

STATE OF MICHIGAN

IN THE SUPREME COURT

**ON APPEAL FROM THE COURT OF APPEALS AND THE
WORKERS' COMPENSATION APPELLATE COMMISSION**

RICK PETERSEN,

Plaintiff-Appellee,

vs

**MAGNA CORPORATION and MIDWEST
EMPLOYERS CASUALTY COMPANY;**

Defendants-Appellants,

and

**KOLEASECO and THE ACCIDENT FUND COMPANY;
MAGNA CORPORATION and TIG INSURANCE
COMPANY; BCN TRANSPORTATION SERVICES and
TIG INSURANCE COMPANY; KOLEASECO,
INCORPORATED and CITIZENS INSURANCE
COMPANY; BCN TRANSPORTATION SERVICES;
SERTA RESTOKRAFT MATTRESS COMPANY,
INCORPORATED and HARLEYSVILLE LAKE
STATES INSURANCE COMPANY,**

Defendants-Appellees.

**Supreme Court:
136542-43**

**Court of Appeals:
273293-94**

**WCAC:
03-000036, 03-000260**

BRIEF ON APPEAL- APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS FOR JURISDICTION

This Court has jurisdiction over this matter, pursuant to MCL 418.861a(14) and MCR 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED

IS A WORKERS' COMPENSATION INSURER INAPPROPRIATELY REQUIRED TO PAY THE EMPLOYEE'S ATTORNEY A FEE ON UNPAID MEDICAL EXPENSES, IN ADDITION TO ITS LIABILITY FOR THE UNDERLYING MEDICAL BILLS THEMSELVES?

Defendants-Appellants Magna Corporation
and Midwest Employers Casualty Company answer "YES."
The WCAC answered "NO."
The Court of Appeals answered "NO."

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellants seek the reversal of the opinions below, imposing an attorney fee against them on unpaid medical expenses.

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STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

(Parenthetical numbers followed by "a" refer to pages of
Appellants' Appendix.)

Plaintiff Rick Petersen filed an application for workers' compensation benefits (28a). The magistrate found that plaintiff had sustained a work-related injury, and directed defendant Midwest Employers Casualty Insurance Company ["Midwest"] to pay weekly wage loss benefits, as well as reasonable and necessary medical expenses incurred as a result of the work injury (44a).

In addition, the magistrate ordered Midwest to pay to plaintiff's attorney a fee in the amount of \$46,034.56, an amount equal to 30% of certain unpaid medical bills incurred by

plaintiff (63a). The authority cited for this order was MCL 418.315(1), the medical benefits provision of the Worker's Disability Compensation Act, which reads in pertinent part as follows:

If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made on behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee paid by the employee.

The WCAC affirmed the attorney fee award against defendant Midwest (99a). The Court of Appeals affirmed as well, although the panel was somewhat split in its reasoning.

Judge Whitbeck held that MCL 418.315(1) permitted the imposition of an attorney fee against Midwest (123a). In a concurring opinion, Judge White agreed, but further wrote that she did not read §315(1) "as precluding the proration of a portion of the attorney fee to the provider" who receives payment pursuant to that provision (124a). Judge Zahra concurred with the underlying award (125a), but dissented as to the imposition of an attorney fee against the employer or its carrier pursuant to §315(1) (127a-129a). Instead, he would have remanded the case "for consideration of whether attorney fees should be prorated between plaintiff and his health care providers" (129a).

This Court granted leave to appeal on September 24, 2008 (130a). In its order granting leave, the Court directed that the parties address the following issues:

(1) what is the meaning of the term "prorate" in the last sentence of § 315(1), and whether that term represents an exception to the American Rule regarding attorney fees (see *Haliw v City of Sterling Heights*, 471 Mich 700, 707 (2005)); (2) whether the magistrate's authority to prorate attorney fees is limited to the parties to the worker's compensation action; and if so, does the penultimate sentence of MCL 418.315(1) limit which parties are subject to proration; and (3) what is the status, if any, of health care providers and medical insurers in prorating of attorney fees. (130a)

Defendant Midwest will address these questions within the Argument below.

ARGUMENT

A WORKERS' COMPENSATION INSURER MAY NOT BE REQUIRED TO PAY THE EMPLOYEE'S ATTORNEY A FEE ON UNPAID MEDICAL EXPENSES, IN ADDITION TO ITS LIABILITY FOR THE UNDERLYING MEDICAL BILLS THEMSELVES.

Standard of Review. This Court may reverse the WCAC if it applies erroneous legal reasoning or operates within the wrong legal framework. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000); *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401-402; 605 NW2d 300 (2000). Questions of statutory construction are reviewed de novo. *Grimes v Dep't of Transportation*, 475 Mich 72, 76; 715 NW2d 275 (2006). When reviewing issues of statutory construction, the Court's purpose is to discern and give effect to the intent of the Legislature. *DiBenedetto, supra*, at 402. Where the language of the statute under review is unambiguous, the Court must enforce the language as written and no further construction is permitted. *Id; Mayor of the City of Lansing v Public Service Comm'n*, 470 Mich 154; 680 NW2d 840 (2004). If the language of the statute is ambiguous, the Court may look outside that language to ascertain the Legislature's intent. *DiBenedetto, supra*, at 402.

All tribunals below based their orders that defendant Midwest pay plaintiff's attorney a fee on unpaid medical expenses upon the following language from MCL 418.315(1):

If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made on behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee paid by the employee.

The first sentence establishes the beneficiaries of the employer's obligation to pay medical expenses for a work-related injury, requiring reimbursement to the employee for any expenses he or she already paid and further mandating payment "to persons to whom the unpaid expenses may be owing..." The second sentence goes on to permit the imposition

of an attorney fee if this obligation is invoked: “The worker’s compensation magistrate may prorate attorney fees at the contingent fee paid by the employee.” These sentences should be construed together, with the first establishing those entitled to payment, and the second assessing a fee upon the recipients of the payments.

The only way to interpret this language consistently, so as to give effect to the plain meaning of all words used, is to apportion the fee payable on medical expenses between the parties receiving payments for those expenses, either the employee or the provider. To the extent that the employee is reimbursed, he or she pays his portion of the fee. To the extent that the providers are paid, they contribute their portion. This is consistent with the statute’s use of the word “prorate.”

“Prorate” and the American Rule

Merriam-Webster’s Collegiate Dictionary (11th Ed, 2003) defines “prorate” as follows: “to divide, distribute, or assess proportionately” (132a).¹ The meaning of this word is clear and unambiguous, contemplating a proportionate division of fees. If the entire fee on unpaid medical expenses is to be paid by one party, the employer or carrier, where is the division, distribution, or assessment? The result reached below – imposing an attorney fee on top of defendant’s liability for medical expenses – is not division. *It’s addition.*

When the Legislature has wanted to add a penalty to an employer or carrier’s liability, it has used language which clearly accomplishes that goal. The late payment penalty provisions of the Worker’s Disability Compensation Act are a good example:

(2) If weekly compensation benefits or accrued weekly benefits are not paid within 30 days after becoming due and payable, in cases where there is not an ongoing dispute, \$50.00 per day shall be added and paid to the worker for each day over 30 days in which the benefits are not paid. Not more than \$1,500.00 in total may be added pursuant to this subsection.

¹Where a statutory term is undefined, it is reasonable to consult a lay dictionary. *Brackett v Focus Hope, Inc*, 482 Mich 269, 211; 753 NW2d 207 (2008).

(3) If medical bills or travel allowance are not paid within 30 days after the carrier has received notice of nonpayment by certified mail, in cases where there is no ongoing dispute, \$50.00 or the amount of the bill due, whichever is less, shall be added and paid to the worker for each day over 30 days in which the medical bills or travel allowance are not paid. Not more than \$1,500.00 in total may be added pursuant to this subsection. [MCL 418.801(2)-(3)]

As the language of each of these provisions indicate, the Legislature is fully capable of adding a penalty to an employer or carrier's liability when that is its intent.

