STATE OF MICHIGAN

COURT OF APPEALS

JAMES GREGORY, Plaintiff/Counter Defendant-Appellee/Cross Appellant,	UNPUBLISHED May 30, 2013
v	No. 309616 Ingham Circuit Court
HOME-OWNERS INSURANCE COMPANY, Defendant/Counter Plaintiff-Appellant/Cross Appellee.	LC No. 09-000558-NF

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendant appeals, and plaintiff cross-appeals, as of right an order awarding plaintiff work-loss benefits and attorney fees pursuant to the no-fault act, MCL 500.3101 *et seq*. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

On June 12, 2007, plaintiff was involved in a motor vehicle accident which resulted in a spinal injury. He had not been able to work since the accident. At the time of the accident, plaintiff was an employee of Commnorth, Inc., a subchapter S corporation doing business as JML Electronics. Plaintiff was also the sole shareholder, president, and primary employee of Commnorth. As an employee of Commnorth, plaintiff earned a base salary of at least $29,237 per year, for which he received a W-2 statement. As sole shareholder of Commnorth, plaintiff received about $63,326 per year as profit from its operation, which he properly reported for tax purposes.

Following his accident, plaintiff sought personal insurance protection (PIP) benefits pursuant to his no-fault automobile insurance policy issued by defendant. See MCL 500.3105(1). In particular, plaintiff sought work-loss benefits pursuant to MCL 500.3107(1)(b) and submitted the appropriate documentation in support of his claim. Defendant determined that plaintiff was entitled to monthly work-loss benefits in the amount of $4,534.83, and paid such amount until August 2008. At that time, defendant determined that it had erroneously overpaid plaintiff's work-loss benefits, asserting that plaintiff was only entitled to the earnings he would have received from Commnorth as an employee, not as a shareholder. Accordingly, by letter dated August 7, 2008, defendant suspended "all wage loss payments until we have recouped the $32,684.16 which has been overpaid." On March 19, 2009, however, defendant reinstated

plaintiff's work-loss benefits and paid plaintiff his previously withheld "employee" wages. Plaintiff subsequently retained counsel and, on April 24, 2009, filed this legal action seeking the recovery of his overdue work-loss benefits, interest, and attorney fees.

Defendant responded to plaintiff's complaint and filed a counterclaim seeking a declaratory judgment that plaintiff had been paid all work-loss benefits to which he was entitled as set forth on the W-2 forms plaintiff received from his employer. Defendant denied that plaintiff was entitled to recover work-loss benefits as a sole shareholder of Commnorth and sought to recover overpaid work-loss benefits.

Subsequently, the parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that the holding in *Ross v Auto Club Group*, 481 Mich 1; 748 NW2d 552 (2008), "that the losses of a subchapter S corporation could not be considered in the calculation of work loss benefits, but only the W-2 income received by the claimant," applied with equal force to this case where the subchapter S corporation was profitable at the time of plaintiff's injury. See *id*. at 8. Accordingly, defendant argued that plaintiff's claim for work-loss benefits should be summarily dismissed.

On the day defendant filed its motion for summary disposition, the Commissioner of the Office of Financial and Insurance Regulation filed an amicus curiae brief, arguing that the holding in *Ross* was inapplicable to this case.[1] The Commissioner asserted that plaintiff was entitled to work-loss benefits which included "not only his W-2 wages, but also any additional lost income reasonably attributable to the work that he would have performed at his subchapter S corporation had he not been injured." The Commissioner noted that the parties had performed an economic analysis which determined that plaintiff was entitled to work-loss benefits in the amount of $3,748 per 30-day period, and argued that plaintiff should be awarded that amount. Plaintiff's motion for summary disposition presented similar arguments.

On February 4, 2011, the trial court entered its opinion and order granting plaintiff's motion for summary disposition, and denying defendant's motion for summary disposition. The trial court held that MCL 500.3107(1)(b) provides for work-loss benefits which include "loss of income from work." The term "income" is not limited only to a person's wages as reflected in a W-2 form, but "includes other sources of income from work as well." The court rejected defendant's interpretation of *Ross* which framed the issue as: "whether someone can recover work-loss benefits under MCL 500.3107(1)(b) if he or she is the sole employee and shareholder of a subchapter S corporation that lost more money than it paid in wages." *Ross*, 481 Mich at 7. That is, in *Ross*, the corporation was operating at a loss. *Id*. at 5. In this case, the trial court noted, the corporation was operating at a profit and plaintiff had been receiving, and paying tax, on flow-through income. Thus, the trial court held, plaintiff was entitled to work-loss benefits in the amount of $3,748 per 30-day period, minus any set-offs, as the parties had calculated.

Plaintiff then filed a motion for penalty interest pursuant to MCL 500.3142(3) and attorney fees under MCL 500.3148(1). Plaintiff argued that defendant wrongfully discontinued

[1] The Commissioner was granted leave to file his amicus curiae brief by stipulation and order.

paying his work-loss benefits from August 7, 2008 through March 20, 2009, in a purported effort to recoup its overpayment, which entitled plaintiff to penalty interest with regard to those overdue benefits. Further, plaintiff argued, defendant's refusal to pay him work-loss benefits which included his lost income from Commnorth was not reasonable. Although defendant purportedly relied on the holding in *Ross*, the facts in *Ross* were clearly distinguishable from the facts in this case and numerous cases supported plaintiff's position. Accordingly, plaintiff argued, he was entitled to penalty interest and attorney fees as provided by the no-fault act.

Defendant responded to plaintiff's motion, denying that plaintiff was entitled to attorney fees because its denial was reasonable and grounded on a legitimate question of law. Defendant conceded that plaintiff was entitled to penalty interest, but argued that the award should be limited to the time period in which benefits were suspended.

On June 22, 2011, the trial court entered an order awarding plaintiff penalty interest in the amount of $812 for the period of time in which defendant suspended payment of plaintiff's work-loss benefits—August 2008 through March 2009, as well as attorney fees in an amount to be decided upon receipt of proofs.

Subsequently, plaintiff filed a motion requesting attorney fees in the amount of $36,610, arguing that all of plaintiff's work-loss benefits were overdue as set forth in MCL 500.3148(1). Plaintiff argued that his attorney expended efforts to collect penalty interest arising from defendant's wrongful suspension of work-loss benefits and that apportionment of attorney fees was not permissible when an insurer unreasonably refused to pay benefits. See, e.g., *Tinnin v Farmers Ins Exch*, 287 Mich App 511; 791 NW2d 747 (2010); *Cole v Detroit Auto Inter-Ins Exch*, 137 Mich App 603; 357 NW2d 898 (1984). Pursuant to *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), plaintiff argued, his attorney's hourly rate was $350, which was customary in this specialized area of law and consistent with his attorney's reputation and professional standing. Further, 102.6 hours were spent on this matter. Accordingly, plaintiff requested an order for attorney fees in the amount of $36,610.

Defendant opposed plaintiff's request for attorney fees, arguing that defendant stopped withholding work-loss benefits based on plaintiff's W-2 wages and refunded withheld amounts well before plaintiff retained counsel; thus, plaintiff's counsel did not render any services with regard to those work-loss benefits. Further, defendant argued, because its denial to pay plaintiff work-loss benefits that included his alleged income from Commnorth was reasonable and grounded on a legitimate question of law, plaintiff was not entitled to any attorney fees.

On March 30, 2012, after concluding at oral argument that "there was no requirement that attorney fees be apportioned to the penalty interest and then to the subchapter S income/loss dispute," the trial court entered an order granting plaintiff's motion for attorney fees in the amount of $36,610. Thereafter, defendant filed this appeal and plaintiff filed his cross-appeal.

Defendant first argues that the profits of a subchapter S corporation may not be considered in calculating work-loss benefits under the no-fault act; thus, plaintiff's motion for summary disposition should have been denied on this issue. On cross-appeal, plaintiff responds that such pass-through income constitutes "income from work" under MCL 500.3107(1)(b); thus, the trial court properly granted plaintiff's motion for summary disposition on this issue.

After de novo review of the trial court's summary disposition ruling that involved an issue of statutory interpretation, we agree with plaintiff. See *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004); *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003).

In *Brown v Home-Owners Ins Co*, 298 Mich App 678; 828 NW2d 400 (2012), this Court recently considered this precise issue whether "the profit generated by a subchapter S corporation is included in the work-loss calculation for benefits payable under MCL 500.3107(1)(b)." *Id*. at 684. In that factually similar case, the injured plaintiff was an employee and sole shareholder of a subchapter S corporation. The plaintiff sought work-loss benefits on the basis of his W-2 wages, as well as "on the basis of the profit the subchapter S corporation would have generated during the period of disability," i.e., the "flow-through earnings." *Id*. at 681-682. The defendant insurer paid the plaintiff work-loss benefits based on his W-2 wages only. *Id*. at 681. Plaintiff filed a lawsuit and, upon plaintiff's motion for summary disposition, the trial court ruled in plaintiff's favor. The defendant appealed, and this Court held that MCL 500.3107(1)(b) provides for the payment of benefits for "[w]ork-loss consisting of the loss of income from work" and the term "income" included "gains or benefits that arise from other sources as well as a result of one's 'work.'" *Id*. at 685-686 (citation omitted). This Court rejected the defendant's argument that the holding in *Ross*, 481 Mich at 1, precluded consideration of distributions from a subchapter S corporation, noting that in *Ross* the subchapter S corporation at issue "lost more money than it paid in wages." *Brown*, 298 Mich App at 688, quoting *Ross*, 481 Mich at 7. Accordingly, this Court concluded that the holding in *Ross* was "limited to those situations in which the claimant's subchapter S corporation is operating at a loss." *Id*. at 689. The subchapter S corporation at issue in *Brown*, however, was operating at a profit and the plaintiff had been receiving and paying tax on flow-through income from the corporation. *Id*. Thus, in *Brown*, the plaintiff was entitled to a work-loss calculation of benefits that included the profit generated by the subchapter S corporation. *Id*.

In this case, Commnorth was also operating at a profit and plaintiff had been receiving and paying tax on flow-through income from the corporation. Accordingly, for the reasons set forth in *Brown*, plaintiff was entitled to work-loss benefits that included the profit generated by Commnorth. We reject defendant's arguments to the contrary, including its interpretation of the holding in *Ross*.[2] Therefore, the trial court properly granted plaintiff's motion for summary disposition after concluding that plaintiff was entitled to work-loss benefits based on his W-2 wages, as well as the income he received from Commnorth as its sole shareholder.

Next, defendant argues that plaintiff was not entitled to attorney fees under MCL 500.3148(1) because the attorney fees awarded were based on defendant's actions that occurred and ceased before plaintiff retained counsel and before this litigation was commenced. That is, plaintiff was awarded attorney fees because defendant failed, for a short period of time, to pay him work-loss benefits based on his W-2 wages before plaintiff retained counsel and filed this

[2] We note that our Supreme Court has denied the defendant's application for leave to appeal in the *Brown* matter. *Brown v Home-Owners Ins Co*, ___ Mich ___; 829 NW2d 198 (2013).

action. Plaintiff was not, however, awarded attorney fees because of defendant's failure to pay plaintiff work-loss benefits based on income he might have received from Commnorth. This issue was reasonably in dispute.

On cross-appeal, plaintiff argues that the trial court erred in concluding that the issue whether plaintiff was entitled to work-loss benefits based on his income from Commnorth involved a legitimate question of statutory interpretation. Defendant's refusal to pay such benefits was unreasonable and plaintiff was entitled to attorney fees with regard to the recovery of those overdue benefits. Further, plaintiff argues, the trial court properly awarded him non-apportioned attorney fees with regard to his overdue benefits. We agree with defendant.

An award of attorney fees under MCL 500.3148(1) presents a mixed question of law and fact. *Tinnin*, 287 Mich App at 514. "What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Id.*, quoting *Ross*, 481 Mich at 7. Questions of law are reviewed de novo and findings of fact are reviewed for clear error. *Id.* We also review de novo issues of statutory interpretation. *Gladych*, 468 Mich at 597.

First, we reject plaintiff's argument on cross-appeal that the issue of work-loss benefits did not involve a legitimate question of statutory interpretation. The *Brown* Court also considered this issue and concluded: "Given the lack of definition of the phrase 'loss of income from work,' and in particular the term 'income,' in MCL 500.3107(1)(b), a legitimate question of statutory interpretation existed, particularly in light of the *Ross* Court's calculation of work-loss benefits for an individual who was the sole employee and sole shareholder of a subchapter corporation." *Brown*, 298 Mich App at 691-692. Accordingly, the *Brown* Court held that the "defendant did not act unreasonably by paying plaintiff work-loss benefits based upon his W-2 income." *Id.* at 692. We agree with this reasoning and therefore reject plaintiff's argument to the contrary. The trial court's holding that a legitimate issue of statutory interpretation existed is affirmed. Further, because defendant acted reasonably in disputing the payment of work-loss benefits that included plaintiff's income from Commnorth, we affirm the trial court's conclusion that plaintiff was not entitled to attorney fees related to that disputed issue. See *id.*

Second, the trial court held that plaintiff was entitled to attorney fees as a consequence of defendant withholding all work-loss benefits during its efforts to recoup purported overpayments from August 2008 through March 2009. However, at the time that defendant withheld, reinstated, and repaid those work-loss benefits, plaintiff did not have an attorney and this matter was not in litigation. As plaintiff's counsel admitted during oral argument on his motion for attorney fees, the trial court's determination of unreasonable "conduct was as to what had occurred prior to our law firm's involvement, the self-help part of this, where [defendant] had reversed themselves and corrected that prior to our involvement." Nevertheless, plaintiff's counsel argued that "the benefits that [defendant] withheld prior to our involvement were overdue. And we are entitled to advise and represent the client and to be paid an attorney fee for advising and representing them." We do not agree.

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.

Here, other than plaintiff's claim that his income from Commnorth should have been included in his work-loss benefit calculation, plaintiff did not have any "benefits which ***are*** overdue" at the time he retained counsel and filed this action. See MCL 500.3148(1) (Emphasis supplied). The statute uses the present tense verb "are," not the past tense verb "were," with regard to the "overdue" status of PIP benefits. Plain statutory language must be enforced as written. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). Although defendant had wrongfully withheld work-loss benefits based on plaintiff's W-2 wages for a short period of time, those withheld benefits were refunded well before plaintiff retained counsel and filed this action. Thereafter, defendant paid plaintiff work-loss benefits based on his W-2 forms and only disputed the payment of work-loss benefits which included consideration of plaintiff's income from Commnorth. And although plaintiff's counsel assisted plaintiff in obtaining an award of penalty interest with regard to the improperly withheld work-loss benefits, the payment of penalty interest is not a PIP benefit; thus, penalty interest cannot be considered an overdue benefit for purposes of MCL 500.3148(1).

The dissenting opinion, however, concludes that the payment of penalty interest under MCL 500.3148(1) "is part of the PIP benefits and, accordingly, that a plaintiff is entitled to attorney fees when an insurer unreasonably delays paying the penalty interest." First, this conclusion fails to consider the plain language of MCL 500.3107 which sets forth the four general categories of PIP benefits as survivor's loss, allowable expenses, work loss, and replacement services. See also *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). The dissent has failed to cite any legal authority which provides that the payment of penalty interest is a PIP benefit which can be considered "overdue" within the contemplation of MCL 500.3148(1), and we could find no such authority.

Second, MCL 500.3148(1) provides that "[a]n 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 dissent agrees that plaintiff was not entitled to an award of attorney fees with regard to the wage-loss benefits that were reasonably in dispute, but asserts that plaintiff is entitled to an award of attorney fees with regard to the recovery of the penalty interest that defendant failed to pay prior to plaintiff securing counsel and prior to this action being filed. However, according to the plain language of MCL 500.3148(1), for that assertion to be accurate, the payment of penalty interest would have to be considered a PIP benefit which was overdue. Again, the dissent has failed to cite to any legal authority in support of the assertion that the payment of penalty interest is a PIP benefit.

Third, MCL 500.3148(1) also provides that "[t]he 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

supplied). The work-loss benefits that were wrongfully withheld by defendant before plaintiff retained counsel and filed this action were not "*recovered*" as a consequence of this litigation. Those work-loss benefits had been reinstated and paid well before this action was filed and was not a disputed issue in this case; thus, no attorney fees can be attributable to *recovering* those work-loss benefits. The dissenting opinion wholly ignores the first part of the sentence at issue, particularly the words "in addition to the benefits recovered," by isolating and focusing instead on the words "proper payment."

In a similar case, *Moore v Secura Ins*, 276 Mich App 195; 741 NW2d 38 (2007), the plaintiff sought work-loss benefits in the amount of $96,000 and over $11,000 in penalty interest. *Id*. at 207. The jury awarded the plaintiff $42,755 for unpaid work-loss benefits and $98.71 in penalty interest for the overdue work-loss benefits. *Id*. at 197-198. The plaintiff then sought attorney fees pursuant to MCL 500.3148 in the amount of $79,415, which the trial court awarded. *Id*. at 198. On appeal, the defendant argued that the maximum attorney fees to which the plaintiff could be entitled was the portion of attorney fees directly attributable to securing the $98.71 penalty interest award related to the overdue benefits. *Id*. at 210. A majority of this Court disagreed with the defendant and affirmed the attorney fee award.

However, the dissenting opinion in *Moore* noted that the jury's penalty interest award was consistent with a finding that only one week of work-loss benefits were considered "overdue;" that is $822.52 was overdue. *Id*. at 209 (Wilder, P.J., dissenting). But, those overdue benefits were actually paid to plaintiff well *before* the litigation commenced. *Id*. at 210. Citing *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003), the dissent opined that, contrary to the majority opinion, when only some first-party no-fault benefits were overdue, "an attorney fee award may only include the fee amount attributable to recovering the overdue benefits." *Moore*, 276 Mich App at 214. Accordingly, the dissenting opinion concluded that "no part of the $79,415 in attorney fees and costs in this case was attributable to collecting the $822.52 overdue benefit, because that overdue benefit was paid long before litigation." *Id*. And, the dissent noted, "at the very least, plaintiff is required to identify which portion of the requested attorney fees was attributable to the recovery of either an overdue benefit or the $98.71 in interest on an overdue benefit." *Id*.

Our Supreme Court granted leave to appeal in the *Moore* case to consider, in part, whether "the benefits at issue were 'overdue,'" and "assuming defendant unreasonably refused to pay [the claim], but also assuming that only a portion of the benefits sought and awarded were 'overdue,' whether MCL 500.3148(1) permits recovery of attorney fees for all benefits sought and recovered." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). After review of the plain language of MCL 500.3142 and MCL 500.3148, the Court held that "attorney fees are payable only on overdue benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying." *Moore*, 482 Mich at 517, 523, quoting *Proudfoot*, 469 Mich at 485. The Court also agreed with the dissenting opinion in *Moore*, concluding:

> In this case, the jury found that $822.52, or only one week of plaintiff's unpaid work loss benefits, were overdue. Generally, plaintiff's attorney would be entitled to attorney fees incurred to collect those overdue benefits. Here, however, before plaintiff's suit went to trial, defendant already had paid plaintiff $822.52 for one week of work loss benefits and all other payments that defendant

> owed as a result of the computer glitch. *Because plaintiff did not attribute any of the $79,415 that the trial court awarded her in attorney fees and costs to collecting $822.52 in overdue work loss benefits, plaintiff is not entitled to attorney fees.* [*Id*. at 523-524 (Emphasis supplied)].

Accordingly, just as Judge Wilder's dissenting opinion had concluded, our Supreme Court concluded that the plaintiff was not entitled to attorney fees with regard to the overdue work-loss benefits that had been paid by the defendant to the plaintiff *before* the litigation. Further, the Supreme Court rejected the plaintiff's claim that she was entitled to recover attorney fees with regard to the penalty interest that was awarded by the jury. The Court acknowledged that the plaintiff was awarded penalty interest by the jury, but concluded that the plaintiff was not entitled to any attorney fees under MCL 500.3148(1) with regard to that award. *Id*. at 525.

Similarly, in this case, plaintiff had already recovered the overdue work-loss benefits to which he was entitled well before he secured counsel and well before this litigation was commenced. Accordingly, no part of the $36,610 awarded for attorney fees can be attributable to collecting these overdue work-loss benefits. Therefore, we reverse the trial court's holding that plaintiff was entitled to attorney fees with regard to the award of penalty interest.

In light of our conclusion that plaintiff did not secure any "overdue benefits compensable under MCL 500.3148(1)" through the assistance of counsel, *Tinnin*, 287 Mich App at 521, we need not consider plaintiff's argument on appeal that attorney fees cannot be apportioned under MCL 500.3148(1). That is, in this case, plaintiff secured payment of the wrongfully withheld work-loss benefits without the assistance of counsel before this action was filed and defendant did not act unreasonably by failing to pay plaintiff work-loss benefits based on his income from Commnorth. Accordingly, plaintiff was not entitled to an award of attorney fees under MCL 500.3148 and the issue of apportionment of attorney fees is moot. Therefore, we reverse the trial court orders, dated June 22, 2011 and March 30, 2012, holding that plaintiff was entitled to attorney fees pursuant to MCL 500.3148(1).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Christopher M. Murray