STATE OF MICHIGAN

COURT OF APPEALS

ARCHIE CLACK,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE CO.,

Defendant-Appellant.

UNPUBLISHED
January 23, 1998

No. 192420
Wayne Circuit Court
LC No. 94-412132 NF

Before: Bandstra, P.J., and Murphy and Young, JJ.

PER CURIAM.

Plaintiff brought this action against defendant, his automobile insurance carrier, for no-fault benefits. Plaintiff prevailed following a jury trial. Defendant appeals as of right challenging the trial court's award of attorney fees pursuant to MCL 500.3148; MSA 24.13148 and the way in which the trial court calculated interest on the judgment pursuant to MCL 600.6013; MSA 27A.6013. We affirm in part, reverse in part, and remand.

Defendant's first issue on appeal is whether the trial court's finding of unreasonable delay in paying benefits was clearly erroneous. A trial court's finding of unreasonable refusal or delay in payment will not be reversed unless it is clearly erroneous. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). "[A] refusal or delay in payments by an insurer will not be found 'unreasonable' within the meaning of § 3148 where the delay is the product of a legitimate question of statutory construction, constitutional law, or even a bona fide factual uncertainty." *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 66; 404 NW2d 199 (1987). "[W]here there is such a delay or refusal, a rebuttable presumption of unreasonableness arises such that the insurer has the burden to justify the refusal or delay." *McKelvie, supra*. Thus, the insurance company must show that their delay in payment was reasonable. One way for an insurance company to demonstrate reasonableness is through independent medical examination (IME) reports. "[T]he test is whether the [insurance] adjuster's reliance on the opinion of that doctor is reasonable under the circumstances." *Thomson v DAIIE*, 133 Mich App 375, 385; 350 NW2d 261 (1984).

MCL 500.3148; MSA 24.13148 of the no-fault act provides:

> (1) 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.

In determining whether attorney fees are warranted under § 3148, "the inquiry is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable." *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996).

Defendant argues that its reliance on its IME reports was reasonable and that those reports created a bona fide question of factual uncertainty. We disagree. In response to reports by plaintiff's treating physicians that plaintiff's jaw, back, neck, and right knee had been injured and that plaintiff was disabled, defendant ordered various IMEs. With regard to plaintiff's jaw injury, Dr. VanAmeyde performed an IME and confirmed plaintiff's treating physician's diagnosis; however, defendant still refused to pay plaintiff's bills associated with the injury. Subsequent IME reports from Dr. Birnholtz and Dr. Osborn appear to have been submitted to defendant after defendant terminated medical expenses on June 4, 1993. Thus, at the time defendant initially refused benefits in June, 1993, both physicians' reports from Dr. VanAmeyde and Dr. Rocklin, plaintiff's treating physician, confirmed plaintiff's jaw injury. Considering the information known to defendant at the time it initially delayed payment, the trial court's determination that it was unreasonable for defendant not to pay plaintiff's dental bills was not clearly erroneous.

With regard to plaintiff's back and neck injuries, Dr. Taylor performed IMEs on plaintiff in March, 1993 and May, 1993. Dr. Taylor initially confirmed plaintiff's treating physician's diagnosis that plaintiff was having problems with his back and neck; however, Dr. Taylor disagreed with the treating physician's method of treatment. Dr. Taylor recommended an exercise program for plaintiff. Although another IME was completed by Dr. Endress, it was not completed until over a year after defendant ceased paying plaintiff's medical benefits.. Thus, at the time defendant initially stopped paying benefits, defendant could not have relied on Dr. Endress' IME report. See *Shanafelt, supra*. We do not conclude that Dr. Taylor's IME report necessarily created a bona fide factual uncertainty regarding plaintiff's neck and back injuries or that the trial court's decision otherwise was clearly erroneous.

Dr. Taylor also submitted an IME report stating that plaintiff was not disabled, that plaintiff was capable of doing everyday household chores, and that his exam of plaintiff's right knee was negative. However, Dr. Taylor never saw the MRI of plaintiff's knee until trial, and he then admitted that the MRI did show that plaintiff had an internal derangement of the right knee. At the time that work loss and replacement services benefits were terminated in June and July, 1993, Dr. Taylor's incomplete report was the only report stating opposition to the treating physicians' opinions that plaintiff was disabled and unable to do heavy household chores.[1]

Furthermore, defendant never attempted to contact the physicians to ascertain the true situation in the face of any conflicting information contained in the physicians' reports. *Liddell v DAIIE*, 102 Mich App 636, 651; 302 NW2d 260 (1981). In the present case, defendant just terminated benefits.

Based on the above information and the clearly erroneous standard of review, which we must apply to the trial court's finding that defendant's delay or refusal to pay benefits was unreasonable, *McKelvie, supra*, we are not left with a definite and firm conviction that a mistake was made, *Ghidotti v Barber (On Remand)*, 222 Mich App 373, 377; 564 NW2d 141 (1997); *Thomson, supra* at 381. The trial court's award of attorney fees was proper.[2]

Next, defendant argues that the trial court improperly awarded interest on the attorney fees and costs contained in the judgment. We disagree. MCL 600.6013(6); MSA 27A.6013(6) specifically states that prejudgment interest "shall be calculated on the entire amount of the money judgment, including attorney fees and other costs." Subsection 6013(6) was amended, effective April 1, 1994, to include this specific language. 1993 PA 78. Defendant's reliance on cases that were released prior to April 1, 1994 is misplaced.

Defendant also argues that the trial court wrongly applied MCL 600.6013(6); MSA 27A.6013(6) in calculating interest on the judgment. In light of a recent decision by this Court, we need not reach this issue. Instead, we hold that MCL 600.6013(5); MSA 27A.6013(5) is the statutory subsection that controls the interest calculation in this case. Subsection 6013(5) provides:

> For complaints filed on or after January 1, 1987, if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

Recently, in *Yaldo v North Point Ins Co,* 217 Mich App 617, 621; 552 NW2d 657 (1996), this Court held that insurance contracts are written instruments. Because the present case involves an automobile insurance contract, MCL 600.6013(5); MSA 27A.6013(5) controls the calculation of judgment interest.

Even though *Yaldo* was decided after the judgment was entered in this case, *Yaldo* may be applied retroactively. Generally, appellate court decisions are given full retroactive effect. *Jahner v Dep't of Corrections*, 197 Mich App 111, 113; 495 NW2d 168 (1992). "The fact that a decision may involve an issue of first impression does not in and of itself justify giving it [only] prospective application where the decision does not announce a new rule of law or change existing law, but merely gives an interpretation that has not previously been the subject of an appellate court decision." *Id.* at 114. Because the *Yaldo* decision did not announce a new rule of law or change existing law, but merely interpreted a section of a statute that had not previously been the subject of an appellate court decision,

we conclude that it should be applied retroactively to this case. Thus, the applicable interest rate is 12%.

In conclusion, the trial court's finding that defendant's delay in paying benefits and its termination of plaintiff's benefits was unreasonable is not clearly erroneous. The trial court did not err when it allowed interest to accrue on the award of attorney fees and costs. In light of our recent decision in *Yaldo*, the interest on the judgment needs to be recalculated to reflect the 12% interest rate.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Robert P. Young, Jr.

[1] Other reports submitted by Dr. Beale and Dr. Endress were unavailable to defendant at the time benefits were initially terminated.

[2] Following oral argument, the parties submitted supplemental briefs regarding the possible apportionment of attorney fees upon conclusions that defendant's denial of certain benefits was unreasonable, but its denial of other benefits was reasonable. Because we conclude that defendant's denial of all benefits was unreasonable, we need not address the apportionment issue.