STATE OF MICHIGAN

COURT OF APPEALS

RICHARD BRIMER,

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

May 10, 1994

No. 132584
LC No. 88-9433-NI

UNPUBLISHED

Before: Doctoroff, C.J., Michael J. Kelly and D.G. Tyner,* JJ.

PER CURIAM.

Defendant appeals as of right an order of the circuit court entering judgment in favor of plaintiff in the amount of $263,258.78. We affirm.

I

In April, 1987, plaintiff suffered severe injuries in a motorcycle accident. Since 1971, plaintiff had been employed by Ford Motor Company, and since 1975, had been receiving workers' compensation benefits due to his disability from back pain. In October, 1987, Ford offered plaintiff a job lifting light boxes, which was within his medical restrictions. However, according to Ford's staff doctor, plaintiff could no longer work at all due to the recent motorcycle accident. Ford then placed plaintiff on disability retirement and, in December 1987, terminated his workers' compensation benefits.

In November, 1987, plaintiff filed a claim with defendant seeking personal injury protection (PIP) no-fault benefits for medical expenses, work loss and replacement services. On December 9, 1987, plaintiff sent defendant a three-page discharge summary and bill for the medical expenses he had incurred up to that date as a result of the motorcycle accident. On January 20, 1988, plaintiff also provided information about his wage loss.

Defendant refused to pay the medical expenses within the thirty-day statutory period, citing insufficient documentation. In January, 1988, defendant hired an auditor to review plaintiff's claims. On April 7, 1988, defendant paid $97,000 of plaintiff's medical bills. Upon completion of the audit on July 28, 1988, defendant paid the remainder of the medical expense claims minus $7,131.20, which the auditor deemed unsupported.

Defendant refused to pay any work-loss claims due to discrepancies in documentation regarding plaintiff's ability to work.

II

Defendant first argues that the trial court's instructions improperly shifted the burden of proof on liability for allowable expenses under the no-fault act to defendant. We disagree.

The challenged instructions read as follows:

> I want to talk to you about overdue payments. I instruct you that regarding your consideration of overdue payment, that an insurance company's good faith in withholding

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

payments is not a defense to their liability under the penalty provisions. Further, that if the Defendant fails to pay benefits which arise under the Michigan No-Fault Act within 30 days of receiving reasonable proof of injury and the amount of loss, their failure to pay gives rise to a rebuttable presumption of the unreasonable refusal or undue delay. You are instructed that where benefits are not paid within the statutory period, a rebuttable presumption of unreasonable refusal or undue delay arises such that the insurer has the burden to justify the refusal or delay.

You must determine whether reasonable proof of the fact and reasonable proof of the amount were provided to the insurance company. In this regard, the Plaintiff must show the following: That the insurance company was aware. That the Plaintiff sustained an injury as a result of the operation, use or maintenance of an automobile or the motorcycle accident, in this case.

Second, that bills or other proof of the amount of medical expenses connected therewith, and/or proof of the amount of lost wage, were in the possession of the insurance company or known to them, and that the insurance company was aware that the Plaintiff was claiming the medical expenses and/or lost wage for reimbursement.

In general, the no-fault act provides that an insurer is liable to pay PIP benefits, regardless of fault, for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. Nasser v Auto Club Ins Ass'n, 435 Mich 33, 48; 457 NW2d 637 (1990); MCL 500.3105(1) and (2); MSA 24.13105(1) and (2). Section 3107(a) of the no-fault act provides that PIP benefits are payable only for "allowable expenses." MCL 500.3107(a); MSA 24.13107(a). "Allowable expenses" refers to "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation." The no-fault act requires three factors to be met before an item qualifies as an "allowable expense": 1) the charge must be reasonable, 2) the expense must be reasonably necessary, and 3) the expense must be incurred. Nasser, supra at 50 (quoting Manley v DAIIE, 425 Mich 140, 169; 388 NW2d 216 (1986)). The absence of reasonableness or necessity is a defense to an insurer's liability. Id. at 49.

