

STATE OF MICHIGAN
COURT OF APPEALS

JUANITA L. LUEKER,

Plaintiff-Appellee,

v

AUTO OWNERS INSURANCE CO.,

Defendant-Appellant.

UNPUBLISHED

January 19, 2010

No. 287590

Livingston Circuit Court

LC No. 07-023054-NI

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's August 20, 2008 judgment in this personal injury protection insurance (PIP) case. Specifically, defendant challenges the awarding to plaintiff of attorney fees under the no-fault act. We reverse and remand for further proceedings.

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. 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.]

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 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.

As we read the record, according to claims adjustor Simon, after defendant initially paid two of Fasick's bills in early 2006, defendant did not receive another bill until June 2007, when it received approximately \$27,000 worth of bills for 20 months of treatment. If this is so, then Lockwood's report constitutes a reasonable basis for a delay or refusal to pay that existed prior to the running of the 30-day payment period set forth in MCL 500.3142(2). 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.

On remand, we direct the trial court to determine, 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. If defendant received bills in that time frame which went unpaid, then plaintiff is entitled to attorney fees. If, however, all bills received by defendant prior to May 31, 2007 were paid, and the only bills defendant disputed were received by defendant on or after May 31, 2007, then plaintiff is not entitled to attorney fees, because the record shows that the insurer's medical review provided a reasonable basis upon which defendant could dispute the charges.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro