STATE OF MICHIGAN

COURT OF APPEALS

JOYCE E. OWENS and RICHARD L. OWENS, individually and as Guardian to KENNETH M. OWENS, a legally incapacitated person,

Plaintiffs-Appellees,

and

HERRICK MEMORIAL HOSPITAL AND HERRICK MEMORIAL NURSING HOME,

Intervening Plaintiffs-Appellees,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

February 5, 1992

UNPUBLISHED

Nos. 110442; 110443; 111599

Before: Holbrook, Jr., P.J., and Murphy and Jansen, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right several orders granted by the Wayne Circuit Court. In No. 110442, defendant appeals the grant of partial summary disposition to intervening-plaintiff Herrick Hospital, entered July 20, 1988. In No. 110443, the July 5, 1988, grant of partial summary disposition to plaintiffs is appealed. And in No. 111599, defendant appeals the trial court's order awarding Herrick no-fault insurance and attorney fees, and frivolous- motion attorney fees.

The facts of this case are substantially undisputed as they relate to the issues of this appeal. Briefly stated, on December 13, 1982, Kenneth Owens sustained permanent, serious closed head injuries in an automobile accident and was hospitalized at St. Joseph's Hospital until he was transferred to Walter Reed Hospital on February 23, 1983. At the time of the accident, Owens was on active duty with the U.S. Coast Guard and was visiting his parents on authorized leave.

Owens was transferred to the Ann Arbor VA Hospital on April 24, 1983. On July 25, 1983, he was admitted to Herrick Hospital for an in-patient rehabilitation program and remained there until June 28, 1985. On June 12, 1984, Owens was discharged from the Coast Guard. All medical care he received prior to his discharge was paid by the Coast Guard; the medical care received at Herrick after the discharge, however, has not been paid for either by the Coast Guard, the Veterans Administration, or defendant, Owens' no-fault carrier.

Following Owens' discharge from Herrick he began receiving out-patient therapy and rehabilitation services from numerous sources. The VA refused to pay for these expenses as the Ann Arbor VA Hospital could have provided the same care and defendant refused to pay for them on the basis that MCL 500.3109; MSA 24.13109 provides a setoff for otherwise available VA medical benefits.

Following the accident, Owens received full wages from the Coast Guard until his discharge and has received VA disability retirement pay since his discharge in addition to the social security disability benefits he has been receiving since June 1983.

Plaintiffs requested that defendant pay work-loss benefits pursuant to the uncoordinated work-loss policy provided for by MCL 500.3107(b); MSA 24.13107(b). Plaintiffs claimed entitlement to work-loss minus what Owens would have paid in taxes and any appropriate setoff. The total work-loss claimed, before deductions and setoffs, was $28,015.70. Plaintiff filed suit on June 18, 1984, seeking various no-fault benefits for hospital expenses, therapy and rehabilitation, and other benefits in addition to work-loss.

I

Defendant first argues it was entitled to a set-off under Sec. 3109 of the no-fault act for all expenses incurred for medical treatment that could have been provided by the Veterans Administration and thus summary disposition as to Owens' medical bills was in error.

MCL 500.3109; MSA 24.13109 does not mandate the offsetting of all governmentally provided benefits, only duplicative benefits. It is by offsetting these duplicative benefits that Sec. 3109(1) achieves its purpose of reducing and containing insurance costs. Morgan v Citizens Ins Co of America, 432 Mich 640, 646-648; 442 NW2d 626 (1989), reh den 433 Mich 1201 (1989). In this regard, Sec. 3109 does not require that a veteran go through the VA hospital system for medical treatment merely because he is entitled to do so. Thus, summary disposition for plaintiffs as to the medical bills was proper and is affirmed.

II

Defendant next argues it is entitled to a set off for benefits under Sec. 3107(a) for unnecessary medical care. Specifically, defendant argues the in-patient medical treatment at Herrick was unnecessary since the identical treatment could have been rendered on an out-patient basis. Defendant relies upon a memorandum prepared by Dr. Mark Kogan, who reviewed the medical records and concluded that an in-patient level of care was excessive for Owens and was neither medically necessary nor appropriate. Defendant asserts that whether the in-patient treatment was necessary is a fact question to be decided by the trier of fact and the trial court erred in granting Herrick summary disposition pursuant to MCR 2.116(C)(9).

In response, Herrick argues that defendant never raised a Sec. 3107 defense and because its motion for summary disposition was brought pursuant to MCR 2.116(C)(9), failure to plead a valid defense, summary disposition was properly granted. Although defendant did not specifically state a Sec. 3107 defense in its affirmative defenses, the issue of the necessity of Owens' treatment arose during the proceedings and the parties had ample opportunity to reply and were therefore not prejudiced. Whether defendant had specifically stated a valid defense therefore is the determinative question on this issue.

MCL 500.3107; MSA 24.13107 provides in relevant part:

> Personal protection insurance benefits are payable for the following:
>
> (a) allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation.

By denying that the in-patient hospitalization was not reasonably necessary, defendant in effect raised the valid defense of liability. In Nasser v Auto Club Ins Ass'n, 435 Mich 33; 457 NW2d 637 (1990), the Supreme Court rejected this Court's holding that the defense of reasonableness as to a plaintiff's medical expenses was "legally insufficient -- so untenable that no factual development would have prevented plaintiff's right to recovery." Id., pp 50-51, quoting Nasser v Auto Club Ins Ass'n, 169 Mich App 182, 186; 425 NW2d 762 (1988). The Supreme Court stated:

> While the situation may be rare, as this one is, it cannot be said as a matter of law that contesting the reasonableness and necessity of medical expenses can never defeat all liability. In other words, it is possible for there to be cases in which the factual developments establish that none of the medical expenses incurred were reasonable or

necessary, and that therefore there is no insurer liability. The fact that this may not turn out to be such a case in no way diminishes the validity of the "reasonableness defense" for purposes of MCR 2.116(C)(9). (Emphasis in original.) Id., p 51.

The Court went on to state that the fact that an insurer may be liable for some of the expenses does not necessarily establish its liability for all of the expenses including any unreasonable charges for unnecessary services. Id. It concluded by pointing out that Sec. 3107 should be viewed as a liability provision rather than a damages provision. Id.

Generally, the question of whether expenses are reasonably necessary is one of fact for the jury, Nelson v DAIIE, 137 Mich App 226, 231; 359 NW2d 536 (1984). If an expense could be said to be both reasonable and necessary with certainty, the court could make that decision as a matter of law in much the same way that under certain circumstances it may decide if plaintiff has sustained a threshold injury. Nasser, supra, p 55 citing DiFranco v Pickard, 427 Mich 32, 51; 398 NW2d 896 (1986). If such a determination is made, it would be made only after viewing the evidence in a light most favorable to the non-moving party. Gallagher v Parshall, 97 Mich App 654, 658-659; 296 NW2d 132 (1980).

In the case before us, we find that the Kogan memorandum prevents the trial court from finding with any degree of certainty that the in-patient treatment was both reasonable and necessary. The fact that the factual developments could eventually show all of the expenses were reasonable and necessary in no way diminishes the reasonableness defense for purposes of a MCR 2.116(C)(9) motion. Nasser, supra, p 51. As such, the trial court erred in granting summary disposition and we remand for trial on this point.

III

Defendant also argues it was entitled to a complete setoff under Sec. 3109(a) for VA disability benefits and Coast Guard wages received by Owens from work-loss benefits otherwise owing.

The test for determining whether government-provided benefits are to be deducted from no-fault benefits pursuant to MCL 500.3109(1); MSA 24.13109(1) was set forth in Jarosz v DAIIE, 418 Mich 565; 345 NW2d 563 (1984). Briefly stated, the test requires deduction of the government benefits if (1) they serve the same purpose as the no-fault benefits and (2) they are provided or are required to be provided as a result of the same accident. Id., p 577. Applying this test to VA medical benefits in Tatum v Government Employees Ins Co, 431 Mich 663; 431 NW2d 391 (1988), the Court concluded that VA medical benefits are a permissible setoff only if the insured was offered a coordinated policy. Id., p 670-672.

Following the logic of that holding, it follows that if an insured has an uncoordinated policy then the insurer is not entitled to a setoff. It also follows that Tatum would be equally applicable to VA disability benefits. Since the insurance policy in this case was an uncoordinated policy, defendant was not entitled to a setoff of the VA disability benefits.

We turn now to defendant's claim of a setoff for the Coast Guard wage continuation. Defendant argues it is entitled to a setoff on the basis that wage continuation satisfied the Jarosz test. We agree.

In Brashear v DAIIE, 144 Mich App 667; 375 NW2d 785 (1985), a "work loss" within the meaning of MCL 500.3107(b); MSA 24.13107(b) was held to include situations in which an injured employee loses time from work he or she would have performed had he or she not been injured even where the employer continues to pay wages under a formal wage continuation plan or as a gratuity. Id., p 671. Another panel of this Court, in Spencer v Hartford Accident & Indemnity Co, 179 Mich App 389; 445 NW2d 520 (1989), relied on Brashear in finding that even though a plaintiff received wage continuation benefits pursuant to a collective bargaining agreement, a work loss within the meaning of the no-fault act had occurred. Id., p 392. The Court also held that wage continuation paid pursuant to the collective bargaining agreement did not constitute "governmental benefits" to be set off under Sec. 3109(1) even though the other party to this collective bargaining agreement was a township since they were not paid pursuant to a state or federal law. Id., p 394.

Owens enjoyed wage continuation pursuant to 37 USC 502(a) which provides in pertinent part:

> A member of the Army, Navy, Air Force, Marine Corps, National Guard, or National Oceanic and Atmospheric Administration, who is absent because of sickness or wounds, or who is directed by the Secretary concerned, or he designated representative, to be absent from duty to await orders pending disability retirement proceedings for a period that is longer than the leave authorized by Sec. 701 of title 10, is entitled to the pay and allowances to which he would be entitled if he were not so absent.

Thus, by applying the Jarosz test, the wages paid would be deducted from no-fault benefits.

Even though plaintiff at bar did suffer a work-loss within the meaning of MCL 500.3107(1); MSA 24.13107(1), we find that the trial court improperly denied defendant a setoff for the Coast Guard wage continuation. The language of MCL 500.3109(1); MSA 24.13109(1) clearly addresses benefits "provided under the clause of any state or the federal government", and since the wage continuation was paid pursuant to 37 USC 502(a), defendant is entitled to a setoff.

We reject plaintiff's argument that social security benefits are not an allowable setoff to no-fault benefits when the insured has a uncoordinated policy. It has been specifically held in Michigan that social security disability benefits are a mandatory setoff. See Thompson v DAIIE, 418 Mich 610; 344 NW2d 764 (1984); Gran v DAIIE, 148 Mich App 82; 383 NW2d 616 (1985). Such a result is in perfect accord with the purpose of Sec. 3109(1) which was intended to eliminate duplicative recovery of benefits and to contain insurance costs. Moore v Auto Club Ins Ass'n, 173 Mich App 308; 433 NW2d 355 (1988).

IV

Defendant's final arguments concern the award of attorney fees to plaintiffs and Herrick pursuant to MCL 500.3148(1); MSA 24.13148(1) and MCR 2.114(E) and the no-fault interest awarded Herrick pursuant to Sec. 3142(3).

It is well-settled law in this state that refusal or delay in making payment is not unreasonable when the insurer raises a good-faith question of statutory construction, constitutional law, or a bona fide factual uncertainty. See Gobler v Auto-Owners Ins Co, 428 Mich 51; 404 NW2d 199 (1987); Bloemsma v Auto Club Ins Co, 174 Mich App 692; 436 NW2d 442 (1989). Unless clearly erroneous, a lower court's finding of unreasonable refusal or delay in making payment will not be disturbed on appeal. Cole v DAIIE, 137 Mich App 603; 357 NW2d 898 (1984).

MCL 500.3148(1); MSA 24.13148(1) provides that "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." It is clear the purpose of this penalty provision is to ensure prompt payment to the injured party. Allstate Ins Co v Citizens Ins Co of America, 118 Mich App 594, 607; 325 NW2d 505 (1982). Whenever the injured party does not receive timely benefits, a presumption of unreasonable refusal or delay on the part of the insurer arises. Combs v Commercial Carriers, Inc, 117 Mich App 67, 73; 323 NW2d 596 (1982), lv den 417 Mich 923 (1983).

In the case before us, defendant was presented with reasonable proof of Kenneth Owens' medical expenses. Although the actual amounts were never disputed, defendant refused to pay because of its belief it was entitled to a governmental benefit setoff. We do not believe, however, that the possibility of a future governmental benefit setoff is a reasonable basis for denying plaintiffs benefits in the first instance. Plaintiffs' bills should have been promptly paid and defendant could have sought whatever reimbursement it was entitled to at a later date. We therefore affirm the trial court's award of Sec. 3148 attorney fees to plaintiffs.

We reverse, however, the Sec. 3148 attorney fees awarded to Herrick. We do so because we do not believe that Herrick, as an intervening health care provider, is a "claimant" as contemplated by the Legislature in enacting the penalty provision of the no-fault insurance act.

In Darnell v Auto-Owners Ins Co, 142 Mich App 1; 369 NW2d 243 (1985), this Court held that an assigned claims facility was not a claimant in an action for personal or property protection insurance benefits which were overdue. Id., p 14. In reaching this conclusion, the Court stated that it was clear that the purpose of the penalty provision of the no-fault act was to ensure that the injured party was promptly paid. Id.

In the case before us, we cannot conclude that Herrick Hospital is "an injured party" for whom the Legislature was attempting to assure prompt payment of benefits. Plaintiffs are the "injured party" and, thus, the sole claimant for no-fault benefits in this action. It was clearly erroneous for the trial court to award Herrick Sec. 3148 attorney fees and no-fault penalty interest.

We also reverse the award of attorney fees pursuant to MCR 2.114(E) for defendant's alleged violation of MCR 2.119(F)(3). We find that the arguments raised by defendant in its motion for rehearing, most notably that the trial court did not address whether plaintiffs were required to make a good-faith attempt to seek medical care within the VA system prior to obtaining private care, was a proper basis for seeking a motion for rehearing.

Affirmed in part; reversed in part and remanded in part.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Kathleen Jansen