STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

CAROLYN BALLARD,

Plaintiff,

Case No. 95-3400-NI

vs

OPINION

STATE FARM
INSURANCE CO.,

Defendant.
_____/

This first-party no-fault case was recently tried to the bench. Defendant's answer had demanded a jury trial (plaintiff's complaint had not), but, on the day set for trial, the parties agreed on the record to a non-jury trial. Two witnesses testified, and several documents, primarily, plaintiff's medical records, were submitted. Based on that evidence, this Court finds that plaintiff is entitled to the insurance benefits she seeks, to actual attorney fees, and to penalty interest. Depending upon the outcome of mediation, she may also be entitled to mediation sanctions; the case having been tried to the bench, this Court is unaware of the mediation evaluation and the parties' responses to it.

Findings of Fact

This Court finds the facts to be the following:

1. On August 9, 1994, the vehicle which plaintiff was driving was rear-ended at an intersection in Monroe County, Michigan. The car was owned by a friend of hers and was insured by defendant. Although both plaintiff and the car's owner were residents of Ohio, plaintiff is, there is no dispute, entitled to Michigan no-fault benefits for any losses compensable under our no-fault automobile insurance law.

2. Complaining of neck and lower back pain, plaintiff was taken by ambulance to Mercy Memorial Hospital in Monroe, Michigan. After treatment in that facility's emergency room, she was released with the following diagnosis: "(1) acute cervical strain; (2) acute

lumbar strain; (3) hypertension; [and] (4) insulin history of diabetes." It is conceded -- perhaps, it is more precise to say that it is undisputed -- that the strains were caused by the collision. Whichever, it would be utterly unprincipled of this Court -- because there was presented no evidence to the contrary -- to find that plaintiff was not so injured as a direct consequence of the collision.

3. The initial medical expenses resulting from the accident were quite modest. The ambulance ride cost $300.00. She was billed $78.00 for the x-rays at the hospital and $97.00 by the emergency room physicians. Presumably, those minor charges reflect what was not covered by some other insurance; emergency room physicians and x-rays cost much more. Medications and a deep heat massager prescribed by the emergency room physicians cost $31.02. Follow-up treatment was more expensive. Plaintiff was billed $3,590.00 by her own physician for physical therapy and for other treatments to her neck, back and shoulders. Finally, plaintiff paid $620.00 to her granddaughter for assistance with housekeeping, errands, personal hygiene, etc., necessitated by her injuries.

4. Plaintiff promptly contacted defendant, but the specifics of that contact are unknown. A file was opened by defendant's Toledo office on or about August 30, 1994, but the representative of defendant who testified at trial was not aware of its contents. Presumably, a claim form was not submitted because that was done by plaintiff's counsel on June 30, 1995. Had a completed claim form been submitted to the Toledo office in 1994, one would, in all likelihood, not have been submitted in June, 1995. What is clear is that defendant did nothing on the file until plaintiff retained a lawyer and that lawyer submitted a claim on plaintiff's behalf.

5. As just noted, plaintiff's counsel did submit on June 30, 1995, a completed application for benefits. In response, defendant asked for plaintiff's medical records and for the identity of any health care providers who had treated her before the accident. Defendant wanted to determine whether any of plaintiff's difficulties pre-dated the accident. All of the requested information was submitted to defendant on or about October 12, 1995. Once that information had been provided, defendant engaged in no further investigation whatsoever, nor did it take any action to pay plaintiff's claim or to deny it.

6. Defendant's representative admitted at trial that all the information needed to process plaintiff's claim had been received on or about October 12, 1995. Nothing was paid, however, for quite some time thereafter. The x-ray charges and the emergency physicians' bill had been paid in December, 1994. The other bills languished, however. In early June of this year (1997), defendant's counsel negotiated directly with plaintiff's physician; that doctor agreed to accept $3,000.00 in full payment of his charges. Defendant's representative

acknowledged at trial that the bills for the ambulance ride, the massager, and the medications ought be paid. The only reason given for not paying the doctor's bill sooner and for not paying at all the ambulance bill, the prescriptions and the massager was the fact that the case "was in litigation." To protect plaintiff in light of the one-year limitation on suing for first-party benefits, her counsel had filed this case on July 31, 1995.

