

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellant,

v

INITIAL TRANSPORT, INC, GREAT WEST
CASUALTY COMPANY, and KIRK
NATIONAL LEASING COMPANY a/k/a KIRK
NATIONAL LEASE COMPANY,

Defendants,

and

EMPLOYERS MUTUAL INSURANCE
COMPANY,

Defendant-Appellee.

UNPUBLISHED

June 24, 2010

No. 291010

Wayne Circuit Court

LC No. 04-43065-ND

Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order on remand awarding it penalty interest from March 24, 2006 to August 8, 2006. We vacate and remand for further proceedings because the trial court failed to make necessary factual findings according to the remand order.

This case arose out of an October 2003 accident when a semi-tractor, owned by defendant Initial Transport, Inc., towing a cargo tank containing gasoline fell off an entrance ramp from I-75 to I-94, and the resulting fire destroyed parts of the overpass and adjoining structures. *Dep't of Transp v Initial Transp, Inc*, 276 Mich App 318, 321; 740 NW2d 720 (2007). In December 2003, Employers Mutual Insurance Company (Employers) offered to tender its entire million-dollar policy to plaintiff, but conditioned tender on receipt of satisfactory proof of loss and "a complete release of liability as to itself and its insured," and plaintiff declined the offer. In 2007, this Court ordered the payment of penalty interest, and remanded for the trial court to determine the amount of interest due. *Id.* at 334. The Court noted both that "plaintiff did not submit proof of the amount of damage done to the overpass and adjoining structures before it filed its complaint," *id.* at 332, and that by June 21, 2006, when the trial court

entered an order granting Employers's motion for summary disposition, the amount owing on the claim was not reasonably in dispute, *id.* at 333. Specifically, the opinion said:

Moreover, nothing in the penalty interest statute provides that an entity directly entitled to benefits under the insured's contract of insurance is required to sign a release before receiving such benefits. MCL 500.2006(1). Further, defendants have not cited any authority in support of their position that an insurer can avoid paying penalty interest by requiring a party to execute a release before payment of a claim. Accordingly, we reverse the portion of the trial court's order denying plaintiff interest, and remand for a determination of the amount of interest due from Employers under MCL 500.2006(4). We direct the trial court to order Employers to pay interest at the rate of 12 percent per annum from a date 60 days after satisfactory proof of loss was received. [*Id.* at 333-334.]

The Michigan Supreme Court reversed in part on a different issue and remanded to the trial court "for further proceedings regarding the defendant Employers Mutual Casualty Company's penalty interest payment obligation, as unanimously ordered by the Court of Appeals." *Dep't of Transp v Initial Transp, Inc*, 481 Mich 862, 863; 748 NW2d 239 (2008).

At issue here is whether the trial court properly followed the remand order to determine the date when plaintiff provided satisfactory proof of loss so as to trigger an award of penalty interest from 60 days thereafter. We review a trial court's findings of fact for clear error. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). Findings of fact are deemed clearly erroneous where the reviewing court is left with a definite and firm conviction that a mistake has been made. *Carrier*, 269 Mich App at 329-330.

The statutory basis for awarding penalty interest arises under MCL 500.2006(4), which provides as follows:

If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law. The interest shall be paid in addition to and at the time of payment of the loss. If the loss exceeds the limits of insurance coverage available, interest shall be payable based upon the limits of insurance coverage rather than the amount of the loss. If payment is offered by the insurer but is rejected by the claimant, and the claimant does not subsequently recover an amount in excess of the amount offered, interest is not due. Interest paid pursuant to this section shall be offset by any award of interest that is payable by the insurer pursuant to the award.

“Failure to pay claims on a timely basis or to pay interest on claims as provided in [§ 500.2006(4)] is an unfair trade practice unless the claim is reasonably in dispute.” § 500.2006(1).

The trial court ordered that penalty interest should be paid from March 24, 2006, to August 8, 2006, when Employers paid benefits to plaintiff. The trial court reasoned that this was the date when it ruled, in response to the parties’ motions for summary disposition, that the Michigan No-Fault Act was plaintiff’s exclusive remedy. Again, this Court “direct[ed] the trial court to order Employers to pay interest at the rate of 12 percent per annum from *a date 60 days after satisfactory proof of loss was received.*” *Initial Transp, Inc*, 276 Mich App at 333-334 (emphasis added). However, in making its ruling, the trial court clearly erred because it failed to make any factual findings regarding when the satisfactory proof of loss was received. On appeal, it has been proffered that the satisfactory proof of loss could have been received at various times, including the time of the complaint in September 2004. Without a factual finding regarding when satisfactory proof of loss was received, the trial court could not determine a date 60 days thereafter from which penalty interest should be paid.

Because this Court’s role is to review the trial court’s decision, but not to make factual findings, *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34 n 12; 609 NW2d 567 (2000), we vacate the trial court’s award of penalty interest, and remand for the trial court to: 1) ascertain the date when defendant received satisfactory proof of loss and 2) order Employers to pay interest according to our earlier order for remand. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher