STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM MORGAN,

Plaintiff-Appellant,

-v- No. 94680

MOSES EVANS and FRANK CONRAD WINTER,

Defendants,

and

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.
_____/

BEFORE: Cynar, P.J., and E.A. Weaver and J.H. Hausner*, JJ.

PER CURIAM

Plaintiff appeals as of right from an order granting defendant Citizen Insurance Company of America summary disposition pursuant to MCR 2.116(C)(10).

The underlying dispute concerns the payment of no-fault insurance benefits. Plaintiff was injured while being driven to National Guard training. Defendant was plaintiff's no-fault insurer. Plaintiff's initial hospitalization was paid by the Veterans Administration. Approximately nine months later, plaintiff was diagnosed as having a herniated disc in his back and surgery was recommended. Plaintiff claims that he sought approval for the operation from his staff sergeant. According to plaintiff, his sergeant stated that the military would not pay for the surgery because it was considered an elective procedure. Nonetheless, plaintiff chose to have the surgery performed at a nonmilitary hospital at a cost of over $10,000. He subsequently requested reimbursement of his medical expenses from the military. Plaintiff's claim was denied for the following reasons:

"a.) Non-emergency medical care in a civilian treatment facility is not authorized without written or verbal authorization from the Chief, National Guard Bureau of his designee. There is no documentation in this package that showed any authorization for care was asked for or granted.

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* Circuit judge, sitting on the Court of Appeals by assignment.

"b.) There is no furnished medical documentation indicating that the auto accident in January, 1984, was the cause of the soldier's herniated disk which was diagnosed nine months later in September, 1984."

Plaintiff then filed this action against defendant. Defendant responded by claiming that it was not liable for plaintiff's medical expenses because of the setoff provision, §3109, of the no-fault insurance act.[1] The trial court granted defendant's motion for summary disposition, finding that plaintiff elected not to receive the benefits offered by the federal government.

MCL 500.3109(1); MSA 24.13109(1) provides:

"Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."

Medical care provided a member of the armed forces pursuant to 10 USC 1071 is a benefit provided under the laws of the federal government required to be subtracted from no-fault benefits otherwise payable to the injured person. Crowley v Detroit Automobile Inter-Ins Exchange, 428 Mich 270; ___ NW2d ___ (1987). See also Dengler v State Farm Mutual Automobile Ins Co, 135 Mich App 645; 354 NW2d 294 (1984); Bagley v State Farm Mutual Automobile Ins Co, 101 Mich App 733; 300 NW2d 322 (1980). The issue presented in this case is whether §3109 requires an offset even though plaintiff did not receive any medical benefits from the military.

In Perez v State Farm Ins Co, 418 Mich 634; 344 NW2d 773 (1984), our Supreme Court ruled that §3109 does not authorize subtraction of unavailable workers' compensation benefits. In that case, workers' compensation benefits were unavailable to the plaintiffs because their employer failed to provide workers' compensation coverage. The Court concluded that any benefits that would have been payable pursuant to workers' compensation could not be subtracted from no-fault work loss benefits.

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[1] Plaintiff's complaint also alleged wage loss and replacement services expenses. The trial court's dismissal of these claims is not on appeal.

However, the Court has also ruled that when an injured party settles a claim with the primary insurer for less than the full benefit, the no-fault insurer is entitled to offset the amount required to be paid rather than the settlement amount. Gregory v Transamerica Ins Co, 429 Mich 625, 634-636; 391 NW2d 312 (1986). In so ruling, the court adopted the reasoning of the federal district court in Moore v Travelers Ins Co, 475 F Supp 891 (ED Mich, 1979), that any other result

> "would allow the Plaintiff to elect who, as between the no-fault and compensation carriers, to collect benefits from. This would disturb the legislatively established relative spheres of application of no-fault and compensation. Section 3109(1) clearly contemplates that the no-fault carrier should be liable only for the excess of its coverage over and aabove that potentially provided by the compensation ccarriers. [475 F Supp 894-895.]"

We interpret the foregoing Supreme Court decisions as indicating that a no-fault insurer may offset primary insurance benefits except when injured persons fail to receive benefits through no fault of their own. In this case, plaintiff might have been entitled to medical benefits provided by the military if he had received treatment at a Veterans Administration hospital. Instead he chose to have nonemergency surgery performed at a nonmilitary hospital. Under the circumstances of this case, we agree with the trial court that defendant was entitled to subtract from insurance benefits otherwise payable the amount that would have been paid by the federal government if plaintiff had sought treatment at a military hospital. Recovery from defendant in this case would defeat the purpose of the setoff provision by allowing plaintiff to choose which insurance would pay for his medical treatment. The decision of the trial court is AFFIRMED.

/s/ Walter P. Cynar
/s/ Elizabeth A. Weaver
/s/ John H. Hausner