While it is true that the burden of proving reasonableness and necessity rests with the claimant under § 3107(a), id. at 49-50, interest has nothing to do with this provision. The instructions challenged by defendant relate to penalty interest for overdue PIP payments and have nothing to do with liability or with Nasser, supra. The no-fault act provides for such interest in § 3142. MCL 500.3142; MSA 24.13142. Such penalties apply whenever an insurer is liable for payments under § 3107(a) and refuses to pay, regardless of whether the insurer acts in good-faith. Davis v Citizens Ins Co, 195 Mich App 323, 328; 489 NW2d 214 (1992).

The trial court's instructions did not misstate plaintiff's duty to prove liability under § 3107(a). Rather, they accurately stated the provisions of § 3142 on penalties for overdue PIP payments that are already established as reasonable and necessary under § 3107(a).

III

Defendant next argues that the trial court reversibly erred by adding sua sponte an instruction on defendant's discovery rights under the no-fault act.

During trial, defendant questioned its claims adjuster at length regarding his failure to process plaintiff's claims within thirty days. The substance of the adjuster's response was that the hospitals and doctors greatly hindered his attempts to verify plaintiff's claims. Because of this testimony, the trial court read MCL 500.3159; MSA 24.13159 as a supplementary instruction. This provision empowers a court to enter an order of discovery in a no-fault insurance case where a dispute exists regarding an insurer's right to discovery of an injured person's earnings, history, condition, and treatment.

The trial court erred in reading this instruction, for there was no dispute as to "discovery." In addition, discovery rights did not apply to defendant's attempts to obtain information prior to the start of litigation.

However, since there were sufficient instructions on the proper burdens of both parties, and since the instruction on discovery did not shift plaintiff's burden regarding liability, as defendant suggests, the error was harmless.

IV

Defendant further argues that the trial court erred in refusing defendant a workers' compensation offset against plaintiff's work-loss benefits. We disagree.

Section 3109(1) of the no-fault act provides:

> Benefits provided or required to be provided under the law of any state or the federal government shall be subtracted from personal protection insurance benefits otherwise payable for the injury. [MCL 500.3109(1); MSA 24.13109(1).]

In Mathis v Interstate Motor Freight System, 408 Mich 164, 183; 289 NW2d 708 (1980), the Supreme Court held that workers' compensation benefits must be set off against no-fault benefits. The phrase "benefits provided or required to be provided" has been interpreted to include all compensation benefits available to an injured party, regardless of whether the party receives the payments. Perez v State Farm Mutual Automobile Ins Co, 418 Mich 634, 646; 344 NW2d 773 (1984).

In this case, there was no evidence that plaintiff had any workers' compensation benefits available to him after October 8, 1987, when Ford placed him on disability retirement. We decline to require plaintiff to contest or appeal Ford's decision in order to avoid an offset of his PIP benefits. We also note that the jury specifically found, with sufficient supporting evidence, that plaintiff had suffered a work loss distinctly attributable to his accident. Such a loss is compensable under defendant's policy, not the Workers' Disability Compensation Act.

V

Defendant contends error in awarding plaintiff prejudgment interest from the filing date of the complaint without regard to benefit payments that did not become due until after the filing date.

MCL 600.6013; MSA 27A.6013 provides in relevant part:

> (1) Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section ....
>
> * * *
>
> (6) ... for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint ....

Generally, interest accrues from the time a plaintiff files a complaint until satisfaction of the judgment. Matich v Modern Research Corp, 430 Mich 1, 7; 420 NW2d 67 (1988); Eley v Turner, 193 Mich App 244, 247; 483 NW2d 421 (1992). However, several decisions of this Court have held that, with regard to payments or debts accruing after the filing of the complaint, prejudgment interest is computed from the date of accrual. Farmers Ins Group v Lynch, 186 Mich App 537, 538-539; 465 NW2d 21 (1990); McDaniel v Macomb Co Bd of Road Comm'rs, 169 Mich App 474, 478-479; 426 NW2d 747 (1988), lv den 432 Mich 888 (1989); Central Mich Univ Faculty Ass'n v Stengren, 142 Mich App 455, 461; 370 NW2d 383 (1985), lv den 425 Mich 854 (1986). Other decisions of this Court have disagreed, applying the prejudgment interest provision strictly to

the entire judgment. Om-El Export Co v Newcor, Inc, 154 Mich App 471; 398 NW2d 440, lv den 426 Mich 878 (1986); Ombrello v Montgomery Ward, 163 Mich App 816, 826; 415 NW2d 658 (1987), lv den 430 Mich 854 (1988).

The most recent decision of this Court, and the only one binding on this panel under Administrative Order No. 1990-6, is McKelvie v Auto Club Ins Ass'n, ___ Mich App ___ (Docket No. 136378, 1/19/94). There, this Court adopted the reasoning of the latter line of cases. Since we must follow McKelvie, we affirm the order of the circuit court awarding prejudgment interest on the entire amount of the jury verdict.

VI

Defendant's next argument on appeal concerns the award of attorney fees granted to plaintiff under § 3148 of the no-fault act.

MCL 500.3148; MSA 24.13148 provides for an award of attorney fees where an insurer unreasonably refuses to pay a claim or unreasonably delays in making proper payment. A refusal or delay is reasonable if it is the product of a legitimate question of statutory construction, constitutional law, or a bona-fide factual uncertainty. Gobler v Auto-Owners Ins Co, 428 Mich 51, 66; 413 NW2d 92 (1987). However, where there is such a delay or refusal, a rebuttable presumption of unreasonableness arises. McKelvie, supra at ___. A trial court's finding on the reasonableness of the delay or refusal will not be reversed unless it is clearly erroneous. Id.

Defendant asserts several bona-fide factual disputes, for example, whether plaintiff was disabled and whether this disability arose out of his motorcycle accident or a preexisting condition. The need to resolve these issues allegedly caused defendant to delay payment while it conducted a reasonable inquiry into plaintiff's claims.

The evidence at trial suggested, among other possibilities, that plaintiff suffered a disabling back injury both before and after the accident. The trial court properly found that this was not sufficient reason for defendant's refusal to pay work loss benefits. There was no medical testimony to suggest that plaintiff could not have returned to some form of work at Ford before the motorcycle accident despite the preexisting back injury. In fact, Ford did not place plaintiff on disability retirement until after the accident.

With regard to plaintiff's medical bills, defendant's insurance adjuster stated that the payments were overdue because of obstacles in completing an audit of plaintiff's claims with itemized hospital records. Yet, the auditor admitted that she could have completed the audit based solely on the three-page hospital bill submitted with plaintiff's claims.

Based on this evidence, the trial court did not clearly err in finding defendant's delay and refusal unreasonable.

VII

Defendant's final argument is that the trial court erred in awarding double attorney fees under both the mediation rules and the no-fault act. We disagree.

Double recovery of attorney fees is possible under two provisions of law where each provision serves independent purposes. Howard v Canteen Corp, 192 Mich App 427, 440-441; 481 NW2d 718 (1991). In this case, the trial court awarded attorney fees under the mediation sanction provision in MCR 2.403 and under the sanction provision of the no-fault act, MCL 500.3148; MSA 24.13148. The purpose of MCR 2.403 is to "impose the burden of litigation costs upon the party who insists upon trial by rejecting a mediation award." Keiser v Allstate Ins Co, 195 Mich App 369, 372; 491 NW2d 581 (1992), lv den 442 Mich 887 (1993). On the other hand, the purpose of sanctions under § 3148 of the no-fault act is to encourage no-fault insurers to pay PIP benefits in a timely manner where an injured party has presented reasonable proof of a claim. Darnell v Auto-Owners Ins Co, 142 Mich App 1; 369 NW2d 243 (1985). Since the mediation and no-fault sanction

provisions serve independent policies and purposes, recovery of fees under both provisions is appropriate. Kondratek v Auto Club Ins Ass'n, 163 Mich App 634, 639; 414 NW2d 903 (1987). Accordingly, the trial court did not err in awarding double attorney fees.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael J. Kelly
/s/ Deborah G. Tyner