7. The only portion of plaintiff's claim contested at trial was the $620.00 paid to her granddaughter. The granddaughter testified to having performed various services for plaintiff and to having actually been paid by for them at the rate of $5.00 per hour. Defendant offered no evidence to the contrary. All it did was insinuate by a handful of questions on cross-examination that the granddaughter was lying, or that the assistance was provided only because it might be reimbursed, or that, being family, the granddaughter should have provided the services free of charge. Defendant also argued that nothing in the medical records said specifically that plaintiff was injured to the point of needing any assistance, but no evidence was presented that assistance was not needed. The Court finds the granddaughter's testimony credible and persuasive.

Conclusions of Law

When analyzed in light of the applicable provisions of the Michigan No-Fault Automobile Insurance Act, the above-stated findings of fact lead to the following conclusions of law:

1. All of the medical expenses for which plaintiff claims reimbursement from defendant are reimbursable as first-party benefits. Defendant's payment of most of those expenses and the testimony by its representative that the few unpaid expenses should be paid constitute admissions that those expenses are properly reimbursable. The testimony at trial was clearly such an admission, as was the payment in early June of the vast bulk of plaintiff's treating physician's bills. Cf., *McKelvie v Auto Club Ins Co*, 203 Mich App 331, 336 (1994), *lv app den* 447 Mich 1000 (1994). Negotiations having been directly with plaintiff's treating physician, payment of his outstanding bill was not a compromise settlement of this case, but an acknowledgment of liability. Furthermore, defendant's failure to present at trial any evidence to counter plaintiff's claim for medical expenses precludes this Court from rejecting that claim. It would be unprincipled to reject a claim which appears reasonable on its face in the absence of any counter evidence.

2. Plaintiff is also entitled to reimbursement of the $620.00 she paid to her granddaughter. The cost of services like those provided by her granddaughter are payable personal protection benefits, provided those expenses are themselves reasonable, were

reasonably necessary for the insured's care, and were actually incurred. See *Shanafelt v Allstate Ins Co,* 217 Mich App 625, 637 (1996); and *McKelvie v Auto Club Ins Co*, *supra*, at 335, both applying MCL 500.3107(1)(a); MSA 24.13107(1)(a). As found above, plaintiff did incur such expenses; they were reasonably necessary; and they are reasonable in amount. Defendant's unsupported insinuations to the contrary do not rebut the credible testimony of the provider of the services.

3. Plaintiff's counsel is entitled to be paid by defendant for all work performed by her on this case after November 13, 1995. An attorney who represents a claimant in an action for personal protection insurance benefits is entitled to have his or her fee, so long as it is reasonable, paid by the insurer if it is determined that payment was "unreasonably refused ... or unreasonably delayed ..." MCL 500.3148(1); MSA 24.13148(1). A refusal to make payments or a delay in making them "is not unreasonable where the delay is the product of a legitimate question of statutory construction, case law or a bona fide factual uncertainty." *Butt v DAIIE*, 129 Mich App 211, 220 (1983). The burden is on the insurer to demonstrate that any refusal or delay was justified for one of those reasons, or for some comparable reason. *McKelvie v Auto Club Ins Co, supra.* Plaintiff's counsel is entitled to her fees because defendant cannot make that showing after November 13, 1995. The parties do not dispute any legal issues, and any legitimate factual uncertainty had ended by then.

Because defendant did not have, it appears, all of plaintiff's pertinent medical records until October 12, 1995, there did exist until then a bona fide factual uncertainty about plaintiff's claim. The lack of pertinent information necessarily means that there was some uncertainty about plaintiff's claim and that that uncertainty was bona fide. That uncertainty lasted for some time after receipt of the information, as well. Until defendant had had an opportunity to evaluate the information, there still was a genuine factual uncertainty about the claim. Once, however, defendant had been provided all the information it needed and had had an opportunity to digest and evaluate that information, there no longer existed a bona fide factual uncertainty. That conclusion necessarily follows from the fact that defendant paid or acknowledges it should pay, both without receiving any new information, the vast bulk of plaintiff's claim. *McKelvie v Auto Club Ins Co, supra*; and *Butt v DAIIE, supra*, at 220-221. If the information provided to defendant was sufficient, as it must have been for plaintiff to act on it without anything new in June, 1997, it must also have been sufficient in October, 1995, when received. After a month to review that information, defendant can properly be held to have appreciated that.

