STATE OF MICHIGAN

COURT OF APPEALS

DANIEL BAMM,

Plaintiff-Appellee,

v

FARM BUREAU MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
July 23, 2009

No. 278856
Washtenaw Circuit Court
LC No. 05-000209-NF

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

In this no-fault case, defendant appeals by right the trial court's order granting plaintiff's request for attorney fees following a jury trial. We affirm.

Defendant first argues that its delay in, and then denial of, payment of plaintiff's claim was reasonable because of plaintiff's preexisting back condition and because of plaintiff's delay in seeking medical treatment following the April 2004 accident. Defendant asserts that the trial court's contrary conclusion was error. We disagree. A trial court's decision to grant or deny attorney fees under the no-fault act[1] is reviewed for clear error. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316-317; 602 NW2d 633 (1999). A finding is clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004).

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.

[1] MCL 500.3101 *et seq.*

An insurer's delay in making payments under the no-fault act is not unreasonable if it is based on a legitimate question of statutory construction or factual uncertainty. *Attard*, 237 Mich App at 317. "[W]hen considering whether attorney fees are warranted under the no-fault act, the inquiry is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable." *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996). "When an insurer refuses to make or delays in making payment, a rebuttable presumption arises that places the burden on the insurer to justify the refusal or delay." *Attard*, 237 Mich App at 317.

Personal protection insurance (PIP) benefits are overdue "if not paid within 30 days after an insurer receives reasonable proof of the fact and the amount of loss sustained." MCL 500.3142(2). "[R]easonable proof" does not equate to definitive or exact proof. See *Williams v AAA Mich*, 250 Mich App 249, 267; 646 NW2d 476 (2002). Given plaintiff's previous back injury and herniated disk, there was reason for defendant to carefully evaluate plaintiff's medical records to determine if his current back problems were caused by the accident or if they predated it.

As noted above, the 30-day clock for determining whether PIP benefits are overdue begins to run after reasonable proof of the loss and the damages sustained is received. In this case, the clock started running when the relevant medical records were received showing that there was a new injury caused by the accident. However, defendant did not even attempt to obtain plaintiff's medical records until almost a full 30 days had passed from the time plaintiff first informed defendant of the accident. Then, once the request was made and defendant received the records, it appears that defendant still did not examine them in a timely fashion.

At the time defendant obtained the medical records and information, there was uncontradicted evidence, based on both doctors' reports and the MRI results, that plaintiff had a new disk hernaition after the April 2004 accident that had not been observed before the accident. There were multiple physicians' reports opining that this new herniation was likely caused by the trauma of the accident. While there was some dispute as to whether plaintiff had initially told his family doctor that he was involved in the accident, it was uncontested that he did seek treatment with a chiropractor shortly after the accident and that he then saw his own doctor several weeks after that. In sum, for the ten months before defendant had plaintiff examined by its own doctor, all of the existing medical evidence indicated that it was more probable than not that plaintiff's new herniation had been caused by the automobile accident. Given the multiple, uncontradicted reports indicating that the new injury had been caused by the accident, we conclude that defendant had more than reasonable proof to support plaintiff's claim.

Defendant contends that its denial of plaintiff's claim did not become "final" until its own doctor had received an opportunity to prepare a report in this case. But even if this report did provide sufficient reason to deny plaintiff's claim, defendant acted unreasonably by delaying for ten months and waiting until after litigation had already commenced to send plaintiff to its own physician. Furthermore, even after defendant's physician evaluated plaintiff, the findings of defendant's physician were ambiguous at best, and were apparently based more on the belief that plaintiff had not reported the accident to his own doctors than on any hard medical evidence.

In light of defendant's unreasonable delay in attempting to obtain plaintiff's records, the unanimous opinion of the initial treating physicians that it was more probable than not that the

new herniation was caused by the accident, and the untimely and ambiguous report of defendant's physician, the trial court properly determined that the insurer's initial refusal to pay was unreasonable. See *Shanafelt*, 217 Mich App at 635. We cannot conclude that the trial court clearly erred by finding that defendant's refusal to timely pay plaintiff's claim was unreasonable or by awarding attorney fees under the no-fault act. *Attard*, 237 Mich App at 316-317.

Nor do we conclude that our Supreme Court's decision in *Moore v Secura Ins*, 482 Mich 507; 759 NW2d 833 (2008), mandates a contrary result. In contrast to the facts of *Moore*, where the plaintiff apparently consulted only one physician whose "records do not reflect whether he attributed plaintiff's inability to work to her accident-related injuries or her preexisting osteoarthritis," *id*. at 513, at least three doctors in the present case clearly opined that plaintiff had sustained a new disk injury as a result of the April 2004 automobile accident. Moreover, unlike the situation presented in *Moore*, where the independent medical evaluation (IME) doctor clearly and unambiguously opined that the "plaintiff had severe osteoarthritic degeneration in both knees that predated the accident, and that the accident had not exacerbated plaintiff's underlying osteoarthritis," *id*., the physician retained by defendant in the case at bar merely stated that the MRI results were inconclusive, that plaintiff's condition may have been degenerative in nature, that he could not "attribute the progression of degenerative changes to one single event" such as a car accident, and that his findings were based at least in part on the fact that "[plaintiff] didn't even seek medical attention at the time." This simply is not the type of case in which the insurance company was faced with a "tie" between its own doctors and the plaintiff's doctors. See *id*. at 522. The weight of the medical evidence in this case suggested that plaintiff's new disk herniation had been caused by the automobile accident. As our Supreme Court noted in *Moore*, "an insurer acts at its own risk in terminating benefits in the face of conflicting medical reports." *Id*.

Defendant next argues that, even if attorney fees were warranted, the trial court abused its discretion by granting over $95,000 in attorney fees. We disagree. A trial court's determination of the reasonableness of an attorney fee award is reviewed for an abuse of discretion. *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). Six factors to be considered when assessing the reasonableness of an attorney fee are:

> "'(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.'" [*Id*. (citations omitted)].

"[T]he trial court is not limited to these factors and need not detail its finding with regard to each specific factor." *Bloemsma v Auto Club*, 190 Mich App 686, 689; 476 NW2d 487 (1991). A contingency fee agreement may be considered as one factor in determining the reasonableness of a fee, but it is not by itself determinative. *Hartman v Associated Truck Lines*, 178 Mich App 426, 430-431; 444 NW2d 159 (1989); *In re Estate of L'Esperance*, 131 Mich App 496, 502; 346 NW2d 578 (1984).

Under the six *Wood* factors, it is clear that plaintiff's attorney was of high professional standing and experience and that he expended a great deal of skill, time, and labor on this case. Defendant argues that the attorney fees granted in this case were disproportionately high because the fees actually awarded greatly exceeded the recovery amount of approximately $20,000. But

as plaintiff points out, that $20,000 amount does not include the cost of a future back operation, which was also awarded to plaintiff, and which plaintiff claims could exceed $50,000. Defendant also makes much of the fact that there was an original contingency fee agreement between plaintiff and his counsel. But as noted above, the existence of a contingency fee agreement is not itself dispositive when calculating reasonable attorney fees under the no-fault act. *Estate of L'Esperance*, 131 Mich App at 502.

Because there was no dispute as to the number of hours plaintiff's attorney spent on this case, or that those hours were necessary, the only issue remaining was the hourly rate charged. Defendant has provided no authority or argument as to why $350 an hour for an experienced and skilled attorney is so high as to be an abuse of discretion. See *University Rehabilitation Alliance, Inc v Farm Bureau Gen Ins Co of Michigan*, 279 Mich App 691, 702; 760 NW2d 574 (2008). Given the large number of hours worked on this case over several years and the experience and standing of plaintiff's attorney, we simply cannot say that the amount of attorney fees ultimately awarded for plaintiff in this case constituted an abuse of discretion. *Wood*, 413 Mich at 588.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald S. Owens