STATE OF MICHIGAN

COURT OF APPEALS

VICTOR PARHAM,

Plaintiff-Appellee,

v No. 92838

PREFERRED RISK MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

/

BEFORE: Beasley, P. J., H. Hood and E. Borradaile*, JJ.

PER CURIAM

Defendant appeals as of right from the trial court's judgment awarding plaintiff $8,233.23 in work loss benefits under Michigan's No-Fault Act, MCL 500.3107(b); MSA 24.13107(b) and the trial court's award to plaintiff of $49,400.00 in attorney fees for defendant's unreasonable delay in paying plaintiff the benefits.

Plaintiff was injured in an automobile accident near Bowling Green, Kentucky, on August 28, 1975, while driving an automobile owned by his brother-in-law, John Giacalone. At the time of the accident, Plaintiff was a member of the United States Army. Plaintiff had broken his wrists on July 14, 1975 in an unrelated accident in which he fell off a ladder at his barracks. Treatment for this accident postponed his planned discharge date of July 30, 1975. He was placed on convalescent leave and allowed to return to his mother's home in Warren, Michigan to recuperate.

From time to time, plaintiff had to return to his Fort Campbell, Kentucky base for treatment of his injured wrists.. The automobile accident occurred as plaintiff was returning to Michigan after one of these trip. Giacalone had

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

suggested that plaintiff drive Giacalone's automobile to Kentucky, because Giacalone, who was attempting to sell his automobile, had been unsuccessful in finding a buyer in Michigan. Giacalone felt that perhaps plaintiff could find a buyer in Kentucky. The accident occurred when an automobile driven by David R. Runner and owned by Iris K. Runner went out of control, crossed the center line, and went into plaintiff's lane. The Runner automobile was uninsured.

Prior to plaintiff's accidents, plaintiff had planned to begin working as an installer for Landark Drywall, a company co-owned by Giacalone, as soon as he was discharged. At Landark, plaintiff was to be paid $5.00 per hour for a 40-hour workweek. However, due to plaintiff's automobile accident, he was detained in the Army until November 14, 1975. Because installing drywall involved much bending and lifting and because plaintiff injured his knees in the automobile accident, plaintiff did not begin working at Landark until September 16, 1976.

On January 21, 1976, plaintiff filed suit in the Macomb County Circuit Court against Detroit Automobile Inter-Insurance Exchange ("DAIIE"), Giacalone's insurer, and defendant, the insurer of plaintiff's mother and brother, to compel arbitration of uninsured motorist benefits and to determine stacking of the policies. DAIIE was subsequently dismissed from the action after settling. On September 24, 1976, plaintiff filed an amended complaint in which he sought personal protection benefits under defendant's policy.

The trial court entered a judgment of no cause of action against plaintiff, on the ground that since plaintiff was an employee of his brother-in-law at the time he was driving the car, MCL 500.3114(3); MSA 24.13114(3)[1] required that Giacalone's insurer, rather than defendant, pay benefits. We reversed, holding that the trial court had erroneously applied the "right of control" test of the employer/employee relationship rather

than the "economic reality" test. Parham v Preferred Risk Mutual Ins Co, 124 Mich App 618; 335 NW2d 106 (1983). We remanded for a determination of the amount of personal injury protection benefits and reasonable attorney fees should the trial court determine that plaintiff was not an employee of Giacalone.

Upon remand, the trial court found that plaintiff was not an employee of Giacalone at the time of the accident. Thus, defendant was liable for the payment of benefits. The court awarded plaintiff $8,233.23 in work loss benefits pursuant to MCL 500.3107(b); MSA 24.13017(b). In calculating the amount of work loss benefits due, the court made the following findings of fact:

"A. Plaintiff would have been discharged from the Army on September 11, 1975, but for the [automobile] accident, and he was required to remain in the Army for treatment of his injuries from the accident until November 14, 1975.

"B. Plaintiff would have started working with his brother-in-law hanging drywall at the rate of $5.00 per hour for forty hours per week commencing September 15, 1975.

"C. For the period from September 15, 1975, to November 14, 1975, plaintiff received a total of $713.85 pay from the Army.

"D. Plaintiff remained unable to work hanging drywall until September 15, 1976. Thus, plaintiff would have earned $200 per week for fifty-two weeks had he not been injured in the accident. Fifty-two weeks times $200 equals $10,400. From this amount $713.85 should be subtracted under MCL 500.3109. $10,400 minus $713.85 equals $9,686.15.

"Under MCL 500.3107; MSA 24.13107, fifteen percent of the benefits payable must be subtracted unless the claimant can show a smaller income tax liability. No such showing was made. $9,686.15 times eight-five percent equals $8,233.23.

"E. Plaintiff is entitled to work loss benefits in the amount of $8,233.23. The Court will hold in abeyance the matter of statutory interest, as it is unable to determine at this time whether reasonable proof of the fact and the amount of the loss sustained was presented to the insurer."

The court then scheduled an evidentiary hearing for proofs regarding plaintiff's claim for statutory 12% interest and attorney fees. To halt the accrual of penalty interest, defendant paid plaintiff the work loss award on March 18, 1985; however, defendant refused to pay judgment interest, arguing that plaintiff had not demanded it in his complaint. On April 1, 1985, the trial court entered an order amending the October 20

order to include a provision for statutory judgment interest. On June 3, 1986, the trial court granted plaintiff partial summary judgment on assessment of statutory penalty interest under the no-fault act.

On June 10, 1985, the court conducted an evidentiary hearing on whether plaintiff was entitled to reasonable attorney fees. Two attorneys, Herbert Rusing and Charles Barr, testified as expert witnesses. Rusing testified that defendant had acted unreasonably in denying plaintiff's claim on the basis of non-residency. Barr testified that plaintiff was clearly entitled to benefits. Plaintiff also introduced the deposition of Robert Novak, defendant's branch claims manager, describing defendant's investigation into whether plaintiff was a Michigan resident, and several exhibits indicating that although plaintiff had had a Kentucky motorcycle permit in 1974, it had expired nine months before this accident.

On April 4, 1986, the court issued its opinion awarding plaintiff $49,400 in attorney fees. The court found that defendant had unreasonably denied coverage based on lack of residency, and after losing this defense, based on lack of priority. The court addressed the six factors relevant to determining the reasonableness of attorney fees set forth in Petterman v Haverhill Farms, Inc, 125 Mich App 30; 335 NW2d 710 (1983).

Defendant appeals from these two judgments, raising four issues. We affirm.

First, defendant claims that plaintiff's complaint for personal protection benefits was barred by the one-year statute of limitations, MCL 500.3145(1); MSA 24.13145(1). The statute states in pertinent part:

> "An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of

injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury."

Defendant alleges that the first notice it received that plaintiff was seeking personal protection insurance ("PPI") benefits was the amended complaint, filed September 24, 1976. Since this was 13 months after the accident, defendant claims the PPI benefits claim was barred. Initially, we note that defendant failed to raise this statute of limitations defense in its first responsive pleading, and therefore, defendant has waived the defense. Butler v DAIIE, 121 Mich App 727, 741; 329 NW2d 781 (1982); Liddell v DAIIE, 102 Mich App 636, 653-54; 302 NW2d 260, lv den 411 Mich 1079 (1981). Even if this defense was not barred, we find that plaintiff did comply with the statute. On November 25, 1975, plaintiff's counsel sent a letter to defendant informing defendant that he had been retained to prosecute plaintiff's claim for bodily injuries arising out of the automobile accident, under the uninsured motorist provision. The letter described the circumstances of the accident, the witnesses, and plaintiff's injuries. Defendant responded to the letter on December 12, 1975, acknowledging plaintiff's uninsured motorist claim and requesting additional information from plaintiff. In alleging that plaintiff's claim for PPI benefits was barred, defendant confuses "notice of injury" with "notice of personal protection claim". The language of the statute requires written notice of the injury, which includes plaintiff's name, address, and the time, place, and nature of the injury. We find that plaintiff's November 25, 1975 letter complied with the statutory notice requirement. Further, under GCR 1963, 118.4 [now MCR 2.118(D)], plaintiff's amended complaint relates back to the original complaint. Thus, reversal is not required on this issue.

Next, defendant claims that the trial court erred in basing plaintiff's work loss award on plaintiff's expected

employment installing drywall. Defendant argues that in effect, the court was basing its award on plaintiff's loss of earning capacity rather than on accrued earnings. Defendant claims that the drywalling job was speculative.

MCL 500.3107; MSA 24.13107 states in pertinent part:

"Personal protection insurance benefits are payable for the following:

* * *

(b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he had not been injured. . ."

This Court discussed the definition of work loss in Nawrocki v Hawkeye Security Ins Co, 83 Mich App 135, 143-44; 268 NW2d 317 (1978), lv den 406 Mich 896 (1979):

"The Michigan no-fault act was based upon the uniform motor vehicle accident reparations act, 13 ULA 349, et seq. 'Work loss' is defined in §1(a)(5)(ii) of that act, and the commissioners' comment on this definition leaves no doubt that work loss as used in that act does not mean loss of earning capacity:

''Work loss,' as are the other components of loss, is restricted to accrued loss, and thus covers only actual loss of earnings as contrasted to loss of earning capacity.' 13 ULA 362.

The foregoing leaves us convinced that work loss, as used in §3107(b), is not to be equated with loss of earning capacity."

The Supreme Court has also addressed what is covered by work loss benefits:

"A reading of both the clear language of §3107(b) and the drafter's comments to the uniform act leads us to conclude that work-loss benefits are available to compensate only for that amount that the injured person would have received had his automobile accident not occurred. Stated otherwise, work-loss benefits compensate the injured person for income he would have received but for the accident." MacDonald v State Farm Ins Co, 419 Mich 146, 151-52; 350 NW2d 233 (1984).

We feel that the trial court properly awarded plaintiff work loss benefits in accordance with the wages plaintiff would have earned installing drywall. At trial, plaintiff testified that he planned to be trained as an installer in Giacalone's drywall business as soon as he was released from the service. Giacalone confirmed that plaintiff was to begin

employment in September, 1975, but was unable to work for a year after the automobile accident. Under these facts, the award was proper. Had plaintiff not been injured in the auto accident, the evidence showed that he would have begun work at Landark Drywall in September, 1975. This work was not speculative, as both plaintiff and his prospective employer had agreed on the date he would start. As the statute provides work loss benefits to compensate for the loss of income a claimant would have received if he had not been injured, the trial court's award was appropriate.

Next, defendant claims that plaintiff's unemployment benefits should have been set off from his work loss award, pursuant to MCL 500.3109(1); MSA 24.13109(1). That statute states:

"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."

In Jarosz v DAIIE, 418 Mich 565; 345 NW2d 563 (1984), the Supreme Court established the test for determining whether benefits must be set off under § 3109(1):

"We conclude that the correct test is: state or federal benefits 'provided or required to be provided' must be deducted from no-fault benefits under § 3109(1) if they:

1) Serve the same purpose as the no-fault benefits, and

2) Are provided or are required to be provided as a result of the same accident." Jarosz, supra, 577.

It is clear that the second prong of this test has not been met. The unemployment compensation plaintiff was receiving was not 'provided or required to be provided as a result of the automobile accident'. Thus, the trial court did not err in not setting off plaintiff's unemployment benefits from the wage loss benefits it awarded plaintiff.

Finally, defendant claims that the trial court abused its discretion in awarding plaintiff attorney fees pursuant to MCL 500.3148; MSA 24.13148(1) on the ground that defendant

unreasonably refused to pay benefits. MCL 500.3148(1); MSA 24.13148(1) states:

> "An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment."

The trial court's findings of unreasonableness on the part of the insurance company will be disturbed on appeal only if that finding is clearly erroneous. Liddell, supra, 650. In the instant case, the trial court found that after the court awarded plaintiff $8,233.23 in work loss benefits, defendant unreasonably refused to pay judgment interest because plaintiff had not included a prayer for judgment interest in his amended complaint. This conduct caused plaintiff to seek an order from the court commanding defendant to pay judgment interest. In addition, defendant prolonged the case for 9 ½ years as it pursued meritless claims and defenses. At the evidentiary hearing, expert witnesses testified that defendant had acted unreasonably in denying plaintiff's claim on the basis of non-residency, and that plaintiff was clearly entitled to benefits. After a thorough review of the record, we find that the court's award of attorney fees was not clearly erroneous.

Affirmed.

/s/ William R. Beasley
/s/ Harold Hood
/s/ Earl E. Borradaile

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1. MCL 500.3114(3); MSA 24.13114(3) states:

> "An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle."