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<p>COURT OF APPEALS, STATE OF COLORADO Two East 14th Ave. Denver, Colorado 80203</p> <hr/> <p>Appeal from the Larimer County District Court, Case No. 2003 CV 1058, Div. 5B, the Honorable James H. Hiatt, District Court Judge</p>	<p>FILED IN THE COURT OF APPEALS STATE OF COLORADO</p> <p>JUN 26 2006</p> <p>Clerk, Court of Appeals</p> <p>▲ COURT USE ONLY ▲</p>
<p>Appellant: MARLENE BARNES</p> <p>v.</p> <p>Appellee: SHELTER MUTUAL INSURANCE COMPANY</p> <hr/> <p>Light, Harrington & Dawes, P.C. Steven J. Dawes, No. 13193 1512 Larimer Street, Suite 300 Denver, Colorado 80202 Tel.: 303-298-1601 Fax: 303-298-1627 sdawes@lhdlaw.com <i>Attorneys for Appellee</i></p>	<p>Case No.: 2005 CA 2086</p>
<p style="text-align: center;">ANSWER BRIEF</p>	

Appellee, Shelter Mutual Insurance Company, by its undersigned counsel, respectfully submits its Answer Brief.

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STATEMENT OF THE ISSUES

1. Whether the factual findings by the trial court were supported by the evidence at trial and were not clearly erroneous.

2. Whether (a) the trial court's decision finding for the Defendant, Shelter Mutual Insurance Company, and (b) the trial court's determination that the Defendant did not act in bad faith were supported by the evidence at trial, were not clearly erroneous, and were not error as a matter of law.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case has to do with a motor vehicle accident on February 26, 2002. Defendant Shelter Mutual Insurance Company ("Shelter") issued a policy of automobile insurance, which included coverage under the Colorado Auto Accident Reparations Act for personal injury protection (PIP) benefits, to Plaintiff Marlene Barnes. The policy of insurance included a Preferred Provider Option (PPO) endorsement. The PPO organization is CorVel Corporation ("CorVel").

As a result of the accident, Plaintiff Marlene Barnes sustained T6 and T7 compression fractures in her thoracic spine. Her physician recommended a kyphoplasty procedure, which Shelter approved upon the recommendation of CorVel. After that surgery, Ms. Barnes' physician, Dr. Robert Benz, released her

from care, stating that she was 100% recovered from her spinal injury resulting from the auto accident. Later she developed new compression fractures in her thoracic spine, and her physician recommended another kyphoplasty. Upon the recommendation of CorVel, Shelter's claims representative, Pamela Carbocci, agreed to Ms. Barnes undergoing an independent PPO medical examination to determine whether the second kyphoplasty procedure was reasonable, necessary, and related to the motor vehicle accident. During the pendency of that review by the independent physician, Ms. Barnes' own physician determined that the new fractures had healed so that the second kyphoplasty would no longer be useful.

Marlene Barnes brought three claims for relief against Shelter. The first two claims (for uninsured motorist benefits) were settled prior to trial. The only claim at trial was for bad faith breach of insurance contract. Ms. Barnes claimed that Shelter acted in bad faith by not approving the second kyphoplasty procedure.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

A trial to the court occurred on January 25 and 26, 2005. Because of a late disclosure by the Plaintiff of testimony from the treating physician, the trial court continued the matter to allow the Defendant's expert medical witness to review the new disclosure from the treating physician. Defendant's expert's testimony was submitted to the trial court by deposition-preserved testimony, and the parties gave

their closing arguments on May 17, 2005. The trial court issued its decision on August 15, 2005, in which it concluded that Shelter had acted reasonably and had not engaged in any unreasonable delay, and the court determined that Shelter did not act in bad faith. The trial court entered judgment in favor of Shelter.

C. STATEMENT OF THE FACTS

Shelter issued a policy of automobile insurance, which included coverage for personal injury protection (PIP) benefits, to Plaintiff Marlene Barnes. The policy of insurance included a Preferred Provider Option (PPO) endorsement.¹ The PPO organization is CorVel.

Plaintiff Marlene Barnes was involved in a motor vehicle accident on February 26, 2002. As a result of that accident, Plaintiff's reported injuries were a sternal contusion, lumbosacral back pain, skin tear on her right hand, and a contusion on the left hand. She also subsequently complained of knee pain. She made a claim for PIP benefits to Shelter.² In his May 9, 2002 report, her family physician, Dr. Hughes, noted (approximately 2 1/2 months after the motor vehicle accident) that Plaintiff had begun to complain of mid-back pain. (Testimony of Dr. Hughes, R. Vol. IV, p. 35, lines 14-25 through p. 36, lines 1-9.) Ms. Barnes was

¹ The PPO endorsement was admitted into evidence with the insurance policy, Exhibit FF. (R. Vol. II, p. 195, lines 16-25 through p. 197, lines 1-2.)

² Exhibit I, the Shelter file, was admitted into evidence (R. Vol. II, p. 195, lines 2-12.)

referred to Dr. Robert Benz, an orthopedic surgeon. Dr. Benz initially evaluated Marlene Barnes on May 23, 2002, three months post-accident. He discovered that Ms. Barnes had compression fractures of her sixth and seventh thoracic vertebrae (T6 and T7), based upon x-rays and an MRI. (Testimony of Dr. Benz, R. Vol. V, p. 46, lines 1-10.) The June 20, 2002 MRI report of the thoracic spine states, in part, as follows:

Abnormal signal consistent with edema and compression fractures at T6 with 20% loss of height anteriorly and T7 with no appreciable loss of height. *No other acute compression fractures are identified and remaining thoracic spine is unremarkable in appearance....* (Emphasis added.)

(Exhibit H, the CorVel file, R. Vol. XII, page 132.)

Dr. Benz concluded that the compression fractures resulted from the motor vehicle accident. In his report of June 27, 2002, Dr. Benz advised Ms. Barnes that she had two options: (1) one option would be to give this condition additional time; and (2) the second option was a thoracic kyphoplasty. (Exhibit H, the CorVel file, R. Vol. XII, page 78.) (Testimony of Dr. Benz, R. Vol. V., p. 17, lines 19-25.)

CorVel had a contract with Shelter, (R. Vol. II, p. 198, lines 17-23.³), and under that contract CorVel provided nurse case management services to Marlene Barnes. Laura Cuddihy, R.N., Nurse Consultant, from CorVel was assigned to the

³ Contract admitted as Exhibit R (R. Vol. II, p. 198, line 23.)

file.⁴ She researched the kyphoplasty procedure because she was unfamiliar with it. (R. Vol. II, p. 123, lines 14-25.) Ms. Barnes' attorney sent an Internet brochure. (R. Vol. II, p. 124, lines 9-20.) (Vol. XII, Exhibit H, pp. 137-140.) He did not send any research studies. This information indicated that this was a controversial procedure, not FDA approved. (R. Vol. II, p. 126, lines 7-23.)

Dr. Benz's office sent her an advertisement brochure from the vendor (Kyphon). (R. Vol. II, p. 126, lines 24-25 through p. 128, lines 1-5.) (Vol. XII, pp. 148-150.) The brochure had a "FINAL NOTE" on the lower right hand corner of the last page. The Final Note states that the treatment "is most successful with immediate intervention" and recommended that patients be referred for evaluation "as quickly as possible." This note was not directed toward Ms. Cuddihy's attention. At trial, Ms. Cuddihy testified that this statement in this note was not unusual. It would be the kind of statement one would make for any general orthopedic procedure. In other words, any fracture needs to be addressed as quickly as possible. (R. Vol. II, p. 128, lines 13-17; p. 131, lines 14-25.)

Ms. Barnes agreed to the kyphoplasty procedure, to be performed at the T6 and T7 vertebrae, and the procedure was approved. (R. Vol. II, p. 135, lines 20-25; p. 136, lines 1-3.) The kyphoplasty procedure was performed on July 27, 2002. (R.

⁴ Exhibit H, the CorVel file, was admitted into evidence. (R. Vol. II, p. 130, lines 8-14.)

Vol. V, p. 24, line 4.) (R. Vol. II, p. 138, lines 22-24.) This was five months after the auto accident of February 26, 2002, which was when Dr. Benz said that Ms. Barnes had sustained the compression fractures. (R. Vol. II, p. 138, line 25 through p. 139, lines 1-10.)

The surgical report of the first kyphoplasty procedure on July 27, 2002 was received by Shelter on August 20, 2002. (R. Vol. II, p. 215, lines 5-9.) In the "Indications" section, the surgical report states that the kyphoplasty procedure, using polymethyl methacrylate was not approved for use in the spine by the FDA. The report indicates that Ms. Barnes was given this information by her physician. (R. Vol. II, p. 215, lines 12-25 through p. 216, line 1.) (Vol. XII, Exh. I, p. 65.)

Ms. Cuddihy testified that the first kyphoplasty procedure had been provided to Ms. Barnes on July 27, 2002, which was five months after the auto accident (R. Vol. II, p. 128, lines 13-25; p. 138, lines 22-25 through p. 139, lines 1-10.), and at no time did Dr. Benz's office express to Ms. Cuddihy that the kyphoplasty procedure had to be performed right away or express concern about the procedure being performed promptly. (R. Vol. II, p. 136, lines 8-15.)

On September 3, 2002, Dr. Benz prepared an office note stating as follows:

I think at this point she is completely recovered from her kyphoplasty. I feel she is 100% recovered from her spine injury. Therefore, I am completely releasing her from medical care.

(R. Vol. II, p. 216, lines 18-25 through p. 217, lines 1-11.) (Vol. XII, Exh. I, p. 71.) He confirmed that finding in a subsequent letter to CorVel. (R. Vol. XII, Exhibit H, pp. 72-73.) Accordingly, CorVel closed its file, without objection by Ms. Barnes' attorney. (R. Vol. II, p. 139, lines 21-15 through p. 141, lines 1-6.) Shelter closed its file. (R. Vol. II, p. 217, lines 12-15.)

In October 2002, Ms. Barnes returned to Dr. Benz complaining of new back pain. Laura Cuddihy at CorVel was requested to provide authorization for another MRI on October 21, 2002. (R. Vol. II, p. 142, lines 2-5.) However, Ms. Cuddihy did not receive any records from Dr. Benz's office until November 17, 2002. (R. Vol. II, p. 142, lines 16-25 through p. 143, line 1.) She had to request the records twice. (R. Vol. II, p. 144, lines 1-3.) At that time, Ms. Cuddihy was informed that Dr. Benz had concluded that Ms. Barnes had sustained new compression fractures, at T9 and T12. (R. Vol. II, p. 143, lines 5-16.) The T9 and T12 compression fractures had not shown up in any medical records before that time. (Id.) In his report of October 30, 2002, Dr. Benz had advised Ms. Barnes to undergo a second kyphoplasty surgery, to be performed at the T9 and T12 levels. Shelter received that report by fax on November 4, 2002. (R. Vol. II, p. 222, lines 1-6.) (Vol. XII, Exh. I, pp. 100-101.)

