STATE OF MICHIGAN

COURT OF APPEALS

JAMES BLASZCZYK, Plaintiff-Appellee,	UNPUBLISHED May 13, 2008
v	No. 275553 Oakland Circuit Court
LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant-Appellant.	LC No. 2004-059413-NF

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In this action to recover no-fault attendant care benefits, defendant Liberty Mutual Fire Insurance Company appeals as of right from a judgment in favor of plaintiff James Blaszczyk, following a jury trial. Defendant only challenges the portion of the judgment awarding only no-fault attorney fees in the amount of $285,975.[1] For the reasons set forth in this opinion, we affirm.

This case arises from defendant's refusal to pay no-fault attendant care benefits to an insured who suffered brain damage as a result of an electrical injury that occurred when a downed power line fell on his vehicle. The issues at trial concerned whether attendant care was medically necessary and, if so, for how many hours a day and at what hourly rate and skill level the services should be compensated. The only issues on appeal, however, concern the reasonableness of defendant's decision not to pay plaintiff's claim, and the reasonableness of the amount of attorney fees awarded.

I. No-Fault Attorney Fees

[1] The trial court also awarded plaintiff jury verdict damages of $152,496, taxable costs of $21,484.40, no-fault penalty interest of $22,284.24, and statutory interest of $65,670, but defendant does not challenge these awards on appeal.

Defendant first argues that the trial court clearly erred in finding that defendant's decision to investigate plaintiff's claim was unreasonable, and in awarding penalty attorney fees under the no-fault act.

This Court "review[s] for clear error a trial court's finding that an insurance company unreasonably refused to pay benefits and its decision to award attorney fees under MCL 500.3148(1)." *Moore v Secura Ins*, 276 Mich App 195, 198; 741 NW2d 38 (2007). "A finding is clearly erroneous when, even if there is evidence in the record to support it, this Court is left with the definite and firm conviction that a mistake has been made by the trial court." *Id*.

MCL 500.3148(1) provides:

> 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. [Emphasis added.]

Additionally, § 3142 of the no-fault act, MCL 500.3142(2), provides, in pertinent part:

> Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer.

"The purpose of the [§ 3148] penalty provision is to ensure prompt payment to the insured." *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). Accordingly, "[o]verdue benefits give rise to a rebuttable presumption of unreasonable refusal or undue delay." *Moore*, *supra* at 199. However, "[i]f the insurer's refusal or delay in payment is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty, the refusal or delay will not be found unreasonable." *Id*. (citation omitted).

The reasonableness of the delay or refusal is to be assessed as of the time the decision is made. *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 354; 737 NW2d 807 (2007). Thus, the jury's verdict cannot be used as evidence to rebut the presumption that the initial refusal to pay was unreasonable. *Id*. at 354-355. The "inquiry is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay the expense was unreasonable." *Moore*, *supra* at 204.

"The statute requires only *reasonable* proof of the amount of loss, not exact proof." *Moore*, *supra* at 199 (citation omitted) (emphasis in the original). Under § 3142, reasonably supported portions of a claim become overdue after 30 days, even if other parts of the claim are not properly supported. Therefore, an insurer is required to pay the undisputed portion of a

claim, at the risk of it becoming overdue. See *McKelvie*, *supra* at 336; *Cole v DAIIE*, 137 Mich App 603, 613; 357 NW2d 898 (1984).

For example, in *McKelvie*, *supra* at 335-336, the insurer disputed the necessity of 24-hour attendant care, the reasonableness of the hourly rate charged, and whether certain expenses had been incurred—and refused to pay any portion of the claim. On appeal, this Court agreed that "[t]he fact that an insurer may be liable for some expenses (i.e., those reasonably incurred) does not necessarily establish its liability for all of the expenses." *Id*. at 336. However, the existence of a bona fide dispute concerning some of the services provided "does not justify making no payment." *Id*. This Court concluded that the trial court did not err in finding that the insurer's refusal to pay any portion of the claim was unreasonable. *Id.* at 336-337.

Similarly, in *Cole*, *supra* at 613, the insurer did "not dispute that it owed replacement service benefits or that it owed penalty interest for the delay in paying these benefits." However, the insurer "attempt[ed] to justify its failure timely to pay replacement service benefits because it believed it was entitled, pursuant to § 3109, to set off social security benefits received by the survivors against the survivors' loss benefits payable under the policy." *Id*. On appeal from the trial court's award of attorney fees, this Court determined that "[t]he trial court correctly found that this was not a reasonable legal excuse for [the] defendant's failure to pay any replacement service benefits." *Id*. The Court reiterated that "[t]he fact that a portion of the amount due was in dispute did not justify withholding the entire amount due." *Id*.

Likewise, in *Butt v DAIIE*, 129 Mich App 211, 215, 220; 341 NW2d 474 (1983), there was a dispute concerning the reasonableness of the daily fee requested for replacement services. The insurer believed that $15 a day was reasonable, rather than $20 a day. *Id*. On appeal, this Court found that the trial court properly awarded no-fault attorney fees because the insurer "did not have good cause to delay in making payments of at least $15 per day." *Id*. at 221.

In the present case, the jury found that plaintiff's benefits were overdue as of June 6, 2004. That gives rise to a rebuttable presumption that defendant's refusal to pay was unreasonable. On appeal, defendant advances four basic theories for why it believes its refusal to pay was not unreasonable: (1) whether the accident was covered under the no-fault act, (2) whether benefits were barred by the one-year-back rule, (3) whether the rate and number of hours requested were reasonable, and (4) whether attendant care was medically necessary.

A. No-Fault Act

Under MCL 500.3105(1), an injury is not covered by the no-fault act unless it arises out of the use of a motor vehicle as a motor vehicle. "Whether an injury arises out of the use of a motor vehicle 'as a motor vehicle,' turns on whether the injury is closely related to the transportational function of automobiles." *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 215; 580 NW2d 424 (1998). Thus, if plaintiff's injury did not meet this test, defendant would not be liable to pay no-fault benefits.

In this case, however, defendant had paid all of plaintiff's other claims since the 1999 accident without raising the issue whether the accident was covered by the no-fault act. The trial court did not clearly err in finding that defendant failed to show that there was a legitimate dispute concerning whether the accident was covered by the no-fault act. Rather, as in

Amerisure Ins Co v Auto-Owners Ins Co, 262 Mich App 10, 24; 684 NW2d 391 (2004), defendant "clung to the slimmest of reeds" in support of a no-coverage theory. Thus, the trial court did not err in finding that defendant's refusal to pay for this reason was unreasonable.

B. One-Year-Back Rule

Under MCL 500.3145(3), where prior benefit payments have been made, the no-fault act limits recovery to losses incurred during the one year preceding the action. *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 61; 718 NW2d 784 (2006). In this case, plaintiff sought benefits going back three years. Thus, there was a legitimate dispute concerning whether benefits were recoverable beyond one year. However, defendant had no legitimate basis to believe that losses incurred during the preceding one-year period were barred by the one-year-back rule. Thus, the trial court did not clearly err in finding that the one-year-back rule justified defendant's failure to pay the undisputed portion of plaintiff's claim.

C. Rates and Number of Hours

Plaintiff's May 2004 claim sought attendant care benefits at the rate of $25 an hour, for 24 hours a day. In 1999, plaintiff received attendant care benefits for 16 hours a day, at a rate of $8 an hour. Plaintiff did not provide a clear explanation for the difference in the rates and number of hours demanded. Therefore, defendant had a reasonable basis for disputing the higher rate and number of hours demanded in 2004.

However, defendant had an obligation to pay the undisputed portion of plaintiff's claim. A dispute concerning rates and hours does not justify making no payment at all. *McKelvie*, *supra* at 335-337. As the trial court found, defendant should have at least paid plaintiff's claim at the same rate and number of hours as in 1999. The trial court did not clearly err in finding that defendant's refusal to pay on this basis was unreasonable.

D. Medical Necessity

An insurer is liable to pay expenses for reasonably necessary services. See MCL 500.3107(a). Defendant argues that there was a legitimate dispute concerning whether attendant care was medically necessary.

Defendant's claim specialist, Pamela Curtis, admitted that upon receiving plaintiff's claim, she reviewed his electronic file for the last six months to a year. Significantly, Curtis did not review Renee LaPorte's ten-page attendant care evaluation, which was submitted in support of plaintiff's claim, and which is replete with references to the findings contained in plaintiff's medical records. Curtis also did not review plaintiff's medical records herself. Rather, she asked Emma Darling, a case manager, to evaluate the validity of plaintiff's attendant care claim, i.e., whether attendant care was reasonably necessary, and whether it was supported by the medical record.

Darling reviewed plaintiff's claim and its accompanying documentation, all the medical records in defendant's possession, and defendant's electronic file. Darling recommended an independent medical evaluation, but concluded that "Attendant Care of a supervisory nature is supported for safety reasons primarily due to physical disability related to progression of Mr[.]

Blaszczyk's electric-shock-induced Parkinsonian syndrome." Nonetheless, Curtis denied the claim until additional information was submitted.

At trial, Curtis testified that plaintiff's medical records did not show that his condition had deteriorated to the point that he needed attendant care. However, Curtis did not review plaintiff's medical records or LaPorte's evaluation. Further, Darling reported that, although recent records were unavailable, the medical records in plaintiff's file showed that his condition was deteriorating as of a year before the claim was submitted.

Curtis testified that plaintiff had failed to specify what services were being provided to plaintiff. However, a lengthy discussion of the services being provided by plaintiff's wife was contained in LaPorte's evaluation, which Curtis did not review.

Curtis testified that she relied on surveillance reports showing plaintiff participating in various activities, such as driving, carrying items from a car without using his cane, walking down the street by himself, mowing the lawn, and doing yard work. However, plaintiff never claimed that he was unable to walk, and his medical records did not so imply. Rather, he had mobility problems, memory problems, tremors, became confused, and became anxious when his routine changed. The surveillance reports were not inconsistent with plaintiff's needs, as reported in his medical records. Further, defendant conceded that there was no evidence of fraud.

In sum, we agree with the trial court that defendant failed to show that, at the time it denied plaintiff's claim, there was a bona fide factual uncertainty concerning whether attendant care services were medically necessary, or concerning what services were being provided. Plaintiff was only required to submit "*reasonable* proof . . . of loss, not exact proof." *Moore*, *supra* at 199 (citation omitted) (emphasis in the original). Thus, under that standard of review we follow in such cases, we hold that the trial court did not clearly err in finding that defendant's refusal to pay attendant care benefits on this basis was unreasonable.

For these reasons, we affirm the trial court's determination that plaintiff was entitled to no-fault attorney fees under MCL 500.3148(1).

II. Reasonableness of Attorney Fees

Defendant next argues that the amount of attorney fees awarded was unreasonable, and that the trial court erred by failing to hold an evidentiary hearing to resolve this issue.

This Court "review[s] for abuse of discretion the amount of attorney fees awarded." *Moore*, *supra* at 198. The decision whether to hold an evidentiary hearing to determine the reasonableness of requested attorney fees is reviewed for an abuse of discretion. *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 171-172; 702 NW2d 588 (2005), rev'd in part on other grounds 476 Mich 131 (2006). "An abuse of discretion occurs when the trial court's decision results in an outcome that falls outside the principled range of reasonableness." *Moore*, *supra* at 198.

"There is no precise formula for computing the reasonableness of attorney fees, but the factors to be considered include: (1) the professional standing and experience of the plaintiff's

attorney; (2) the skill, time, and labor involved in the plaintiff's no-fault claim; (3) the amount in question and the results achieved by the plaintiff's attorney; (4) the difficulty of the no-fault case; (5) the expenses incurred; and (6) the nature and length of the professional relationship between the plaintiff's attorney and the plaintiff." *Moore*, *supra* at 203. A trial court need not detail its findings on every factor relevant to an attorney fee award. *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

In *Howard v Canteen Corp*, 192 Mich App 427, 438; 481 NW2d 718 (1991), overruled in part on other grounds in *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999), a prevailing claimant's attorney sought an award of attorney fees, but admitted that, because she worked on a contingency fee basis, she did not keep contemporaneous billing records. She submitted affidavits and other documentary evidence in support of her request, and the trial court granted the request in full without making any findings. *Id*. at 438-439. On appeal, this Court held that "[w]here the opposing party challenges the reasonableness of the requested fee, the trial court should hold an evidentiary hearing regarding the issue." *Id*. at 438. The Court found that merely holding oral argument did not give the opposing party the opportunity to challenge specific hours allegedly spent, or rates demanded. *Id*. at 439. Further, "[i]f any of the underlying facts, such as the number of hours spent in preparation, are in dispute, the trial court should make findings of fact regarding the disputed issues." *Id*. at 438-439.

Conversely, in *People v Martin*, 271 Mich App 280, 330-333; 721 NW2d 815 (2006), a defendant objected to the trial court's assessment of prosecution costs without holding an evidentiary hearing. Instead, upon receiving the motion, the trial court ordered the prosecutor to submit documentation in support of his request, allowed the defendant time to respond, and made findings on the disputed items, such as the number of hours spent by the prosecutor, and the costs incurred by various police departments. *Id*. at 332-333. On appeal, this Court concluded that because two hearings were held, the "defendant's argument is really an argument concerning the sufficiency of the hearing held." *Id*. at 333-334. The Court noted that the "defendant has not presented any evidence that the figures relied on by the court were inaccurate and does not argue that he was deprived of the opportunity to present his position to the court, present evidence, call witnesses, or confront the witnesses against him." *Id*. at 334. Accordingly, the Court found that the defendant had abandoned its argument on appeal.

Although we do not find that defendant has abandoned its argument in this case, as in *Martin*, plaintiff submitted detailed billing records and affidavits with his motion, and defendant responded, challenging the number of hours, the hourly rates, all hours billed beyond the one-year-back rule, and various specific items, including ministerial work by attorneys and the number of office conferences.

On appeal, defendant disagrees with the hourly rates chosen by the trial court, but does not challenge the accuracy of any of the information on which the trial court relied, including the billing summaries submitted by plaintiff. Defendant also does not argue that it was prevented from submitting any evidence, or from fully advocating its position to the trial court. Thus, defendant has failed to show that the trial court abused its discretion by failing to hold an evidentiary hearing, and deciding the matter based on the documentary evidence submitted by the parties.

Concerning the applicable factors, defendant challenges only two factors: (1) the amount in question and the results achieved by the plaintiff's attorney; and (2) the nature and length of the professional relationship between plaintiff's attorneys and plaintiff.

As noted by defendant, plaintiff recovered $152,496 in attendant care benefits, much less than the $622,000 to $1,330,000 that plaintiff had demanded, or about one-fourth of his desired recovery. The attorney fee award of $285,975 is nearly twice the amount of the verdict (before adding costs and interest). However, because defendant had refused to pay even the undisputed portion of the claim, we agree that plaintiff's counsel obtained a good result at trial.

Defendant observes that, by not filing a claim until May 2004, plaintiff's counsel forfeited a large portion of plaintiff's back claim under the one-year-back rule. We agree that a large portion of plaintiff's claim became barred. However, the trial court appropriately accounted for this factor in its award because it reduced the requested award by eliminating all attorney fees incurred before the claim was filed. Defendant has not shown that a further reduction is warranted.

Defendant also argues that the hourly rates allowed by the trial court were excessive in comparison with the rates charged by mediators in Oakland County. However, considering the admittedly superior reputation of plaintiff's counsel, this comparison does not seem valid. Additionally, except for the requested rate of lead counsel, the trial court reduced the requested rates of the other attorneys who performed the bulk of the work on plaintiff's case.

In sum, defendant has failed to show that the amount of attorney fees awarded is outside the range of reasonable and principled outcomes under the circumstances.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Stephen L. Borrello