STATE OF MICHIGAN

COURT OF APPEALS

FRANK GEORGE MCKELVIE,

Plaintiff/Counter-Defendant-Appellee, Cross-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION, a Michigan reciprocal inter-insurance exchange,

Defendant/Counter-Plaintiff-Appellant, Cross-Appellee,

and

MEDICAL MANAGEMENT SERVICES, INC.,

Defendant/Counter-Plaintiff.

January 19, 1994
9:15 a.m.
FOR PUBLICATION

No. 136378
LC No. 86-1106-CK

Before: Brennan, P.J., and Reilly and Danhof,* JJ.

PER CURIAM.

Defendant Auto Club Insurance Association (ACIA), appeals as of right from a circuit court judgment awarding plaintiff Frank McKelvie attorney fees under §3148 of the no-fault act, MCL 500.3101 et seq.; MSA 24.13101 et seq. McKelvie cross-appeals from the trial court's ruling in a prior opinion and order that McKelvie was entitled to judgment interest under MCL 600.6013; MSA 27A.6013, from the date the delay in payment began, rather than the date the original complaint was filed, for ACIA's subsequent refusal to completely reimburse nursing and home care costs. We affirm.

McKelvie sustained injuries in a January 5, 1985 accident, which resulted in quadriplegia. He was hospitalized for approximately six months, and also required rehabilitation services, which he obtained from Professional Rehabilitation Associates (PRA). He also required twenty-four-hour-a-day home care services. Although ACIA paid for McKelvie's various medical, nursing and home care costs, it did not pay for PRA's services, nor did it provide the specially equipped van recommended by PRA and requested by McKelvie. On March 28, 1986, McKelvie filed a complaint against ACIA for these failures to pay. On February 2, 1987, McKelvie amended his complaint to include a tort claim, which was later dismissed. Various counterclaims and motions not in issue here also followed.

On August 25, 1988, ACIA reduced its reimbursement for McKelvie's nursing and home care to payment for eight hours of care per day. In response, McKelvie amended his complaint again on September 19, 1988 to include ACIA's refusal to pay for twenty-four-hour care, as well as its failure to pay expenses incidental to so-called REGYS treatment which McKelvie obtained in Florida during 1987, and the cost of a REGYS home therapy (ERGYS) unit. Prior to trial, ACIA agreed to pay for the ERGYS unit. The jury found ACIA liable for rehabilitation costs, nursing and home care expenses, and for certain of the expenses incidental to the REGYS treatment.

Pursuant to MCL 600.6013; MSA 27A.6013, the trial judge awarded interest on the unpaid nursing and home care expenses. However, rejecting McKelvie's argument that the interest should be calculated as of

* Retired Court of Appeals judge, sitting on the Court of Appeals by assignment

the date of McKelvie's original complaint, the judge instead ordered that it be calculated from the date of delay, August 25, 1988. Pursuant to MCL 500.3148(1); MSA 24.13148(1), and upon McKelvie's motion, the judge also awarded attorney fees based on ACIA's unreasonable failure to pay PRA expenses, the incidental expenses of REGYS treatment, and nursing and home care after August 1988. From these two decisions, the parties appeal.

I

We find first that the trial court did not clearly err in awarding McKelvie attorney fees pursuant to §3148 of the no-fault act. That section provides:

> 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 purpose of this penalty provision is to ensure prompt payment to the insured. Allstate Ins Co v Citizens Ins Co, 118 Mich App 594, 607; 325 NW2d 505 (1982). A refusal or delay in payment by an insurer will not be found unreasonable under this statute where it is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty. United Southern Assurance Co v Aetna Life & Casualty Ins Co, 189 Mich App 485, 492; 474 NW2d 131 (1991). However, where there is such a delay or refusal, a rebuttal presumption arises of unreasonableness such that the insurer has the burden to justify the refusal or delay. Bloesma v Auto Club Ins Ass'n, 174 Mich App 692, 696-697; 436 NW2d 442 (1989). The trial court's finding of unreasonable refusal or delay will not be reversed unless it is clearly erroneous. United Southern Assurance Co, supra.

MCL 500.3107(a); MSA 24.13107(a) defines allowable expenses as "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation." The requirements are that (1) the charge be reasonable, (2) the expense be reasonably necessary, and (3) the expense be incurred. Davis v Citizens Ins Co, 195 Mich App 323, 326; 489 NW2d 214 (1992).

With regard to ACIA's refusal to pay PRA, there was evidence at the trial that PRA performed services for McKelvie that were related to doctor-ordered prescriptions, yet ACIA made no payment at all. From that evidence, as well as ACIA's arguments during proceedings that PRA did nothing which Frank McKelvie or his wife could not do, that PRA's charges of approximately $50 per hour were unreasonable, and that since McKelvie had not been billed for those charges, they had not been incurred, the trial court could reasonably have concluded that ACIA made a policy decision to disallow any payment to PRA, without any evaluation of the reasonable necessity of any of the services. The court found that this blanket denial of all payment to PRA was unreasonable.

The fact that an insurer may be liable for some expenses (i.e., those reasonably incurred) does not necessarily establish its liability for all of the expenses. Nasser v Auto Club Ins Ass'n, 435 Mich 33, 51; 457 NW2d 637 (1990). However, the fact that PRA provided some services which ACIA may have had a bona fide reason for disputing does not justify making no payment. See Cole v DAIIE, 137 Mich App 603, 613; 357 NW2d 898 (1984) (the fact that a portion of the amount due is in dispute does not justify withholding the entire amount due).

With regard to ACIA's reduction of nursing/home care reimbursement to eight hours a day as of August 25, 1988, the record evidence of the last expert opinion on which ACIA relied for its diminution was in 1987 and, as the trial court found, provides no basis for reducing coverage for daily care from twenty-four to eight hours. To the contrary, the evaluation indicated that at that time McKelvie apparently required someone in attendance throughout both day and night. ACIA asserts that the trial court found that ACIA simply stopped paying for home care, and thus made a factual error. However, the trial court's opinion clearly

recognized that ACIA had made a decision to pay for eight hours of nursing care per day. We thus find no clear error in the trial court's decision that ACIA's refusal to continue payment for twenty-four-hour care was unreasonable.

With regard to the expenses incidental to the Florida REGYS program, the evidence offered at trial tended to support ACIA's view that there was bona fide factual uncertainty. However, despite its original hesitance to pay for what it viewed as experimental treatment, ACIA did ultimately pay the costs of the program itself, refusing only McKelvie's claims for incidental expenses. ACIA's witness later claimed that she paid the REGYS program expense in error.

However, the trial court, sitting as a fact finder in determining the reasonableness of ACIA's refusal to pay, was entitled to decide such issues as credibility. MCR 2.613(C). While it did not state that ACIA's witness' testimony was incredible, it gave weight to the inconsistency in ACIA's action in finding that ACIA's refusal to pay was unreasonable. We find that the question was a close one, but that the trial court did not clearly err in finding ACIA's refusal to pay unreasonable. We note that, contrary to ACIA's argument on appeal, there is nothing in the trial court's decision to show that it applied any principle of estoppel to bar ACIA's claim.

II

We address McKelvie's cross-appeal in this case because, despite the filing of a nonconforming brief, the issue raised is one of law and the record is factually sufficient. Verbison v ACIA, 201 Mich App 635, 641; ___ NW2d ___ (1993).

Pursuant to MCL 600.6013; MSA 27A.6013, interest on a money judgment in a civil action is to be awarded "from the date of filing the complaint to the date of satisfaction of the judgment." However, while one panel of this Court has held that the statute should be applied according to its straightforward terms because its purpose is to compensate not only for delay in receiving money but for the expense and inconvenience involved in litigation, Om-El Export Co, Inc v Newcor, Inc 154 Mich App 471, 481-482; 398 NW2d 440 (1986), others panels have held that the purpose of prejudgment interest is to compensate the prevailing party for actual delays in recovering money damages, and have granted interest commencing as of the date of delay. Farmers Ins Group v Lynch, 186 Mich App 537, 538; 465 NW2d 21 (1990); Central Michigan Univ Faculty Ass'n v Stengren, 142 Mich App 455, 461; 370 NW2d 383 (1985); Foremost Life Ins Co v Waters (On Remand), 125 Mich App 799, 803; 337 NW2d 29 (1983). ACIA argues the latter view.

We note first that although Farmers Ins Group, supra, was published after November 1, 1990, it is not binding precedent under Administrative Order No. 1990-6, 436 Mich lxxxiv, because it was released as an unpublished opinion before November 1, 1990, and only subsequently approved for publication. People v Cooke, 194 Mich App 534, 537; 487 NW2d 497 (1992).

We note secondly that the Supreme Court's decision in Old Orchard By The Bay Associates v Hamilton Mutual Ins Co, 434 Mich 244; 454 NW2d 73 (1990) supports the holding of Om-El Export, supra:

> The rationale for awarding statutory interest under MCL 600.6013; MSA 27A.6013 is primarily a compensatory one. The Revised Judicature Act interest statute serves the purpose of compensating the prevailing party for loss of the use of the funds awarded as a money judgment, as well as offsetting the costs of bringing a court action.
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> The second purpose of awarding judgment interest is to provide an incentive for prompt settlement. The award of statutory prejudgment interest under MCL 600.6013; MSA 27A.6013 in suits to collect on an insurance contract is a useful illustration; in this context, prejudgment interest serves a distinct deterrent function by encouraging settlement at an earlier time and discouraging a defendant from delaying litigation solely to make payment at a later time. [Id. at 252-253.]

Were it clear that in this case, the interest in issue related to a claim stated in McKelvie's original complaint, we would find the trial court's decision to award interest as of August 25, 1988, the date ACIA refused to fully reimburse for home care and nursing costs, erroneous under Old Orchard, supra.

However, while McKelvie initiated his claims for reimbursement against ACIA on March 28, 1986, the instant claim did not arise until August 25, 1988, and was not added to McKelvie's formal complaint until September 19, 1989. We accept that §6013 is a remedial statute which is to be construed liberally in favor of a plaintiff. Denham v Bedford, 407 Mich 517, 528; 287 NW2d 168 (1980). However, we do not believe that a plaintiff is entitled to collect interest on a claim which did not arise until well over two years after the initial complaint was pled. Such an award exceeds the purpose of compensating for a delayed payment, overcompensates for the related litigation, and departs from the purpose of providing an incentive for prompt settlement by both imposing a penalty upon defendant and conferring a favor upon plaintiff. Such a result was not permitted at common law, and we are not persuaded that the Legislature intended such a result under §6013. See Rittenhouse v Erhart, 424 Mich 166, 218; 380 NW2d 440 (1985); Gordon Sel-Way v Spence Bros, 438 Mich 488, 499; 475 NW2d 704 (1991); Banish v Hamtramck, 9 Mich App 381, 398-400; 157 NW2d 445 (1968).

Under the facts of this case, we do not believe that the trial court erred as a matter of law in awarding interest as of the date of delay.

The trial court's decisions on both issues are thus affirmed.

/s/ Thomas J. Brennan
/s/ Maureen P. Reilly
/s/ Robert J. Danhof