Ms. Cuddihy consulted with Pamela Carbocci, the Shelter claims representative, and they decided to get a second opinion, so they requested Ms. Barnes undergo an independent PPO medical evaluation. Because these new compression fractures had not previously been found after the motor vehicle accident, the medical evaluation was scheduled to determine whether the new compression fractures were caused by the February 26, 2002 auto accident. (R. Vol. II, p. 144, lines 9-25 through p. 146, lines 1-14; see also p. 222, lines 23-25 through p. 224, lines 1-12.)

Under the Shelter policy, the insured must submit to physical examination at the Company's expense by doctors selected by the Company as often as the Company may reasonably require, which is usually the PPO examination. (R. Vol. II, p. 196, lines 5-23.) (R. Vol. XIII, Exh. FF, last page, top left column.)

Shelter had received the MRI report of the thoracic spine on November 18, 2002, stating that there was a "mild-moderate compression fracture of the T6 and T7 vertebral bodies with approximately 25-40 percent loss of vertebral body." However, the previous MRI report that Shelter had received on July 8, 2002, (prior to the first kyphoplasty procedure) said that T6 vertebral body had a "20% loss of height, minimal at T7." Therefore, after the first surgery the loss of vertebral height at T6 and T7 appeared to be worse than before the first surgery. This was another

reason that Shelter requested the independent PPO medical evaluation. (R. Vol. II, p. 228, lines 22-25 through p. 230, lines 1-17.)

CorVel scheduled the PPO independent medical evaluation. (R. Vol. II, p. 145, lines 21-25 through p. 146, lines 1-15.) Scheduling that medical evaluation took some time for several reasons. First, Shelter and CorVel wanted to use a physician who was familiar with the kyphoplasty procedure. (R. Vol. II, p. 225, lines 7-25.) However, Ms. Cuddihy had trouble finding a physician who was familiar with the kyphoplasty procedure. Second, it had to be a physician approved within the PPO network. Third, Ms. Barnes' attorney required that the evaluation be at a location relatively close to Ms. Barnes' home. Ms. Cuddihy located a physician in the metro Denver area, but Ms. Barnes' attorney said that the office was too far for Ms. Barnes to travel. Finally, Ms. Cuddihy located a physician in Boulder, Colorado, Dr. Alan Villavicencio, who is familiar with the kyphoplasty procedure and who could perform the independent medical evaluation. (R. Vol. II, p. 146, lines 16-25 through p. 150, lines 1-8.) The medical evaluation was scheduled for February 3, 2003. (R. Vol. II, p. 150, lines 5-8.) Ms. Barnes, her attorney, and Dr. Benz were all notified of the referral for the second opinion. (R. Vol. II, p. 158, lines 10-25 through p. 159, lines 1-11.) (R. Vol. II, p. 232, lines 9-25 through p. 233, lines 1-15.) (R. Vol. II, p. 234, lines 13-18.) No concern over

the timing of the PPO examination and the need for the second kyphoplasty procedure, and no objections to the PPO examination were conveyed by Dr. Benz (R. Vol. II, p. 158, lines 10-25 through p. 159, lines 1-11.) or by Ms. Barnes' attorney. (R. Vol. II, p. 233, lines 16-25 through p. 234, lines 1-10.) (See also p. 235, lines 16-25 through p. 236, lines 1-20.)

Ms. Barnes attended the medical evaluation on February 3, 2003. Dr. Villavicencio's report was received by CorVel on February 13, 2003. (R. Vol. II, p. 150, lines 1-18.) It was received by Shelter on February 12, 2003. (R. Vol. II, p. 236, lines 21-25 through p. 237, lines 1-7.)

Dr. Villavicencio apportioned 50% of the T9 and T12 compression fractures to the motor vehicle accident and 50% to her pre-existing osteopenia. (R. Vol. II, p. 151, lines 1-11.) (Vol. XII, Exh. H, p. 51, last ¶.) He recommended another MRI to evaluate whether surgery would be appropriate at the T9 and T12 levels. He said that if the fractures had healed, then surgery would not be appropriate. If they had not healed, then surgery could still be considered. He also recommended a back brace and additional physical therapy. (R. Vol. II, p. 151, lines 23-25 through p. 152, lines 1-5; p. 237, lines 22-25 through p. 238, lines 1-3.) (Vol. XII, Exh. H, p. 52.) His report was sent to Dr. Benz and to Ms. Barnes' attorney on February 18, 2003. Dr. Benz's office said it didn't receive the report, so it was re-faxed to Dr.

Benz's office on February 19. (R. Vol. II, p. 152, lines 6-25 through p. 153, lines 1-7.)

Shelter determined to pay 100% of the back brace and the MRI and physical therapy, and that decision was conveyed to Laura Cuddihy at CorVel and to Dr. Benz. (R. Vol. II, p. 238, lines 14-25 through p. 239, lines 1-16.) The MRI was scheduled and performed on February 27, 2003. (March 7, 2003 report of Dr. Benz, Vol. XII, Exh. I, p. 173.)

Then, by letter of February 18, 2003, received by Ms. Cuddihy on March 5, 2003, Ms. Barnes' attorney contested some of the conclusions reached from the report of Dr. Villaviencio, specifically the 50%-50% apportionment. (R. Vol. II, p. 153, lines 18-25; Vol. XII, Exh. H, pp. 189-190.) As a result, the same day (March 5) Ms. Cuddihy sent the attorney's letter to Dr. Villavicencio, requesting an Addendum report. (R. Vol. II, p. 154, lines 1-14; p. 239, lines 17-20; p. 240, lines 3-8; p. 241, lines 5-15; and p. 242, lines 3-11.) Ms. Barnes' attorney was notified of that request for the Addendum report. (R. Vol. XII, Exh. H, p. 151.) No objection was made by Ms. Barnes' attorney.

On March 7, 2003, Dr. Benz wrote a letter stating that the second proposed kyphoplasty procedure was no longer viable. The letter was received by Ms. Cuddihy on March 24. (R. Vol. II, p. 160, lines 10-15.) (See also p. 243, lines 1-3.)

On no occasion did Dr. Benz, Ms. Barnes' attorney, or Ms. Barnes object to the scheduling of the PPO independent medical evaluation. Neither Dr. Benz nor Ms. Barnes' attorney complained about the time necessary to complete the PPO independent medical evaluation. Neither Ms. Barnes' attorney nor any physician advised Shelter or CorVel that there was any specific time period in which the proposed kyphoplasty procedure needed to be completed. Ms. Cuddihy was not concerned about any delay not only because she has not been advised that any need to schedule the kyphoplasty procedure sooner but also because it had taken five months after the time of the accident to perform the first kyphoplasty procedure, which apparently had been successful. Whereas, only four months had elapsed by the time of the receipt of the report of Dr. Benz and the request for the Addendum Report. (R. Vol. II, p. 156, lines 11-25 through p. 157, lines 1-20.) (See also p. 243, lines 13-25 through p. 244, lines 1-8.)

Expert Testimony

There was conflicting evidence on whether the T9 and T12 compression fractures were caused by the motor vehicle accident. Dr. Benz testified that they were, and Dr. Herbert Maruyama, an orthopedic surgeon who performed an independent medical evaluation at the request of the Defendant in this lawsuit,

testified that they were not caused by the motor vehicle accident. Dr. Villavicencio testified that they were in part. (R. Vol. I, Order dated 8-15-05, p. 77.)

Plaintiff's attorney hired Bradley Levin, a plaintiff's attorney, as a "bad faith expert." Mr. Levin testified that Shelter acted in bad faith because, he contended, it took too long to schedule and complete the PPO independent medical evaluation.

Shelter's own expert on the issue of good faith and fair dealing in claims handling, Garth Allen, testified in response to the allegations of Mr. Levin.⁵ Mr. Allen prepared a report rebutting, allegation by allegation, the report of Mr. Levin. Mr. Allen testified that Shelter and CorVel did not act in bad faith. Limitations had been imposed upon CorVel in scheduling the independent medical evaluation: the procedure is controversial; it took time for Ms. Cuddihy to locate a physician familiar with the kyphoplasty procedure; and Ms. Barnes' attorney required that the physician be close to Ms. Barnes' home. Mr. Allen testified that given those limitations the time it took to find a physician and schedule the examination was not unreasonable. Mr. Allen testified that, based upon the information available to Shelter and CorVel, they acted reasonably under the circumstances. (R. Vol. III, p. 92, lines 10-2 through p. 95, line 7.)

⁵ Mr. Allen was admitted by the trial court as an expert in the area of insurance law, to include knowledge and expertise in the standards, customs, practices, and procedures in the insurance industry relevant to automobile insurance and personal injury protection coverage and claims procedures. (R. Vol. III, p. 88, lines 16-24.)

Mr. Allen testified that he disagreed with the opinions of attorney Levin in several respects. First, he disagreed with the assertion by Mr. Levin that Shelter and CorVel should not have sought a consultant familiar with the kyphoplasty procedure. (R. Vol. III, p. 98, lines 12-25 through page 99, lines 1-8.) Second, he testified that Mr. Levin's assertion - that the scheduling and conducting of the independent medical examination to too long - was unrealistic. Mr. Allen noted that no one told CorVel that there was any time sensitive determination for the decision on the kyphoplasty procedure. In addition, although the Plaintiff has attempted to make much out of the "Final Note" at the bottom of the brochure that Ms. Cuddihy had received, Mr. Allen pointed out that the note doesn't use the word "surgery;" it simply noted that it was best to treat the compression fracture condition early on. The note was in small print. (R. Vol. III, p. 118, lines 5-6.) The note didn't say to the reader that any expedited process should be used. (R. Vol. III, p. 99, lines 23-25; p. 100, lines 1-7. See also, p. 109, lines 1-11; p. 111, lines 9-21.)

Mr. Allen testified that neither Shelter nor CorVel acted with any unreasonable delay; nor did they act in bad faith. Mr. Allen testified he found no violations of the Unfair Claim Practices Act. (R. Vol. III, p. 100, lines 8-25 through page 102, line 1.)

SUMMARY OF THE ARGUMENT

Plaintiff, Marlene Barnes, brought one claim for relief, for bad faith breach of insurance contract, against Shelter Mutual Insurance Company. The trial court concluded that Shelter did not unreasonably delay and did not act in bad faith with respect to a request for a second kyphoplasty procedure.

The evidence before the trial court included the fact that in September 2002, after the first kyphoplasty procedure, Ms. Barnes' surgeon, Dr. Robert Benz, had declared Ms. Barnes "100% recovered" from her spine injury, and he released her from care. CorVel and Shelter were notified in November that new compression fractures had been found at T9 and T12, according to an MRI report and these fractures has not been found after the February 2002 motor vehicle accident in the June 20, 2002 MRI report. Shelter could reasonably conclude that an independent PPO medical examination should be conducted to determine whether the new compression fractures were caused by the subject motor vehicle accident.

A number of delays occurred before the PPO examination could be scheduled and completed, including locating a PPO physician familiar with the kyphoplasty procedure and accommodating the request by Ms. Barnes' attorney that the physician's office be located near where Ms. Barnes resided. Once a physician was located, the examination was promptly scheduled. Ms. Barnes, Ms.

Barnes' attorney, and Dr. Benz were all notified of the PPO examination, and no one made any objection. After the examination report of Dr. Villavicencio was received, Dr. Benz and Ms. Barnes' attorney were sent copies promptly. Among other things, Dr. Villavicencio recommended a repeat MRI. Ms. Barnes' attorney took exception to some of the conclusions. The repeat MRI showed that the compression fractures had healed. The trial court correctly concluded that at no time did Dr. Benz or Ms. Barnes' attorney express any undue concern to Shelter or CorVel about any delay in obtaining the second opinion. The trial court's determination, that the investigation did not take so much time that the delay was unreasonable or constituted bad faith, is supported by the evidence in the record.

ARGUMENT

I. STANDARD OF REVIEW.

On appeal, the Court reviews the trial court's factual findings under the clear error standard but review its legal conclusions *de novo*. *Egle v. City & County of Denver*, 93 P.3d 609 (Colo. App. 2004); *DiCocco v. National General Ins. Co.*, ___ P.3d ___, 2006 WL 1348476 (Colo. App. 05/18/06). To the extent findings of fact of the trial court are challenged on appeal, the standard of review is very deferential. *Hartman v. Regents of University of Colorado*, 22 P.3d 524, 529 (Colo. App. 2000).

II. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS WERE SUPPORTED BY THE EVIDENCE AT TRIAL.

A. **The Trial Court Correctly Found that the "Final Note" Was Not Expressly Called to the Attention of CorVel/Shelter.**

Plaintiff Marlene Barnes errs in her contention that the trial court incorrectly concluded that the "Final Note" in the brochure was not called to the attention of Laura Cuddihy of CorVel.

Ms. Cuddihy testified that she received an Internet article from Ms. Barnes' attorney and a brochure from Dr. Benz. The brochure was written by the vendor, Kyphon, and its stated that treatment is most successful with immediate intervention and that patients should be referred for an evaluation as quickly as possible. While Ms. Cuddihy recalled receiving and reviewing the brochure, the "Final Note" is at the end of a brochure in small print. Ms. Cuddihy testified that this statement in this note was not unusual. It would be the kind of statement one would make for any general orthopedic procedure. In other words, any fracture needs to be addressed as quickly as possible. (R. Vol. II, p. 128, lines 13-17; p. 131, lines 14-25.) What the trial court concluded was that this "Final Note" was not specifically directed to Ms. Cuddihy's attention by Dr. Benz or his office. (Order, p. 3; R. Vol. I, p. 73.) After receiving the brochure, she recommended, and Shelter approved, the first kyphoplasty procedure, which was performed five months after

the motor vehicle accident. Ms. Cuddihy testified that no one brought to her attention any urgency in the kyphoplasty procedure, and given the five months lapse of time she would have no reason to suspect that the procedure had to be performed immediately, particularly since Dr. Benz had previously concluded that Ms. Barnes was 100% recovered from her spinal injury after that first kyphoplasty procedure. As the trial court noted, the "Final Note" does not say that any delay precludes the operation. The trial court also correctly pointed out that numerous health care providers had communicated with Shelter and CorVel, but the reports emphasized the pain symptomology reported by Marlene Barnes, not that the opportunity for the operation might have been lost. (Order, p. 6; R., Vol. I, p. 76.)

B. The Trial Court's Conclusion that Prior MRIs and X-rays Had Not Revealed the New Compression Fractures at T9 and T12 Is Supported by the Record.

The trial court concluded that after Marlene Barnes returned to Dr. Benz on October 18, 2002, and an additional MRI was performed, new compression fractures were found at T9 and T12. The first MRI was performed on June 20, 2002. That MRI report stated as follows:

Abnormal signal consistent with edema and compression fractures at T6 with 20% loss of height anteriorly and T7 with no appreciable loss of height. *No other acute compression fractures are identified and remaining thoracic spine is unremarkable in appearance.* (Emphasis added.)

(Exhibit H, the CorVel file, R. Vol. XII, page 132.)

The first kyphoplasty was performed on July 27, 2002. On August 8, 2002, Dr. Benz saw Ms. Barnes and reviewed some x-rays indicating that there was a "mild compression deformity at T9, which from my reading does not appear to be significantly changed from previous films." (Emphasis added.) In other words, there was no clinical significance to the T9 findings from earlier x-rays. On September 3, 2002, Dr. Benz prepared an office note stating as follows:

I think at this point she is completely recovered from her kyphoplasty.
I feel she is 100% recovered from her spine injury. Therefore, I am completely releasing her from medical care.

(R. Vol. II, p. 216, lines 18-25 through p. 217, lines 1-11.) (Vol. XII, Exh. I, p. 71.)

The October 30, 2002 MRI report stated, among other things:

There is an acute compression fracture of the T9 vertebral body with approximately 25-30% loss of vertebral body height...There is an acute compression fracture of the superior endplate of T12 with approximately 30% loss of vertebral body height....

In his report of November 12, 2002, Dr. Benz stated that Ms. Barnes underwent a repeat MRI examination, "which showed evidence of fractures at T9 and T12." Dr. Benz concluded that (what he called "her additional fractures") were related to the motor vehicle accident. (R. Vol. XII, Exh. H, p. 58.)

The trial court's conclusion - that past x-rays and MRIs had not shown the compression fractures at T9 and T12 - is clearly supported by the record. Until the

October 30, 2002 MRI, there was no evidence of a 25-30% loss of vertebral body height to T9 or T12.

C. The Trial Court's Finding that Neither CorVel nor Shelter Were Informed that There Was a Window of Opportunity Regarding Kyphoplasty Is Supported by the Record.

The trial court found that "it never was adequately and clearly conveyed to CorVel or Shelter that there was a, possibly closing, window of opportunity, regarding kyphoplasty..." (Order, p. 6; R. Vol. I, p. 76.) That conclusion is supported by the record.

First, both Laura Cuddihy of CorVel and Pam Carbocci of Shelter testified that neither of them had been told by Dr. Benz or Ms. Barnes' attorney, that there was any prompt urgency to the kyphoplasty procedure. (Testimony of L. Cuddihy of CorVel, R. Vol. II, p. 156, lines 11-25 through p. 157, lines 1-20.) (Testimony of P. Carbocci of Shelter, p. 243, lines 13-25 through p. 244, lines 1-8.) Second, they had no reason to be concerned about any unnecessary delay because the first kyphoplasty procedure had been performed, successfully, according to Dr. Benz, five months after the motor vehicle accident. Third, Dr. Benz and Ms. Barnes' attorney had both been informed of the scheduling of the PPO examination, and neither expressed any concern about the timing of the examination or urgency for the independent PPO examination to be completed. (R. Vol. II, p. 148, lines 1-15;

p. 243, lines 13-20.) In his January 10, 2003 letter, Dr. Benz did not raise any concern about the PPO examination. (R. Vol. XII, Exh. I, p. 143.) After the PPO examination report was received on February 13 at CorVel, it was sent to both Dr. Benz and Ms. Barnes' attorney. (R. Vol. II, p. 152, lines 6-25 through p. 153. lines 1-7.) Most notably, Ms. Barnes' attorney's response was not to warn of any urgency in proceeding with the second kyphoplasty; rather, his response was to take exception to the opinions of Dr. Villavicencio in his PPO examination report. (R. Vol. XII, Exh. H, pp. 189-190.) Given the totality of the evidence, the trial court's conclusion that the communications from Dr. Benz and Ms. Barnes' attorney failed to state that the opportunity for the kyphoplasty might be lost is supported by the record and is not "clearly erroneous."

D. The Trial Court's Conclusion That the Time Taken to Investigate the Second Kyphoplasty Was Not Unreasonable Is Supported by the Record.

The trial court concluded that in doing the investigation Shelter did not take so much time that any delay was unreasonable or in bad faith. (Order, p. 7; R., Vol. I, p. 77.) That conclusion is supported by the record.

Shelter and CorVel had been informed by Dr. Benz, in his September 3, 2002 office note, that Ms. Barnes was "100% recovered from her spine injury." Dr. Benz stated that he completely released her from medical care. As a result, Shelter

and CorVel closed their files. Then, in late October Laura Cuddihy was contacted by Dr. Benz's office and was requested to provide authorization for another MRI. On November 17, 2002, Ms. Cuddihy received the records from Dr. Benz's office informing her that Dr. Benz had concluded that Ms. Barnes had sustained new compression fractures. Shelter and CorVel could reasonably conclude that these new compression fractures were not caused by the February motor vehicle accident.

As pointed out by the trial court, the medical procedure requested must be reasonable, necessary, and related to the subject motor vehicle accident, § 10-4-706, C.R.S.⁶; see *Sanchez v. American Standard Ins. Co. of Wisconsin*, 89 P.3d 471, 474 (Colo. App. 2003), citing *Adams v. Farmers Insurance Group*, 983 P.2d 797 (Colo. 1999). Given that over eight months had elapsed from the time of the motor vehicle accident, and given that there were new findings which had not been found in the June 20, 2002 MRI report, Shelter and CorVel could reasonably conclude that a PPO examination should be conducted to determine whether the new T9 and T12 compression fractures and the second kyphoplasty procedure were caused by the motor vehicle accident.

⁶ Since repealed.

The trial court correctly noted that not only had Shelter and CorVel not been notified of any immediate urgency for the kyphoplasty, a number of other factors occurred that were reasonable and normal. (Order at p.7, R. Vol. I, p. 77.) First, both files had been closed and had to be reopened. Second, the decision to schedule the PPO examination was made in early December, which was shortly after CorVel had received the records of Dr. Benz. (Laura Cuddihy had been forced to request the records twice from Dr. Benz's office.) Third, it took Laura Cuddihy some time to locate a physician (1) who was familiar with the kyphoplasty procedure; (2) was a PPO physician, i.e. approved within the PPO network; and (3) was at a location convenient for Ms. Barnes. (R. Vol. II, p. 109, lines 19-25 through p. 112, lines 1-4; p. 146, lines 16-25 through p. 147, lines 1-25.) Ms. Barnes complains in her Opening Brief that Ms. Cuddihy's report and billing records don't reflect all the time she took to find an appropriate physician, but her testimony was that she didn't record all of the time spent in attempting to locate the physician because it was non-billable. (Vol. II, p. 110, lines 15-19.)

Finally, Ms. Cuddihy located a PPO physician in Boulder, Colorado, Dr. Alan Villavicencio, who is familiar with the kyphoplasty procedure and who could perform the independent medical evaluation. (R. Vol. II, p. 146, lines 16-25 through p. 150, lines 1-8.) The medical evaluation was scheduled for February 3,

2003. (R. Vol. II, p. 150, lines 5-8.) Ms. Barnes, her attorney, and Dr. Benz were all notified of the referral for the second opinion. (R. Vol. II, p. 158, lines 10-25 through p. 159, lines 1-11.) (R. Vol. II, p. 232, lines 9-25 through p. 233, lines 1-15.) (R. Vol. II, p. 234, lines 13-18.) No concern over the timing of the PPO examination and the need for the second kyphoplasty procedure, and no objections to the PPO examination were conveyed by Dr. Benz or by Ms. Barnes' attorney. (R. Vol. II, p. 233, lines 16-25 through p. 234, lines 1-10.) (See also p. 235, lines 16-25 through p. 236, lines 1-20.)

Ms. Barnes attended the medical evaluation on February 3, 2003. Dr. Villavicencio's report was received by CorVel on February 13. (R. Vol. II, p. 150, lines 1-18.) It was received by Shelter on February 12, 2003. (R. Vol. II, p. 236, lines 21-25 through p. 237, lines 1-7.) His report was sent to Dr. Benz and to Ms. Barnes attorney on February 18, and they were informed that Shelter had authorized the treatment as outlined in Dr. Villavicencio's report. Because Dr. Benz's office said it didn't receive the report, it was re-faxed to Dr. Benz's office on February 19, 2003. (R. Vol. II, p. 152, lines 6-25 through p. 153, lines 1-7.)

As the trial court noted, the real issue was whether this investigation took so much time that any delay was unreasonable and in bad faith, and the court found that the answer was "No." (Order, p. 7; R. Vol. I, p. 77.) Although Ms. Barnes'

retained expert, attorney Bradley Levin, was critical of the timing, the trial court concluded that the testimony of Shelter's expert, Garth Allen, was the more credible, reasonable, and persuasive. (Order, pp. 7-8; R. Vol. I, p. 77-78.)

An appellate court cannot substitute itself as a finder of fact, and the factual findings of the trial court sitting without a jury are not to be disturbed upon appeal unless clearly erroneous and not supported by the record. *Gebhardt v. Gebhardt*, 198 Colo. 28, 595 P.2d 1048 (1979). The credibility of the witnesses, the sufficiency, probative value, and weight of the evidence, and the inferences and conclusions drawn from the evidence are all within the province of the trial court, whose findings will not be disturbed on review unless manifestly erroneous. *Broncucia v. McGee*, 173 Colo. 22, 475 P.2d 336 (1970).

Bockstiegel v. Board of County Com'rs of Lake County, 97 P.3d 324, 328 (Colo. App. 2004). The trial court was in the best position to judge the credibility of the witnesses, and the determination by the trial court should not be overturned on review.

E. Plaintiff Errs in her Citation to the Record Regarding Notice to CorVel about Dr. Benz's Recommendation for a Second Kyphoplasty.

In paragraph E of her Opening Brief, Ms. Barnes contends that "Dr. Benz's office first conveyed to Cuddihy a request to approve the kyphoplasty at T9 and T12 on October 30, 2002." (Opening Brief at 26.) However, that assertion is inaccurate. Ms. Cuddihy did not received Dr. Benz's records until November 17, 2002, after having to request them twice. (R. Vol. II, p. 142, lines 22-25 through p. 143, lines 1; p. 144, lines 1-3.)

F. The Trial Court Correctly Concluded That There Was Considerable Dispute as to Whether the Accident Caused the New Fractures.

In its Order, the trial court concluded that there was a considerable dispute as to whether the motor vehicle accident caused the new fractures at T9 and T12, and that conclusion was supported by the record.

First, the physicians did not agree. Dr. Benz testified that they were caused by the accident; Dr. Maruyama testified that they were not caused by the accident (R. Vol. VII, p. 50, lines 12-25 through p. 51, lines 1-8; p. 52, lines 9-25 through p. 53 lines 1-21). In addition, Dr. Maruyama testified that even newer compression fractures at T8 and T11, found by Dr. Benz in December 2004, were not caused by the February 2002 auto accident. (R. Vol. VII, p. 8, lines 7-25 through p. 9, lines 1-2; p. 14, lines 3-10.) In his report, Dr. Villavicencio stated that the T9 and T12 fractures were, in part, caused by the accident. (R. Vol. XII, Exh. H, p. 51, last ¶.) See Order, p. 7; R. Vol. I, p. 77.)

Also, the June 20, 2002 MRI report stated that compression fractures had occurred only at T6 and T7 and that no other acute compression fractures were identified. After the first kyphoplasty, Dr. Benz had concluded that Ms. Barnes was "100% recovered from her spine injury." Then eight months after the accident, in the October 30, 2002 MRI, the new compression fractures at T9 and T12 were discovered. Given the above evidence, the trial court could reasonably conclude

that a considerable dispute had existed as to whether the motor vehicle accident caused the new compression fractures at T9 and T12.

G. The Trial Court's Conclusion That Shelter Did Not Act in Bad Faith is Supported by the Record.

First-party insurance bad faith claims arise when an insurer refuses to provide benefits directly to an insured pursuant to the insured's policy. *See Rederscheid v. Comprefcare, Inc.*, 667 P.2d 766 (Colo. App. 1983). First-party claims of bad faith are adversarial in nature, and therefore it is impossible for the insurer to act as a fiduciary for its insured when such claims arise. *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336 (Colo. App. 1992). The insurer has a right to protect its own interests along with those of its insured. *Id.* Further, an insurer owes duties to its other shareholders not to honor meritless claims. *Id.*

In order to prove a first-party bad faith breach of insurance contract claim, a plaintiff must show (1) that the insurer's conduct was unreasonable, and (2) that the insurer knew the conduct was unreasonable or recklessly disregarded the fact that the conduct was unreasonable. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1274 (Colo. 1985); § 10-3-1113(3), C.R.S.

The first element of unreasonable conduct must be determined by an objective standard. This requires proof of the standards of conduct in the industry. The second element of knowledge is determined by a more subjective standard. A

plaintiff may not recover on a claim of first-party bad faith if the insurer's delay or denial of the claim was based upon "a permissible, albeit mistaken, belief that the claim is not compensable." *Id.* An insurer's decision regarding an award of benefits to its insured must be evaluated based upon the information available to the insurer at the time of the decision. *Peiffer v. State Farm Mut. Auto. Ins. Co.*, 940 P.2d 967 (Colo. App. 1996), *aff'd on other grounds*, 955 P.2d 1008 (Colo. 1998).

In this case, the trial court's conclusion that Shelter did not act in bad faith is supported by the record. The evidence included the testimony of Garth Allen that Shelter and CorVel did not act in bad faith. Limitations had been imposed upon CorVel in scheduling the independent PPO medical evaluation: the procedure is controversial; it took time for Ms. Cuddihy to locate a PPO physician familiar with the kyphoplasty procedure; and Mr. Barnes attorney required that the physician be close to Ms. Barnes' home. Mr. Allen testified that given those limitations the time it took to find a physician and schedule the examination was not unreasonable. Mr. Allen testified that, based upon the information available to Shelter and CorVel, they acted reasonably under the circumstances. (R. Vol. III, p. 92, lines 10-2 through p. 95, line7.)

Mr. Allen disagreed with the assertion by Mr. Levin that Shelter and CorVel should not have sought a consultant familiar with the kyphoplasty procedure. (R. Vol. III, p. 98, lines 12-25 through page 99, lines 1-8.) He testified that Mr. Levin's assertion that the scheduling and conducting of the independent PPO medical examination took too long was unrealistic. Mr. Allen noted that no one told CorVel that there was any time sensitive determination for the decision on the kyphoplasty procedure. In addition, although the Plaintiff attempted to make much out of a "Final Note" at the bottom of a brochure that Ms. Cuddihy had received, Mr. Allen pointed out that the note doesn't use the word "surgery;" it simply noted that it was best to treat the compression fracture condition early on. The note was in small print. (R. Vol. III, p. 118, lines 5-6.) The note didn't say to the reader that any expedited process should be used. (R. Vol. III, p. 99, lines 23-25; p. 100, lines 1-7. See also, p. 109, lines 1-11; p. 111, lines 9-21.)

Mr. Allen testified that neither Shelter nor CorVel acted with any unreasonable delay; nor did they act in bad faith. Mr. Allen testified he found no violations of the Unfair Claim Practices Act. (R. Vol. III, p. 100, lines 8-25 through page 102, line 1.) The trial court weighed the testimony of Mr. Levin, Plaintiff's expert, and Defendant's expert, Garth Allen, and it found the testimony of Mr. Allen to be more credible, reasonable, and persuasive. The trial court found

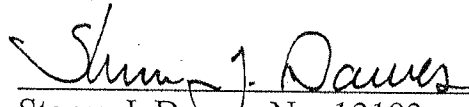
that it agreed with Mr. Allen's analysis and his conclusions. (Order at pp. 7-8; R. Vol. I, pp. 77-78.) The trial court's findings and conclusions were supported by the evidence at trial.

CONCLUSION

The trial court's findings and conclusions were not clearly erroneous or unsupported by the record. To the contrary, the trial court was in the best position to judge the credibility of the witnesses and weigh the evidence, and its findings and conclusions are supported by the record. Defendant-Appellee Shelter Mutual Insurance Company respectfully requests that this Court affirm the Order and Judgment in favor of the Defendant and against the Plaintiff.

Respectfully submitted,

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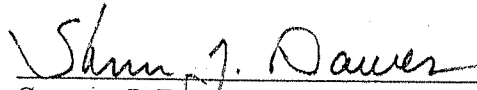
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CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 26th day of June 2006 a true and complete copy of the foregoing ANSWER BRIEF was filed with the Court and served on the attorneys named below via U.S. mail, first-class postage prepaid, addressed to the following:

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