarded for services rendered, but does not pay the interest, as Ace apparently did with Freedom's awards, the provider does not have any further administrative recourse. It cannot file another fee review petition with the Bureau because the statute of limitations, which commences to run when the bill for services is submitted to the provider, has long since run.¹⁸

The Act and its implementing regulations do not establish any exclusive administrative remedy for failure to pay interest. The cases cited by ACE for its exclusivity argument do not hold that a provider may seek an award of unpaid interest from the Bureau only. Several of the case hold that employees may not bring tort claims against their Worker's Compensation insurers.¹⁹ The remainder simply hold that fee review, and only fee review, must be initiated by

¹⁸ See Temple Univ. Hosp. v. Pa. Dep't of Labor and Indus., 873 A.2d 780 (Pa. Commw. 2005) (where first insurer paid part of first bill and provider submitted second bill for remainder due to second insurer, statute of limitations ran from date first bill was submitted, so fee petition based on second bill was untimely). See also Hosp. of Univ. of Pa. v. Bureau of Workers' Compensation, 932 A.2d 1010 (Pa. Commw. 2007) (provider's request for fee review was untimely where it was not filed within ninety days of the original billing date or within thirty days of the notification that treatment was disputed); Thomas Jefferson Univ. Hosp. v. Bureau of Worker's Compensation, 794 A.2d 933 (Pa. Commw. 2002) (where provider files for fee review, it must do so within 90 days of submitting bill, or it must prove that insurer disputed liability which tolls 90 day period).

¹⁹ See Alston v. St. Paul Ins. Co., 531 Pa. 261, 612 A.2d 421 (1992) (employee could not sue insurer and its agents for common law fraud and conspiracy to deny benefits); Kuhn v. PMA Ins. Co., 525 Pa. 171, 578 A.2d 1285 (1990) (employee could not sue insurer for common law fraud to deny benefits); Fry v. Atlantic States Ins. Co., 700 A.2d 974 (Pa. Super. 1997) (employee could not sue insurer for statutory bad faith for delay in approving surgery).

a timely filed fee review petition.²⁰

In the absence of a provision giving exclusive power to the Bureau to enforce the providers' right to receive interest on late payments, this court is an appropriate forum to hear such claims.²¹ Furthermore, this court can hear the claims more efficiently in the form of a class action.

ACE makes a second argument against this court's jurisdiction to hear Freedom's claims for interest due. In Ace's view, since Freedom took an assignment of rights from each of its patients, Freedom is required to exhaust the patient's administrative Worker's Compensation remedies before it may bring suit. However, the patient's assignment of his/her rights to Freedom is irrelevant here because Freedom is asserting its own right to interest under the Act, not the patient's rights to coverage or penalties.

²⁰ See Crozer Chester Medical Center v. Bureau of Workers' Compensation, 22 A.2d 189, 196 (Pa. 2011) (provider's fee review petition was dismissed as premature where insurer "disputed" treatment); Yablon v. Bureau of Worker's Compensation, 20 A.3d 600 (Pa. Commw. 2011) (provider challenged insurer's late downcoding in a fee review petition; Bureau allowed late downcoding and awarded interest on late payment); Enterprise Rent-a-Car v. WCAB, 934 A.2d 124 (Pa. Commw. 2007) (where employer did not pay provider in full, provider should have filed for fee review rather than have claimant file a penalty petition); Hosp. of Univ. of Pa. v. Bureau of Workers' Compensation, 932 A.2d 1010 (Pa. Commw. 2007) (provider's request for fee review was untimely where it was not filed within ninety days of the original billing date or within thirty days of the notification that treatment was disputed); Hough v. WCAB, 928 A.2d 1173 (Pa. Commw, 2007) (employee could bring penalty claim, not fee review claim, against employer for late payment to provider); Temple Univ. Hosp. v. Pa. Dep't of Labor and Indus., 873 A.2d 780 (Pa. Commw. 2005) (provider had ninety days from date it submitted first bill to first insurer to file fee review petition based on partial payment of bill); Allen v. Proto Home Improvements, 847 A.2d 225 (Pa. Commw. 2004) (provider who obtained fee review decision from Bureau, in which the Bureau found the insurer had not made timely payment, was not entitled to a court judgment based on that decision.); Thomas Jefferson Univ. Hosp. v. Bureau of Worker's Compensation, 794 A.2d 933 (Pa. Commw. 2002) (where provider files for fee review, it must do so within 90 days of submitting bill, or it must prove that insurer disputed liability which tolls 90 day period).

²¹ See Schappell v. Motorists Mut. Ins. Co., 934 A.2d 1184, 1190 (Pa. 2007) ("while the language of the [Motor Vehicle Financial Responsibility Law] does not explicitly set forth a private cause of action for interest, when other extrinsic factors are considered through the application of the three-prong test adopted by this Court, the intent of the General Assembly to provide a private cause of action for interest on untimely bills is revealed.")

The other factors the court must consider in determining whether a class action is a fair and efficient method of adjudicating the controversy also weigh in favor of certifying the provider class in this action.

With respect to Consideration 1), whether common questions predominate, ACE attempts to create individual questions to defeat the class. Ace argues some of the class members waived their right to timely payment when they entered into Agreements in which they agreed to receive payments on all outstanding invoices once or twice a month rather than on a rolling basis. However, these “Batching Agreements” do not expressly waive payment of interest on late payments; they simply allow for some payments to be late. Therefore, the Batching Agreements do not create individual issues of law or fact.

The issues regarding the liability of ACE to the class members are not individual issues either. While the amount of damages suffered by each class member is unique, the calculation of such damages will involve the same mathematical formula for all class members: $(\text{amount of compensation paid}) \times 10\% \div 365 \times (\text{number of days late}) - (\text{amount of interest paid, if any})$.²² The many common issues regarding liability and damages predominate over the few individual issues regarding damages.

Consideration 2), the size of the class, weighs in favor of certification. The approximately 1,723 class members, all of whom are known to ACE, are not so numerous or hard to find as to be unmanageable.²³ Considerations 3) and 4) also favor certification. There is a risk of inconsistent adjudications if the class members’ claims against ACE were each

²² See *ABC Sewer Cleaning Co. v. Bell of Pennsylvania*, 438 A.2d 616, 620 (Pa. Super. 1981) (“Even if there are differences in the amounts of damages, however, a class action is clearly not barred.”)

²³ See *Janicik*, 305 Pa. Super. at 143, 451 A.2d at 462 (“The evidence here indicated the names, addresses, and insurance records of all potential class members were centrally stored by [defendant insurer]”).

prosecuted separately.²⁴ The parties have not pointed to any duplicative litigation, pending or resolved, against ACE.

Consideration 6), whether class members will assert their claims separately, weighs in favor of class certification. As a practical matter, the claims of each class member are so small it is unlikely any class member would bring a separate suit given the expense of discovery and trial. However, if their claims are prosecuted as a class action, then those shared expenses do not loom so large.

With respect to Consideration 7), the expense and effort of prosecuting the case as a class action, ACE complains the parties will have to undertake manual review of every provider bill to determine the reason for late payment and whether interest was paid. Apparently, ACE's computerized records do not reflect this information. ACE's own shoddy record-keeping cannot serve as grounds to defeat class certification,²⁵ particularly since the missing information appears to relate to ACE's potential defenses to payment and may not be necessary to prove the class' claims. Furthermore, classes were certified long before computerized record-keeping became ubiquitous, and, in such cases, manual file review must have been necessary too.

Although such review will be tedious and expensive, it is not a sufficient basis for denying certification because the aggregate recovery of the entire class is significant.²⁶ In this

²⁴ See Janicik, 305 Pa. Super. at 143-4, 451 A.2d at 462-3 (“The class action, when compared to separate actions under this criterion, affords the speedier and more comprehensive determination of the claim and thus, the better means to insure recovery if the claim proves meritorious or to spare [defendant] repetitive piecemeal litigation if it does not.”)

²⁵ *Id.*, 305 Pa. Super. at 142, 451 A.2d at 462 (“Problems of administration alone, however, ordinarily should not justify the denial of an otherwise appropriate class action, for to do so would contradict the policies underlying this device.”)

²⁶ See Baldassari v. Suburban Cable TV Co., 808 A.2d 184, 195 (Pa. Super. 2002) (“[I]n determining whether the requirement of Rule 1708(a)(7) is satisfied, one does not view the potential recovery by itself. Rather, the rule requires a consideration of whether the potential expenses and effort of administering the action would render the amount of recovery so small that a class action would not be justified. In many consumer class actions

case, if there are 1,723 class members and they submitted a total of 36,000 bills which were not paid on time and the amount of interest due on each bill is more than \$100, as in Freedom's case, than the total class recovery could be over \$3.6 million. Obviously, if the class contains more members, or the members submitted more bills, the recovery could be significantly larger. The expense of manual file review does not loom so large in light of the total damages that may be awarded.

CONCLUSION

For all the foregoing reasons, Freedom's Motion for Class Certification is granted.

BY THE COURT:



ARNOLD L. NEW, J.

the individual amounts may be very small, but the aggregate may be large and maintenance of the class action might have a deterrent effect on future violations by the defendant.”)