Had defendant looked for new information after October, 1995, it would have to be determined whether there existed a genuine factual uncertainty until the search was concluded, whether fruitfully or unfruitfully. That did not happen in this case, however.

Defendant did nothing thereafter to gather additional information. Additional medical records were not sought. Additional medical opinions or tests were not pursued. Plaintiff's medical care providers, even those whose bills were outstanding, were not quizzed about her condition or the reason for the therapy provided to her. Even with regard to the one item contested at trial, namely: plaintiff's claim for payment for services by her granddaughter, defendant made no inquiries. Specifically, neither plaintiff nor her medical care providers were asked about the need for such services, and no inquiry was made of her granddaughter. This Court will assume that defendant had its reasons for not paying the medical expenses until they were belatedly paid and for taking to trial the claim for lost services, but, not having been told those reasons, the Court cannot find them reasonable. *Conway v Continental Ins Co*, 180 Mich App 447, 452 (1989), *lv app den* 434 Mich 863 (1990). Certainly, ignoring a claim which was not being investigated cannot be characterized as reasonable. *Bradley v DAIIE*, 130 Mich App 34, 45 (1983). Hence, a month was adequate time to evaluate plaintiff's claim, making nonpayment beyond that time unreasonable. It seems appropriate borrow the month time frame from MCL 500.3142; MSA 24.13142, which gives insurance companies 30 days after receipt of sufficient supporting information to pay claims or face penalty interest.

That plaintiff's claim "was in litigation" does not constitute an acceptable reason for not paying it. That a claim is the subject of a lawsuit says nothing, one way or the other, about the merits of that claim. That a lawsuit was filed to recover benefits establishes nothing more than that benefits had not been paid. The existence of litigation says absolutely nothing about the reasonableness of the claim or the reasonableness of not paying it. Furthermore, it is inappropriate as a matter of policy to permit the mere pendency of litigation to establish reasonableness. A principal point of the no-fault statutory scheme is to minimize the need for litigation to collect so-called "first party benefits." *DiFranco v Pickard*, 427 Mich 32, 41 (1986). Hence, the pendency of litigation cannot be permitted to allow an insurer to stop processing a first-party claim and to delay paying it once verified. Permitting that would encourage insurance companies to encourage litigation over first-party benefits.

Finally, that defendant negotiated an acceptable payment directly, i.e., without even notice to her counsel, with plaintiff's treating physician does not obviate its obligation to pay plaintiff's counsel. It is readily apparent that the pendency of this case and the prospect of imminent trial prompted that payment. In fact, defendant's counsel acknowledged at trial that payment was made on the eve of, and to avoid attending, the deposition in Toledo of plaintiff's physician. Since taking a deposition in Toledo does not cost anywhere near the $3,000.00 it was agreed that the physician would be paid, it cannot be said that payment was not an acknowledgment that the money was owed. The scheduled deposition was merely the

occasion for finally making payment; defendant did not want to incur some pointless expenses. In other words, this case is what prompted payment, entitling plaintiff's counsel to payment. *Behr v Baker*, 255 Mich 607 (1931).

That defendant's counsel did not negotiate the payment with plaintiff's counsel does not change the fact that this case, which was being pursued by plaintiff's counsel, prompted the payment. Hence, the purpose of awarding attorney fees is fully implicated in this case. In fact, to not award fees to plaintiff's counsel because of the way the doctor's bill was paid, would undermine the policy behind the statutory provision for attorney fees when payment is unreasonably refused or delayed. The purpose of that provision "is to insure prompt payment to the insured" by imposing a penalty on insurers when payment is unreasonably delayed. *McKelvie v Auto Club Ins Co, supra.* If insurance companies can, as did defendant in this case, withhold payment for many months, and, then, on the eve of a deposition or trial, decide to pay what is owed, but do so directly and, by doing so, avoid the penalty of attorney fees, a device will have been created to delay payment without any penalty. Insurance companies will be encouraged to withhold payment, wait for litigation, and then deal directly with the care providers on the eve of trial, using the money until the very end. Almost surely, if payment can be delayed without a penalty, it will be delayed, directly contravening the objective of the no-fault scheme of insurance, which is to provide prompt payment and to avoid litigation by doing so.