However, MCL 418.315(1) does not use the words "add" or "added." Instead, it uses the word "prorate," a different concept altogether. That being so, the clear language of the statute requires a different construction.

The history of the enactment of the provision in question is also consistent with this result. As pointed out by Commissioner Leslie in a concurring opinion in *Stankovic v Kasle Steel Corp*, 2000 ACO #124, there was no provision in the Worker's Disability Compensation Act to require direct payment to a provider of medical services prior to 1963. Instead, this Court held in *Boyer v Service Distributors, Inc*, 366 Mich 319; 115 NW2d 101 (1962), that payment for unpaid medical expenses was to be made solely to the employee, who would then deal (or not deal) with his providers himself:

If liability is not admitted, the employee has the burden of proving his medical expenses. Upon proof of "the reasonable expenses incurred by or on his behalf" the employee "shall be reimbursed." Thereupon, in the management of his own affairs, the employee may proceed to deal with (or to be dealt with by) his creditors (who may, incidentally, already have proceeded against him). Hopefully, he will pay his bills. If he does not, appropriate steps under the laws with regard to debtor and creditor may be taken. [*Id*, at 322]

As this excerpt from *Boyer* demonstrates, providers had to look to the employee for payment.² If payment was not forthcoming, a provider's only recourse was to sue the

²The *Boyer* Court did recognize the possibility that the parties could consent to direct payment.

employee, and to incur an attorney fee in the process. However, amendments to §315(1) made by 1963 PA 199 changed all that.

Those amendments added the final portion of the penultimate sentence of what is now MCL 418.315(1), which for the first time accorded providers the right to seek direct payment from the employer or carrier, so that they were no longer reliant upon their patients to represent their interests and pay their bills. In addition, the same amendment added the concluding sentence, permitting the imposition of a prorated attorney fee. Clearly, these two developments were considered connected by the legislature, and they should be so considered by this Court as well. The Court does not construe statutory terms in a vacuum, but instead interprets them “in their context and with a view to their place in the overall statutory scheme.” *Tyler v Cain*, 533 US 656, 662; 121 S Ct 2478; 103 L Ed 2d 891 (2001), quoting *Davis v Michigan Dep’ of Treasury*, 489 US 803, 809; 109 S Ct 1500; 103 L Ed 2d 891 (1989). The Legislature intended to let a provider receive direct payment, but further intended that the provider then pay a pro rata share of the attorney fee for the privilege.

This interpretation is *not* an exception to the “American rule,” which provides that “attorney fees are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award.” *Haliw v City of Sterling Heights*, 471 Mich 700, 707; 691 NW2d 753 (2005). Assessing the fee against the provider would not constitute the assessment of attorney fees against the losing party as an element of costs, because the providers would not typically be parties and the fee would be assessed for the privilege of a recovery and not as a penalty for losing.

On the other hand, assessing the fee against defendant, as the lower court and tribunals have done, *would* constitute an exception to the American rule. Such an exception is admittedly permitted, but only where expressly authorized. *Haliw, supra*. It

is difficult to state that such express authorization may be drawn from §315(1), when it uses the word “prorate” rather than “add,” and never specifically states that the fee should be assessed against an employer or carrier. An *express* authorization should never be implied.

Instead, the American rule should be applied to preclude the imposition of attorney fees against defendant Midwest as an element of costs assessed against a losing party. The fees should be assessed against the beneficiaries of the attorney’s efforts, not the targets thereof – the providers, not the employer or workers’ compensation carrier.

Magistrate’s Authority to Prorate Fees

A magistrate’s authority is not limited to employees, employers, and workers’ compensation carriers, the typical parties to a workers’ compensation action. Section 841 of the Worker’s Disability Compensation Act confers broad jurisdiction upon the Workers’ Compensation Agency³ and its magistrates:

Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker’s compensation magistrate, as applicable.
[MCL 418.841(1)]

This Court held in *Aetna Life Ins Co v Roose*, 413 Mich 85, 91; 318 NW2d 468 (1982), that this language “grants the bureau broad authority to review ‘*any* controversy concerning compensation * * * *and all questions* arising under this act’” (emphasis in the original).

