STATE OF MICHIGAN

COURT OF APPEALS

RICK PETERSEN,

Plaintiff-Appellee,

v

MAGNA CORPORATION and MIDWEST EMPLOYERS CASUALTY COMPANY,

Defendants-Appellants,

and

BCN TRANSPORTATION SERVICES INC.; KOLEASECO INC. and CITIZENS INS. CO. OF AMERICA; KOLEASECO INC. and ACCIDENT FUND OF AMERICA; BCN TRANSPORTATION SERVICES and TIG INS. CO.; MAGNA CORPORATION and TIG INS. CO.; and SERTA RESTOKRAFT MATTRESS CO. INC. and HARLEYSVILLE LAKE STATES INS. CO.,

Defendants-Appellees.

UNPUBLISHED
April 17, 2008

Nos. 273293, 273294
WCAC
LC Nos. 03-000260, 03-000036

Before: Whitbeck, C.J., and White and Zahra, JJ.

ZAHRA, J. (*concurring in part and dissenting in part*).

I concur in the conclusions reached by the majority as it relates to the issues of insurance coverage and division of liability for payment of the worker's compensation benefits awarded to plaintiff. I respectfully dissent from the majority's conclusion regarding the imposition of attorney's fees against Magna (the employer) and Midwest the employer's worker's compensation insurer). A worker's compensation magistrate is vested with discretion to insure that an attorney retained by an employee is paid a fee for collecting from an insurer unpaid medical expenses. However, contrary to the opinion of the majority, I conclude the language of MCL 418.315(1) only permits a worker's compensation magistrate to prorate any such fee between the medical care provider and the employee who received the medical treatment. I would reverse the imposition of attorney fees against Magna and Midwest and remand for consideration of whether attorney fees should be prorated between plaintiff and his health care providers.

Michigan has long followed the rule that parties in litigation are responsible to pay their own attorney's fees. *Gilroy v General Motors Corp*, 438 Mich 330, 340 ___ NW2d__ (1991). Notwithstanding this rule, the Michigan Legislature has found it appropriate in limited instances to impose attorney's fees on parties deemed to be the cause of the litigation or parties who lose in litigation. For example, in the Michigan Consumer Protection Act, MCL 257.1407(2), the Legislature provides for an award of attorney's fees to a prevailing plaintiff, stating "[a] consumer who prevails in any action brought under this act may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorneys' fees . . . ." Similar provisions exist in other statutory provisions, including the Michigan Whistle Blower Protection Act, MCL 15.363(3), the Michigan Civil Rights Act, MCL37.2801, the Michigan Freedom of Information Act, MCL 15.240(6), the Michigan Condemnation Procedures Act, MCL 213.51 and Michigan's Persons with Disabilities Act, MCL 37.1606(3).

The Michigan Legislature has also addressed the propriety of assessing attorney fees against an insurer who fails to pay benefits due under a policy of insurance issued under Michigan's No-Fault Act:

> 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 [sic] 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 claims or unreasonably delayed in making proper payment. MCL 3148(1) (emphasis added).

Our Legislature has provided for the award attorney's fees in many diverse areas of the law. In doing so, the Legislature has been very consistent in making the award of attorney's fees express and clear. An express statement directing the imposition of attorney's fees against the employer or its worker's compensation insurer is not found in section 315(1) of the Worker's Compensation Act. Compare the above-cited statutory language in the No-Fault Act to the language at issue in this case. MCL 418.315(1) states:

> The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. . . . If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. ***The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.*** [MCL 418.315(1) (emphasis supplied).]

While the Legislature in the No-Fault Act references an attorney fee that shall be charged against the insurer, section 315(1) of the Worker's Compensation Act merely addresses prorating a fee. I presume the omission of an express award of an attorney fee against the employer and its insurer is intentional.

Notwithstanding the fact that the Legislature has demonstrated the ability to expressly award attorney fees when it deems it appropriate to do so and the Michigan Worker's Compensation Act is devoid such an expression as it relates to the fees at issue in this case, the majority reach their desired result by concluding MCL 418.315(1) is ambiguous and open to interpretation. Free from the constraints of the statutory language, the majority sets forth varying policy reasons why the employer and the employer's worker's compensation insurer should in this case pay an employee's attorney fee incurred in the collection of unpaid medical bills.

When read in the proper context, MCL 418.315 is not ambiguous. Rather, it is susceptible to but one reasonable interpretation. Worker's Compensation Appellate Commissioner Richard Leslie properly interpreted MCL 418.315(1) in his concurring opinion in *Stankovic v Kasle Steel Corp,* 2000 Mich ACO 124, which provides in pertinent part:

> I submit that defendant in this case is perfectly correct when it argues that the proration of the fees is between the employee and the provider of services and does not impose an additional obligation on the employer. The last sentence which permits the proration of attorney fees relates to the next to last sentence. That sentence states that reimbursement for medical expenses is to be made to the employee or to the party to whom the unpaid expenses may be owing. In no way does this language, reasonably interpreted, create an obligation on the part of the employer to pay fees over and above the obligation to pay the medical benefit. It clearly provides for a division of the fee based on the interests of those who recover. To the extent that the employee paid for medical expenses he or she owes the fee. To the extent that medical providers are paid directly, they owe the fee.
>
> Although there may be valid reasons for the legislature to impose fees on the employer, I cannot see in the wording of section 315(1) that they did so. . . . I am confirmed in this view by reviewing the history of section 315(1).
>
> Prior to May 15, 1963, the last portion of this section read:
>
> If the employer shall fail, neglect or refuse so to do [pay medical benefits specified earlier in the section] such employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the Commission. . . . .
>
> This language only allowed for payment of the reasonable medical expenses to the employee. Even in situations where the medical bill was, as yet, unpaid, the provider could not be reimbursed directly. . . . In response, in 1963 the legislature amended this section to provide for direct payment to medical providers. The new language read:
>
> If the employer shall fail, neglect or refuse so to do, such employee shall be reimbursed for the reasonable expense paid by him, or payment may be made in behalf of such employee to persons to whom such unpaid expenses may be owing, by an award of the commission. The commission may prorate attorney fees in such cases at the contingent fee rate paid by such employee and it may also prorate such payments in the event of redemptions. . . .

> Thus, when the legislature amended the statute to allow for direct payment to medical providers, it added the provision which [sic] is currently under consideration. The only purpose for such an addition was to make sure that the provider, which could now be reimbursed directly, would pay its proportionate share of the attorney fee.

Commissioner Leslie also noted the historical error if this Court in interpreting section 315(1) of the Worker's Compensation Act:

> The error of interpreting section 315(1) began with the Court of Appeals' decision in *Boyce v Grand Rapids Paving*, 117 Mich App 546 (1982). In that decision the court summarily rejected the claim that the medical provider, a beneficiary of the efforts of plaintiff's attorney in obtaining a recovery, should share in the obligation to pay attorney fees. The court did so without reference to the language of the statute. Compounding its error, the court immediately turned to the employer, and created an obligation under section 315(1). Their strained reading required the employer, under certain circumstances, to pay an attorney fee over and above the amounts for reasonable and necessary medical treatment.
>
> However, the decision in *Boyce* on the employer's liability for attorney fees is obiter dictum because the court did not decide the case on that issue. In denying that a separate fee could be assessed against the employer, *Boyce* looked to then Bureau Rule 14, which governed attorney fees. At the time of Mr. Boyce's injury, this rule did not allow any attorney fee on the recovery of medical expenses. Because unpaid medical was not included in the amounts for which a fee could be charged, section 315(1), whatever its interpretation could not be the basis for requiring the employer to be responsible for any additional fee payment. Thus, the court's understanding of the meaning of the last sentence of this provision is without force of law.
>
> As a result, the court in *Boyce* got the interpretation of the statute exactly backwards. The statute does, in fact, create an obligation on the part of the provider to pay the portion of the attorney fee reflected in the amount of the bill which was recovered on its behalf. . . . Had the court interpreted this section properly, then there never would have been any need to consider the obligation of the employer for payment of a separate fee.
>
> Six years after *Boyce* the court revisited the issue in *Watkins v Chrysler Corp*, 167 Mich App 122 (1988). At that time, Bureau Rule 14 had been modified to allow for an attorney fee on the payment of medical benefits. In reversing the Appeal Board's award of medical expenses, however, the court found that the medical expenses were not unpaid because the plaintiff's medical expenses had been paid by defendant's health and accident insurer. As a result, there was no extended discussion of *Boyce* or the statutory language.
>
> Unfortunately, *Boyce* has also been uncritically followed in cases solely involving provider fees. In *Zeeland Hospital v Vander Wal*, 134 Mich App 815 (1984) and *Duran v Sollitt Construction*, 135 Mich App 610 (1984) the court held that

> medical providers are not liable for an attorney fee in the absence of a specific agreement with the plaintiff's attorney to do so. As in *Boyce*, neither of these cases considered the specific language of section 315(1) or its history. Had they done so, presumably they would have come to the correct conclusion that the legislature has imposed such a fee on those who receive the benefit of recovery.
>
> I concur with the result reached by my colleagues because of the Court of Appeals' and Commission's longstanding and consistent, albeit erroneous, interpretation of section 315(1) on the question of employer attorney fees. I believe that this issue should be reconsidered by the Court of Appeals or Supreme Court to interpret this section of the act commensurate with its plain meaning. Section 315(1) imposes liability for a fee on plaintiff and the medical providers and not the employer.

I join in Commissioner Leslie's request that our Supreme Court address the issue of attorney fees under section 3135(1) of the Worker's Compensation Act.

I would reverse the imposition of attorney fees against Magna and Midwest and remand for consideration of whether attorney fees should be prorated between plaintiff and his health care providers.

/s/ Brian K. Zahra