Not assessing attorney's fees in cases like this one will likely undermine the objective of no-fault insurance in other significant ways. If insurance companies can pay directly after a lawsuit has been filed and not be assessed attorney's fees, even though the delay in payment was not reasonable, deserving claimants may not pursue their claims, which will encourage insurance companies to withhold payment in the hope that they will never be sued for it. If lawyers are not paid by the insurance companies, as the statute authorizes, the claimants will have to pay; lawyers cannot properly be expected to work for free. The much-reduced net recovery will discourage claimants from pursuing modest claims, which is the size of many first-party claims. Although the beneficiary of the litigation, the providers need not pay the attorney's fees, *Boyce v Grand Rapids Paving Co*, 117 Mich App 546 (1982), *lv app den* 417 Mich 1023 (1983), leaving that burden on the insured. If that happens, a primary incentive for a no-fault insurance system, namely: prompt payment, will dissipate, thereby undermining public acceptance of no-fault insurance. Health care providers may also become reluctant to provide treatment. If an injured patient elects not to pursue a claim, because it is not economically feasible, the provider may be able to pursue one directly, but its return will be reduced by the costs of recovery. If health care providers come to anticipate routinely receiving less than they bill, one of two things will happen: they will inflate their bills, or they will insist on payment from the patient, leaving the patient to seek

reimbursement, something which may impose a significant hardship on the patient. And, of course, if payment is not available, treatment may not be provided. The end result will be the undermining of the no-fault insurance scheme.

4. It necessarily follows that plaintiff is also entitled to the assessment against defendant of the "penalty interest" authorized by MCL 500.3142; MSA 24.13142. That particular section of the No-Fault Act imposes interest at the rate of 12% on any claim for personal protection benefits "not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." Unlike the assessment of attorney fees, an insurer's reasonableness and/or good faith is not relevant to the assessment of penalty interest. Once adjudicated liable for no-fault benefits which it did not pay after receiving reasonable proof of loss, an insurer appears to be open to the assessment of penalty interest. *Conway v Continental Ins Co, supra*, at 453. But, even if penalty interest is assessable only for unreasonable refusals to pay or delays in payment, cf., *Beach v State Farm Ins Co*, 216 Mich App 612, 629 (1996), *lv app den* 454 Mich 920 (1997), such interest is properly assessable in this case because defendant herein did, this Court is convinced, unreasonably delay in making some payments and unreasonably refused to make others. As noted earlier, defendant has offered no acceptable justification for its non-payment. Defendant does not contend that plaintiff did not submit a reasonable proof of her claim, and it proffers no justification for not paying that claim. That makes unreasonable the non-payment to plaintiff's granddaughter and the delay in payment of medical expenses, entitling plaintiff's counsel to her attorney's fees and entitling plaintiff to penalty interest. *Conway v Continental Ins Co, supra*.

5. Plaintiff may also be entitled to mediation sanctions, or defendant may be entitled to them, depending upon the mediation evaluation and the parties' responses to it. When assessing whether plaintiff improved her position sufficiently, if she needed to do that to avoid sanctions, the full amount of her claim, including the doctor fees paid directly, is to be considered the "verdict." Those fees were paid because of this case, so that not including them would enable the insurance company to defeat one of the objectives of mediation. Cf., *Wayne-Oakland Bank v Brown Valley Farms, Inc*, 170 Mich App 16, 20-21 (1988); and *Dresselhouse v Chrysler Corp*, 177 Mich App 470 (1989), *lv app den* 434 Mich 879 (1990). Likewise, and for the same reason, the fees awarded to her counsel are also to be considered part of the judgment; they are part of plaintiff's recovery. If plaintiff is entitled to mediation sanctions, that they will duplicate, in part, this Court's award to her counsel of attorney's fees does not alter that entitlement. *Howard v Canteen Corp*, 192 Mich App 427, 440-441 (1992). This Court does not know, however, whether mediation sanctions are assessable and against whom because it does not know the results of mediation. Because this case was tried to the bench, it was not entitled to know. MCR 2.403(N)(2). Having decided the case, the

Court could probably now *sua sponte* educate itself, *Id.*, but it will not do so for fear that someone would not believe that it was ignorant of the mediation results until it had decided the matter.

6. Finally, plaintiff is also entitled to statutory interest, as well as to penalty interest. *Shanafelt v Allstate Ins Co, supra*, at 664. The penalty interest is assessable from 30 days after adequate proof of loss is received by the insurer, MCL 500.3142(2); MSA 24.13142(2), which, in this case, is 30 days after October 12, 1995. The statutory interest is also to begin that day. *McKelvie v Auto Club Ins Co, supra*, at 338-340. Frankly, this Court questions the correctness of the holding in *McKelvie* regarding the commencement of statutory interest. The holding makes good sense in the abstract, but runs contrary to the plain terms of the statute which says that interest is to be awarded "from the date of filing the complaint ..." MCL 600.6013(4); MSA 27A.6013(4). See *Goins v Ford Motor Co*, 131 Mich App 185, 201-203 (1983), *lv app den* 422 Mich 857 (1985). It is not for the courts to read exceptions into a statute which the Legislature has not put there, even salutary exceptions. *Lawrence v Dept of Corrections*, 88 Mich App 167, 172 (1979), *lv app den* 407 Mich 909 (1979). This Court's doubts are of no moment, however. It has to obey decisions by the Court of Appeals, even decisions which it believes are wrong. *People v Mitchell*, 48 Mich App 361, 363 (1973), *lv app den* 391 Mich 752 (1973).

For the reasons stated in Paragraph 5, above, all interest (penalty and statutory) is to be calculated on the total amount of plaintiff's claim, not just what remains to be paid. Insurers cannot evade those penalties by gamesmanship. Only statutory interest, however, is to be assessed against the attorney fees being awarded pursuant to MCL 500.3148(1); MSA 24.1314(1). They are part of plaintiff's recovery, bringing them within MCLA 600.6013(4); MSA 27A.6013(4), but those fees are not part of the "claim" on which penalty interest can be assessed. Interpreted in the context of the statute, that "claim" is for the first-party benefits not timely paid. Attorney fees are not such a benefit. No interest is to be assessed on the mediation sanctions. *Giannetti Bros Constr Co v Pontiac*, 175 Mich App 442, 450 (1989), *lv app den* 428 Mich 914 (1987).

Conclusion

Ms. Goller, plaintiff's counsel, is asked to submit a proposed judgment. Hopefully, defendant's counsel will be able to approve the form of same. MCR 2.602(B)(2). If he does not, the proposed judgment is to be noticed for settlement. MCR 2.602(B)(4). In addition to ordering defendant to pay what medical and loss of service expenses have not thus far been paid, the judgment is to award plaintiff's counsel her actual fees from and after November 13, 1995, as well as both penalty and statutory interest from and after that same

date. Accompanying the proposed judgment is to be an affidavit from counsel identifying with specificity what those fees are. The proposed judgment is to make provision, if appropriate, for mediation sanctions. Whoever is entitled to sanctions is to submit an affidavit from counsel detailing with specificity the appropriate fees and costs.

Dated: 7-24-97

DENNIS C. KOLENDA

Dennis C. Kolenda, Circuit Judge

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JUL 30 1997

July 29, 1997

Mr. George T. Sinas
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520 Seymour Avenue
Lansing, MI 48937

Re: Ballard vs State Farm Insurance Company

Dear George:

I'm enclosing a copy of a recent decision in Ballard v State Farm Insurance Company. I thought you would find it heartening to know that our Chief Judge over here in Kent County is willing to try a case for less than $1,000 in Circuit Court to further the underlying objectives of the No Fault Statute.

Sincerely,

Diane E. Goller

DEG/cem
Enclosure