In *Roose*, the then-Bureau/now-Agency was permitted to enforce a reimbursement agreement by which the claimant had promised to repay disability benefits in the event of a workers’ compensation award. Certainly, providers of care for a work-related injury are more closely connected to a workers’ compensation claim than would be a group disability

³The Agency was previously known as the “Bureau,” the term used in the statute. This was changed by Executive Reorganization Order No. 2003-1.

insurance carrier that typically pays benefits for *nonwork*-related disabilities, yet the Agency and magistrates have authority over both groups.

Indeed, the provision of medical care is required by MCL 418.315, which also establishes a system by which the fees to be charged for that care are to be regulated in accordance with rules promulgated by the Agency. MCL 418.315(2)-(9). Clearly, the Agency and its hearing officers have authority over medical care providers.

Furthermore, the magistrates have the authority to assess fees against providers of medical care pursuant to the express language of §315(1). “As in any other civil litigation, a workers’ compensation claimant is ordinarily responsible for personal attorney fees.” *Gilroy v General Motors Corp*, 438 Mich 330, 340; 475 NW2d 271 (1991). However, the Legislature may create a statutory exception to that rule. *Id.* In fact, the *Gilroy* analysis is instructive to the outcome in this matter.

In *Gilroy*, the Court looked to another workers’ compensation statute, MCL 418.821(2), which permits a group disability insurer to enforce an injured employee’s agreement to reimburse benefits received from that carrier if he or she later receives an award of workers’ compensation benefits for the same period.⁴ This provision goes on to require an entity enforcing such an assignment to pay “a portion of the attorney fees of the attorney who secured the worker’s compensation recovery...”⁵ This language, requiring the party that benefits from the efforts of the claimant’s attorney to pay a proportionate share

⁴Workers’ compensation benefits are generally not subject to assignment. MCL 418.821(1).

⁵“When a group disability or hospitalization insurance company; health maintenance organization licensed under former Act No. 264 of the Public Acts of 1974, or part 210 of Act No. 368 of the Public Acts of 1978, as amended; or a medical care and hospital service corporation organized or consolidated under former Act No. 108 or 109 of the Public Acts of 1939, or any successor organization enforces an assignment given to it as provided in this section, it shall pay, pursuant to rules established by the director, a portion of the attorney fees of the attorney who secured the worker’s compensation recovery.”

of that claimant's attorney fees, even without a direct attorney-client relationship, echoes the principle embodied by §315(1).

The *Gilroy* Court wrote:

In addition to encouraging disability insurers to make advance interim payments to disabled employees, §821 allows a claimant's attorney to collect part of his fee from the insurer where, through reimbursement, it has benefited [sic] from the attorney's successful prosecution of the workers' compensation case. To require the reimbursed insurer to pay a proportionate share of the attorney fee under those circumstances is fair and avoids giving the insurer a "free ride."
[*Id.*, at 343]

The same reasoning should be applied here. A physician need not sue for his or her bills if the efforts of the claimant's attorney results in payment of those bills. It is no more unfair to require payment of an attorney fee under those circumstances than it is to expect the physician to pay a fee to his or her own attorney if forced to sue him or herself. The medical care provider is benefitting from the attorney's efforts and, as *Gilroy* put it, should not get a "free ride." Certainly, it makes more sense to charge a fee to a party that benefits from the attorney's efforts than to assess one against a party whose interests are completely adverse to those of the attorney's client.

The general language of MCL 418.841(1) and the more specific language of MCL 418.315(1) both confer authority upon the magistrate to assess fees against a health care provider, just as §841(1) and MCL 418.821(2) grant such power with respect to group disability or health insurers. "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). As a consequence, these statutes which clearly share a common purpose – assessment of attorney fees against the party realizing a benefit from the attorney's efforts – should be consistently interpreted and applied.

The line of cases suggesting that an employer or carrier could be held liable for the payment of an attorney fee on unpaid medical expenses, in addition to liability for the

underlying bills themselves, began with the Court of Appeals' opinion in *Boyce v Grand Rapids Paving*, 117 Mich App 546; 324 NW2d 28 (1982). In that case, the Court summarily rejected any suggestion that an entity could be held liable for a fee to an attorney with whom it had no contractual relationship, regardless of the benefit it may have realized from the attorney's services. *Id.*, at 549-550. This opinion was not based upon the language of the statute, which was only subsequently considered. It also failed to note that the Legislature had already created just such a system with regard to group disability carriers and any reimbursement they might realize in the event of a workers' compensation award. In such an instance, MCL 418.821(2) requires the payment of a fee to the attorney whose efforts trigger such a reimbursement, with no need for any contractual or attorney-client relationship.

In any event, the *Boyce* Court ultimately held that the administrative rules then in effect (and later changed) did not permit the charging of an attorney fee upon medical expenses. As a result, its entire analysis regarding the party liable for such a fee constituted dicta, which does not constitute binding precedent. *Allison v AEW Capital Management, LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008). Furthermore, the holding in *Boyce* violated a basic principle of statutory construction, that every word of a statute should be given meaning and no word should be rendered a nullity. *Apsey v Memorial Hospital*, 477 Mich 120, 127; 730 NW2d 695 (2007); *Baker v General Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980). In essence, the *Boyce* Court had held that, although the statute clearly referred to the payment of an attorney fee by someone, no such fee could be ordered.

When the issue arose again in *Watkins v Chrysler Corp*, 167 Mich App 122; 421 NW2d 597 (1988), the Court of Appeals actually acknowledged that the reasoning in *Boyce* constituted dicta. In any event, it imposed no fee because no medical expenses had gone unpaid, a prerequisite to the application of §315(1)'s fee language.

Nonetheless, thus began a continuing series of cases which purported to rely upon the *Boyce* decision to find that an attorney fee could be imposed against an employer, but which never actually granted one. See, e.g., *Zeeland Community Hospital v Vander Wal*, 134 Mich App 815; 351 NW2d 853 (1984); *Duran v Sollitt Construction Co*, 135 Mich App 610; 354 NW2d 277 (1984); *Nezdropa v Wayne County*, 152 Mich App 451; 394 NW2d 440 (1986). None of these cases critically examined the *Boyce* holding or the language of MCL 418.315(1). Of course, none of these decisions may bind this superior tribunal in any event, but they should all be overturned nonetheless.

Correspondingly, and to answer the last part of the Court's second question, the penultimate sentence of §315(1) should be read to limit the parties subject to proration to those parties which receive payment pursuant to its language – the employee to the extent that he or she is reimbursed for medical bills already paid or “persons to whom the unpaid expenses may be owing...” These are the individuals who benefit from the efforts of the attorney, and against whom it is therefore appropriate and reasonable to assess a fee. It is equally reasonable, as noted above, to assume that the last two sentences are inter-related, with one establishing the recipients of benefits and the other establishing liability for an attorney fee for the privilege.

Status of Health Care Providers and Medical Insurers

The Court also inquired as to the status of health care providers and medical insurers in the prorating of attorney fees. As noted above, medical insurers fall within the ambit of MCL 418.821(2), and are required to pay a prorated share of the claimant's fees if they receive reimbursement pursuant to that provision. Medical care providers, on the other hand, are covered by MCL 418.315(1), and must pay a pro rata share [“a portion”] of attorney fees based upon their recovery pursuant to that section.

RELIEF

WHEREFORE Defendants-Appellants MAGNA CORPORATION and MIDWEST EMPLOYERS CASUALTY COMPANY respectfully request that this Honorable Supreme Court reverse the holding below, requiring them to pay an attorney fee on unpaid medical expenses. Defendants-Appellants further request any other relief to which they may be entitled.

Respectfully submitted,

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