STATE OF MICHIGAN

COURT OF APPEALS

FOUAD A. HANNAWI,

Plaintiff-Appellee/Cross-Appellant,

v

AMERICAN FELLOWSHIP MUTUAL INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
November 12, 1999

No. 207629
Wayne Circuit Court
LC No. 96-600799 NF

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiff commenced this lawsuit against defendant, his no-fault insurer, for recovery of personal protection insurance benefits under the no-fault act. MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*. Following a bench trial, plaintiff was awarded work loss benefits and medical expenses in the amount of $54,302.70. The court subsequently awarded plaintiff mediation sanctions in the amount of $15,860, and attorney fees under the no-fault act in the amount of $5,310, plus penalty interest and other costs, for a total award of $89,523.11. Defendant now appeals as of right and plaintiff cross-appeals. We affirm.

Defendant first argues that it is entitled to a new trial because of plaintiff's attorney's misconduct at trial. We disagree. Initially, we note that defendant did not object to most of the instances of alleged misconduct. Moreover, because this was a bench trial, there was little, if any, danger that the court would be swayed by erroneous or prejudicial arguments. That notwithstanding, the record does not reveal a deliberate course of conduct aimed at preventing defendant from receiving a fair and impartial trial. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). Furthermore, it is clear from the trial court's comments that the court was not misled in its findings by any false or misleading statements by plaintiff's counsel. Accordingly, the trial court did not err in denying defendant's request for a new trial on this issue.

Next, defendant argues that the trial court's verdict was against the great weight of the evidence. We disagree. A trial court's decision regarding a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *McLemore v Detroit Receiving Hosp*, 196 Mich

App 391, 398; 493 NW2d 441 (1992). Substantial deference is given to the trial court's finding that a verdict is not against the great weight of the evidence. *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996). To the extent that defendant challenges the trial court's findings of fact, those findings are reviewed under the clearly erroneous standard. MCR 2.613(C); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98; 535 NW2d 529 (1995).

A motion for a new trial brought on the ground that the verdict was against the great weight of the evidence should be granted only if the verdict was manifestly against the clear weight of the evidence. MCR 2.611(A)(1)(e); *Watkins, supra* at 340. After having reviewed the evidence, we cannot conclude that the trial court's decision was manifestly against the clear weight of the evidence. In addition to his own testimony, plaintiff presented competent expert testimony to support his claim. While there was conflicting evidence regarding plaintiff's condition, the trial court was in the best position to judge the credibility of the witnesses and the other evidence. *Mahrle v Danke*, 216 Mich App 343, 352; 549 NW2d 56 (1996). We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial on the basis that the verdict was against the great weight of the evidence.

Next, defendant challenges the trial court's decision to award plaintiff penalty interest under MCL 500.3142; MSA 24.13142, and no-fault attorney fees under MCL 500.3148(1); MSA 24.13148(1). We disagree. A trial court's finding that an insurer unreasonably failed to make payment or unreasonably delayed in making payment is reviewed under the clearly erroneous standard. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 628; 550 NW2d 580 (1996); *Butt v Detroit Automobile Inter-Ins Exchange*, 129 Mich App 211, 220; 341 NW2d 474 (1983).

First, we find no error in the trial court's award of penalty interest under MCL 500.3142; MSA 24.13142. Section 3142 provides that a prevailing party in a no-fault action is entitled to penalty interest of twelve percent per annum if personal protection benefits are not paid within thirty days of reasonable proof of the fact and the amount of the loss. *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 644; 552 NW2d 671 (1996). The intent behind § 3142 is to penalize no-fault insurers that do not make prompt payments to their insureds. *Sharpe v Detroit Automobile Inter-Ins Exchange*, 126 Mich App 144, 148-150; 337 NW2d 12 (1983). Generally, an insurer's delay in making payments is not considered unreasonable where the delay is caused by a legitimate question of statutory construction, case law, or bona fide factual uncertainty. *Butt, supra.* Here, the trial court's finding that defendant unreasonably failed to make proper payment to plaintiff was not clearly erroneous. Plaintiff's treating physicians diagnosed his condition as a herniated disc. While defendant's expert, Dr. John McCollough, testified that he found no evidence of a herniated disc, he also indicated that he could not absolutely rule out that possibility. Furthermore, defendant continued to refuse payment even after one of plaintiff's physicians, Dr. Edward Czarnecki, found evidence of a herniated disc as a result of MRI testing. In addition, defendant has not shown that it did not have sufficient information about plaintiff's wages to determine the amount of his benefits. Thus, we cannot conclude that the trial court clearly erred in determining that defendant failed to show that there was a legitimate factual uncertainty regarding the fact and the amount of the loss at the time benefits were discontinued. *Id*.

Similarly, the trial court did not clearly err in finding that attorney fees were justified under § 3148(1), because defendant unreasonably delayed in paying benefits. *Beach, supra* at 628. Furthermore, because it appears that defendant has not yet paid plaintiff his benefits, we hold that plaintiff is also entitled to an award of attorney fees incurred as a result of this appeal, the amount of which shall be determined on remand. Compare *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42; 586 NW2d 395 (1998).

Next, defendant contends that the trial court erred in awarding mediation sanctions pursuant to MCR 2.403(O)(1). We disagree. A trial court's decision whether to grant mediation sanctions is reviewed de novo because it involves a question of law, rather than a discretionary action. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129-131; 573 NW2d 61 (1997). The amount of mediation sanctions awarded is reviewed for an abuse of discretion. *Put v FKI Industries, Inc*, 222 Mich App 565, 572; 564 NW2d 184 (1997).

Even though both plaintiff and defendant rejected the mediation evaluation, because plaintiff prevailed at trial and recovered a more favorable verdict, he was entitled to mediation sanctions under MCR 2.403(O)(1). Furthermore, the trial court properly considered the factors set forth in Michigan Rule of Professional Conduct 1.5(a) to determine a reasonable attorney fee. *RCO Engineering, Inc v ACR Industries, Inc*, 235 Mich App 48, 67; ___ NW2d ___ (1999). We find no abuse of discretion in the amount of mediation sanctions awarded. Defendant's claim that mediation sanctions should not have been awarded because plaintiff's offer of judgment under MCR 2.405 was not made in good faith is without merit.

On cross-appeal, plaintiff argues that he should have been awarded double attorney fees under both the mediation rule, MCR 2.403(O), and the no-fault act, MCL 500.3148; MSA 2413148. However, in light of our Supreme Court's recent decisions in *McAuley v General Motors Corp*, 457 Mich 513; 578 NW2d 282 (1998) and *Rafferty v Markovitz*, __ Mich __; __ NW2d __ (Docket No. 112535, issued 10/26/99), we agree that a double recovery of attorney fees was not available.

Affirmed and remanded for a determination of plaintiff's reasonable appellate attorney fees.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell