

IN THE SUPREME COURT OF THE STATE OF OREGON

STEPHANIE M. DOWELL,)	
Individually and on behalf of others)	
similarly situated,)	
)	Multnomah County Circuit Court
Plaintiff-Appellant and)	Case No. 120506486
Petitioner on Review,)	
)	Court of Appeals No. A153170
vs.)	
)	Supreme Court No. S063079
OREGON MUTUAL INSURANCE)	
COMPANY, an Oregon corporation,)	
)	
Defendant-Respondent and)	
Respondent on Review.)	
)	

**BRIEF OF AMICUS CURIAE OREGON TRIAL LAWYERS
ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW**

On petition for review from the Decision of the
Court of Appeals from the Judgment of the Multnomah County Circuit Court
Henry C. Breithaupt, Judge Pro Tempore

Opinion Filed: January 28, 2015
Author of Opinion: Tookey, J.
Concurring Judges: Sercombe, P.J.; Hadlock, J.

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I. INTRODUCTION

The Court of Appeals' decision in *Dowell v. Oregon Mutual Insurance Company*, 268 Or App 672, 206 P3d 1042, 1050-51 (2015) is erroneous and merits review. In *Dowell*, the Court of Appeals considered whether ORS 742.524(1)(a), which provides that an insurer must provide PIP coverage for "all reasonable and necessary expenses of medical, surgical, ambulance, and prosthetic services...", includes transportation expenses to attend medical appointments and to obtain medication. *Dowell*, 268 Or App at 673. The court concluded that it did not. However, the plain language of the PIP statute, as well as statutory context, demonstrate that "expenses of medical... services" includes transportation expenses.

Interpretation of the scope of ORS 742.524 is an important issue. Whether the PIP statute requires reimbursement of transportation affects many Oregonians. Given that over three-quarters of the injury accidents in Oregon occur outside of Portland, the expense of transportation to Portland for medical treatment is significant. Precluding payment for transportation expenses will prevent many injured persons from getting prompt medical treatment, which undermines the purpose of the PIP statute. In addition, as discussed in section III A(2)(i), the implications of the Court of Appeals' decision go beyond the specific issue of transportation expenses.

In addition, the Court of Appeals opinion conflicts with all prior appellate decisions from other jurisdictions construing similar PIP statutes to require reimbursement of transportation expenses.

Therefore, OTLA respectfully urges this Court to grant review to clarify the scope of "expenses of medical * * * services" under ORS 742.524(1)(a).

II. REASONS FOR GRANTING REVIEW AND REVERSAL

A. The Court of Appeals incorrectly interpreted ORS 742.524(1)(a) to exclude transportation expenses.

The plain language of the PIP statute, as well as statutory context, demonstrate that "expenses of medical... services" includes transportation expenses.¹

1. The text of ORS 742.524(1)(a) demonstrates that "expenses of medical... services" include transportation expenses.

¹ The legislative history proffered by plaintiff also demonstrates that that transportation expenses do constitute "expenses of medical * * * services." Plaintiff explained that the purpose of the PIP statute is to "reduce litigation, ensure prompt payment of claims, and 'to ensure that all insured drivers, their families and guests, and pedestrians injured by them, would recover medical and economic losses subject to limits purchased without regard to fault.'" Appellant's Opening Brief pp. 6-7 (citing *Monaco v. U.S. Fidelity & Guar.*, 275 Or 183, 187-88, (1976); Senate Judiciary Committee Minutes 2 (May 19, 1971); House Judiciary Committee Minutes 8 (Apr 17, 1973)).

In analyzing the statutory text, the Court of Appeals focused on four statutory terms: "expenses," "of," "medical," and "services."² *Dowell*, 268 Or at 676. Based on those definitions, the court concluded that "the plain meaning of 'expenses of medical * * * services' may be construed as something that is expended to secure a benefit relating to work that is performed by another, when that work involves the practice of medicine (the maintenance of health, and the prevention, alleviation, or cure of disease)." *Id.* at 677. Applying that definition to transportation expenses, the court concluded that ORS 742.524(1)(a) "does not require defendant to pay plaintiff's expenses to attend medical appointments and to obtain medication." *Id.*

This conclusion is wrong. Transportation expenses fall squarely within the plain meaning of the statute. The purpose of incurring

² The full text of ORS 742.524(1)(a) provides as follows: (1) Personal injury protection benefits as required by ORS 742.520 (Personal injury protection benefits for motor vehicle liability policies) shall consist of the following payments for the injury or death of each person: (a) All reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance and prosthetic services incurred within one year after the date of the persons injury, but not more than \$15,000 in the aggregate for all such expenses of the person. Expenses of medical, hospital, dental, surgical, ambulance and prosthetic services shall be presumed to be reasonable and necessary unless the provider is given notice of denial of the charges not more than 60 calendar days after the insurer receives from the provider notice of the claim for the services. At any time during the first 50 calendar days after the insurer receives notice of claim, the provider shall, within 10 business days, answer in writing questions from the insurer regarding the claim. For purposes of determining when the 60-day period provided by this paragraph has elapsed, counting of days shall be suspended if the provider does not supply written answers to the insurer within 10 days and may not resume until the answers are supplied.

transportation expenses in traveling to medical appointments or to obtain medications is to "secure a benefit relating * * * to work * * * involv[ing] the practice of medicine" – specifically, to see a doctor or to obtain medication prescribed by that doctor. Indeed, transportation expenses are a necessary and inherent part of obtaining a the benefit of seeing a doctor or receiving medication given that it is impossible for an individual to secure that without traveling to an appointment or a pharmacy. Therefore, the text of 742.524(1)(a) demonstrates that the "expenses of medical... services" include transportation expenses.

2. The context of ORS 742.524(1)(a) demonstrates that transportation expenses are "expenses of... medical services."

An analysis of the full context of ORS 742.524(1)(a) confirms that transportation expenses are indeed "expenses of medical * * * services."

a. The court's conclusion that ORS 742.524(1)(a) requires services from a "provider" conflicts with express statutory language.

Despite the relatively broad scope of context that can be considered in determining the legislative intent of a statute, the Court of Appeals considered only two provisions outside of ORS 742.524(1)(a) itself. These are ORS 742.518(10), which states that "provider" has the meaning given

that term in ORS 742.801(13), and ORS 742.801(13), which defines provider as "a person licensed, certified or otherwise permitted by laws of this state to administer medical or mental health services in the ordinary course of business or practice of a profession." The court concluded that "'expenses of medical * * * services' * * * contemplates that those services will be provided by a 'provider,'" thus excluding transportation expenses. *Dowell*, 268 Or App at 678.

This conclusion flies in the face of the clear directive of the statute to provide payment for "*all* reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance and prosthetic services * * * ." (emphasis added). Limiting the expenses covered by PIP to those provided by a "provider" would deny coverage for services that are expressly included in ORS 742.524(1)(a), such as dental, ambulance, and prosthetic services. Expenses directly related to those services but not provided by a "provider" – a person licensed or certified to provide medical or mental health services – would not be covered, despite the express language of the statute. Examples of expenses that appear to be clearly contemplated by the statute but that might be excluded given the requirement of a "provider" include dental or prosthetic supplies acquired from a supplier or retailer and

ambulance services that are provided by anyone other than a certified or licensed person.

Moreover, limiting medical expenses to those provided by a "provider" would prevent PIP coverage for common medical expenses. For example, limiting coverage to medical services provided by a "provider" would eliminate coverage for medical devices or medical equipment that a patient must acquire through a medical supplier or retailer. This could include wheelchairs, crutches, braces, syringes, and ostomy supplies, among others, that fall squarely within the directive to pay for "all reasonable and necessary expenses of medical, hospital, dental, surgical, ambulance, and prosthetic services * * * ."

Because restricting the meaning of "expenses of medical * * * services" to expenses incurred by a provider would directly contradict express statutory language, the court's analysis of the statute's context is erroneous.

b. Statutory context not considered by the Court of Appeals confirms that "expenses of medical * * * services" includes transportation expenses.

The PIP statute itself was enacted in 1971. Oregon courts have recognized that the PIP statute was created "to provide, promptly and

without regard to fault, reimbursement for some out-of-pocket losses resulting from motor vehicle accidents." *Ivanov v. Farmers Ins. Co. of Oregon*, 344 Or 421, 427, 185 P3d 417, 421 (2008) (citing *Perez v. State Farm Mutual Ins. Co.*, 289 Or 295, 300, 613 P2d 32 (1980)).

Also relevant to the context of ORS 724.542(1)(a) are statutes directing how the insurance code should be interpreted. ORS 731.008 provides that "the Insurance Code is for the protection of the insurance-buying public." In addition, ORS 731.016 provides that the Insurance Code "shall be liberally construed and shall be administered and enforced by the Director of the Department of Consumer and Business Services to give effect to the policy stated in ORS 731.008." This Court has previously relied upon those provisions in adopting a liberal construction of the PIP statute. *See, e.g., Carrigan v. State Farm Mut. Auto. Ins. Co.*, 326 Or. 97, 104-05, 949 P2d 705, 709 (1997) (interpreting the phrase "resulting from the use *** of any motor vehicles" to include PIP coverage for gunshot injuries that result from the use of a motor vehicle in light of the instructions in ORS 731.016).

This additional context demonstrates legislative intent that provisions of the PIP statute – including ORS 742.524(1)(a) – be interpreted liberally in favor of the insurance-buying public. Including transportation expenses

in the definition of medical expenses in ORS 742.524(1)(a) favors the insurance-buying public, and thus better effectuates the intent of the legislature.

B. The Importance of this Issue.

The coverage provided by the PIP statute is important for many Oregonians. The Oregon Department of Transportation's most recent statistics show that in 2012 alone, there were 36,085 accidents involving injuries.³ Over three-quarters of these occurred outside Portland.⁴

Given that many of the state's medical resources are in Portland, many of those injured in accidents will have no choice but to travel to Portland for medical appointments or to obtain medication. For an injured person living in a rural part of the state, the expense to travel to Portland (perhaps repeatedly) for specialized medical care is neither nominal nor avoidable.

C. Similar PIP statutes in other states have been construed to cover transportation expenses.

Four other jurisdictions – Florida, New Jersey, Colorado, and Michigan – have considered this question and concluded that transportation expenses are medical expenses covered by their PIP statute. Due to the

³ Transportation Data Section Crash Analysis and Reporting Unit, *2012 Oregon Traffic Crash Summary*, p. 3, available at <http://www.oregon.gov/odot/td/tdata/car/docs/2012crashsummarybook.pdf>.

⁴ *Id.* at p. 5.

similarity of coverage between these PIP statutes and Oregon's, these cases provide persuasive authority that this Court may weigh in interpreting ORS 742.524(1)(a). *See O'Connor v. Zeldin*, 124 Or App 444, 447, 862 P2d 1321, 1323 (1995) ("when a statute contains substantially the same terms as a statute from another jurisdiction, decisions construing that other statute may be persuasive").

In *Malu v. Sec. Nat. Ins. Co.*, 898 So 2d 69, 74 (Fla 2005), the Florida Supreme Court held that a PIP statute covering "all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services" required reimbursement of transportation expenses in connection with medical treatment. The court emphasized the statute's wording regarding "*all* reasonable expenses" and case law holding that language of the PIP statute should be interpreted liberally to effectuate the legislative purpose of providing broad PIP coverage to Florida motorists. *Id.*

Similarly, in *Allstate Ins. Co. v. Smith*, 902 P2d 1386, 1388 (Colo 1995), the Supreme Court of Colorado held that expenses for transportation to health care providers for the treatment of injuries arising from an automobile accident are reasonable and necessary expenses for medical

treatment and are compensable under Colorado's PIP statute. The language of that statute provided coverage for "all reasonable and necessary expenses for medical, chiropractic, optometric, podiatric, hospital, nursing, X-ray, dental, surgical, ambulance, and prosthetic services." *Id.* In determining that transportation expenses were included, the court emphasized the essential nature of transportation expenses for those injured in automobile accidents:

In the modern health care system, travel to and from health care providers is an essential element of medical treatment * * * . Without such transportation, the injured party could not obtain necessary medical treatment. Moreover, the cost of transportation expenses is especially burdensome in the case of rural residents who may have to travel significant distances to obtain medical services. For citizens living miles from our cities the inability to obtain compensation for transportation expenses may result in life sustaining medical treatment being unavailable.

Id. at 1388.

In *Plemmons v. New Jersey Auto. Full Ins. Underwriting Ass'n By & Through Selective Ins. Co. of Am.*, 263 NJ Super 151, 156 (App Div 1993), the New Jersey Superior Court found that the transportation expenses incurred traveling to doctors and hospitals for treatment of the injuries arising from an accident were compensable under the PIP statute.⁵ The court

⁵ The statute defines "medical expenses" to include "expenses for medical treatment, surgical treatment, dental treatment, professional nursing services, hospital

emphasized the "direct nexus between plaintiff's transportation costs and his ongoing rehabilitation," given that "both are necessary as a proximate result of the accident." *See also Davis v. Citizens Ins. Co. of Am.*, 195 Mich App 323, 327-28, 489 NW 2d 214, 216 (1992) (holding that a modified van was an allowable expense under Michigan's PIP scheme because of the necessity of transportation to an injured person with limited alternative means of transportation).

Given the similarity between the PIP statutes considered in each of these cases and ORS 742.524(1)(a), these cases provide persuasive authority that ORS 742.524(1)(a) should cover transportation expenses as well.

III. CONCLUSION

OTLA urges this Court to allow review for the reasons stated above.

DATED: April 10, 2015

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expenses, rehabilitation services, X-ray and other diagnostic services, prosthetic devices, ambulance services, medication and other reasonable and necessary expenses." *Id.* (emphasis in original). *Plemmons*, 263 NJ Super at 156.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 (2)(d) and (2) the word-count of this brief (as described in ORAP 5.05(2)(b)) is 2,554 words. I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed electronically the foregoing **BRIEF OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW** with the Supreme Court Records Section, State Court Administrator, on April 10, 2015 through the Appellate eFiling system of the Oregon Court of Appeals.

I further certify I served the foregoing document on the following person(s) at the following address(es), by mailing a true copy thereof, contained in a sealed envelope with the postage prepaid, and deposited in the United States Post Office in Portland, Oregon:

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