

STATE OF MICHIGAN
COURT OF APPEALS

JUANITA L. LUEKER,

Plaintiff-Appellee,

v

AUTO OWNERS INSURANCE CO.,

Defendant-Appellant.

UNPUBLISHED
October 13, 2011

No. 298727
Livingston Circuit Court
LC No. 07-023054-NI

AFTER REMAND

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

In this first-party personal injury protection insurance (PIP) case, defendant Auto Owners Insurance Co. appeals as of right the trial court's June 4, 2010, opinion and order, granting plaintiff Juanita L. Lueker attorney fees under the no-fault act, MCL 500.3101 *et seq.* Specifically, defendant argues that the trial court clearly erred when it found that defendant refused payment of overdue benefits. We affirm.

This is the second time this case is before the Court. This Court reversed the trial court's previous award of attorney fees and remanded for clarification of the court's basis for awarding attorney fees. See *Lueker v Auto Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2010 (Docket No. 287590). This Court summarized the case and explained its reasoning for a remand, in part, as follows:

In June 2005, plaintiff was involved in an automobile accident. In October 2005, Dr. Adam Fasick, a chiropractor, began treating plaintiff. In January and February 2006, defendant paid two of Fasick's bills as part of plaintiff's PIP benefits under her no-fault automobile insurance policy. Gary Simon, a claims adjuster for defendant, testified that in January 2007, defendant had not received any further billing from Fasick's office. However, because plaintiff was receiving replacement services, Simon wrote Fasick a letter inquiring as to plaintiff's medical condition. Fasick responded that treatment was continuing and plaintiff

needed to undergo reevaluation. On June 7, 2007, after not providing any update on plaintiff's medical condition, Fasick sent defendant approximately \$27,000 in unpaid bills for 20 months of treatment.¹ Defendant subsequently hired two chiropractors who were board-certified in utilization review, Dr. Kenneth Lockwood and Dr. Bruce D. Serven, to review plaintiff's case. Lockwood reviewed Fasick's records and Serven performed a physical examination of plaintiff. Simon asked Fasick to respond to the reports generated by Lockwood and Serven, but he failed to do so. Plaintiff subsequently filed a complaint under the no-fault act for recovery of approximately \$27,000 of overdue PIP benefits. The jury awarded plaintiff \$11,755 of overdue PIP benefits and \$1,410 in interest on that amount. Following the jury verdict, plaintiff moved the trial court for no-fault attorney fees pursuant to MCL 500.3148, which the trial court granted. Defendant appeals that award.

Michigan's no-fault insurance statutes, MCL 500.3101 *et seq.*, allow for the imposition of attorney fees against an insurer related to the recovery of PIP benefits that are "overdue." MCL 500.3142; MCL 500.3148(1). Specifically, MCL 500.3148(1) provides:

An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for ... [PIP] 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 in prior opinion.]

Therefore, no-fault attorney fees are properly awarded for the recovery of PIP benefits when 1) the benefits are overdue; and 2) the insurer acted unreasonably in refusing or delaying payment of the benefits. *Moore v Secura Ins*, 482 Mich 507, 526; 759 NW2d 833 (2008).

In this case, the jury determined that the entire amount of \$11,755 was overdue by assessing interest pursuant to statute on that amount. However, as we

¹ Later in the opinion, the Court noted plaintiff's countervailing evidence:

On the other hand, although no one from Fasick's office with firsthand knowledge testified that they sent bills to defendant, Fasick himself testified that his office routinely sent out bills every week which, if true, would mean that the insurer did not receive these bills for the first time on June 7, 2007, but rather sometime much earlier. In such a case, Lockwood's report, even if reliable, could not retroactively cure the delay that occurred more than 30 days after receipt of the bills. [*Lueker*, unpub op at 2.]

read the record, the trial court did not make a determination whether it was awarding attorney fees because the insurer could not reasonably rely on Lockwood and Servan's reports and so any delay was unreasonable, or because the refusal or delay in payment occurred more than 30 days before the receipt of those reports. If the trial court reached the former conclusion, we would reverse as we find that Lockwood's report did provide a reasonable basis to refuse payment. However, if the trial court's reasoning reflected the latter analysis, we would affirm since an insurance medical examination cannot serve to retroactively render reasonable those delays that took place more than 30 days before the report was received. [*Id.* at 1-2.]

This Court ordered that the trial court determine on remand, based on the record created at trial, "if defendant explicitly denied, or failed to pay, any bills that were submitted to it more than 30 days prior to Lockwood's June 30, 2007 report." *Id.* at 2. On remand, the trial court specifically found that Fasick submitted bills to defendant before May 31, 2007, and that the refusal or delay in payment occurred more than 30 days before defendant received the expert reports. As such, the trial court held that plaintiff was entitled to attorney fees pursuant to MCL 500.3148(1).

In the present appeal, defendant argues that there was no evidence to support the trial court's conclusion that defendant failed to pay overdue benefits because defendant did not receive any bills from Fasick between February 2006 and June 7, 2007, when it received bills for multiple months. Thus, defendant argues that it did not have reasonable proof of the fact and of the amount of loss sustained more than 30 days before it received a report from its experts giving it a reasonable basis to refuse payment.

We review a trial court's findings of fact for clear error. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). "A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* (quotations omitted). We review a trial court's award of attorney fees for an abuse of discretion, which "occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* We give deference to the trial court's superior ability to assess the credibility of witnesses. *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

As previously discussed, no-fault attorney fees are properly awarded for the recovery of PIP benefits when (1) the benefits are overdue and (2) the insurer acted unreasonably in refusing or delaying payment of benefits. *Moore*, 482 Mich at 526. Furthermore, PIP 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." MCL 500.3142(2). A rebuttable presumption of unreasonable refusal or delay arises when benefits are not paid within the statutory period. *Combs v Commercial Carriers, Inc*, 117 Mich App 67, 73; 323 NW2d 596 (1982).

We find that the trial court did not clearly err in concluding that defendant received reasonable proof of the fact and of the amount of loss sustained before May 31, 2007. Fasick testified that he was treating plaintiff since October 2005 and that his office mailed bills weekly. This testimony supported the inference that bills for plaintiff's treatment were sent weekly to defendant. Defendant's receipt and payment of some of plaintiff's bills when plaintiff first began treatment supports the inference that defendant received bills for plaintiff's treatment with

some regularity. Moreover, defendant admitted knowing that plaintiff was continuing treatment and admitted to a telephone conversation in May 2007 with Fasick “about the bills” for plaintiff’s treatment. Finally, Corvel, a company employed by defendant to review all medical bills, contacted Fasick and acknowledged receipt of the bills by asking for additional information. While the testimony at trial failed to establish a specific date for the telephone conversation between Corvel and Fasick, the trial court’s conclusion that the conversation occurred before May 31, 2007, was not clear error. “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson v Bessemer City*, 470 US 564, 574; 105 S Ct 1504; 84 L Ed 2d 518 (1985). On the record before us, we are not left with a definite and firm conviction that a mistake was made; thus, the trial court did not clearly err when it determined that defendant unreasonably failed to pay overdue benefits. *Moore*, 482 Mich at 516. The award of attorney fees was not an abuse of discretion.

Finally, we note that plaintiff requests damages under MCR 7.216(C)(1)(a) for having to defend a vexatious appeal. Plaintiff, however, did not file the required motion pursuant to MCR 7.211(C)(8). MCR 7.216(C)(1). Nevertheless, we have considered the issue and conclude that the appeal was not vexatious. Therefore, we decline to award sanctions under MCR 7.216(C).

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Jane M. Beckering