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JAMES GREGORY, Plaintiff/Counter Defendant-Appellee/Cross-Appellant,	UNPUBLISHED May 30, 2013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.

M. J. KELLY, P.J. (*concurring in part and dissenting in part*).

I concur in the result reached by the majority that the trial court did not err in granting summary disposition in plaintiff's favor on the issue of his work loss benefits. I further concur that the decision in *Brown v Home-Owners Ins Co*, 298 Mich App 678; 828 NW2d 400 (2012), which was released while this case was on appeal, is dispositive and that, finally, because the wage loss benefits were, at the time, reasonably in dispute, plaintiff was not entitled to an award of attorney fees on that basis. However, I respectfully dissent from the majority's determination that plaintiff is not entitled to an unapportioned attorney fee under MCL 500.3148(1) for the recovery of statutory penalty interest which defendant had failed to pay prior to plaintiff's lawyer's involvement in the case.

As the majority notes, defendant voluntarily paid the balance of the wage loss that was in dispute before plaintiff obtained representation. But defendant did not pay the penalty interest required under MCL 500.3142. Plaintiff requested penalty interest in his complaint and obtained it through his lawyer's efforts. And because the failure to pay the penalty interest was not reasonably in dispute (indeed, it was conceded), I believe an award of attorney fees was appropriate.

The majority, while acknowledging that plaintiff's lawyer advised and represented plaintiff concerning the penalty interest, maintains—without a citation to authority—that MCL 500.3148(1) does not apply because "the payment of penalty interest is not a PIP benefit." I conclude that mandatory penalty interest is part of the PIP benefit and, accordingly, that a plaintiff is entitled to attorney fees when an insurer unreasonably delays paying the penalty interest.

The no-fault act is a remedial statute that is to be liberally construed in favor of the persons who are intended to benefit from it. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997). In order to ensure the prompt payment of claims, the Legislature provided a penalty for those insurers who encourage litigation by unreasonably delaying payments:

> 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. [MCL 500.3148(1); see also *Ross v Auto Club Group*, 481 Mich 1, 11; 748 NW2d 552 (2008) (stating that the purpose behind the "attorney-fee penalty provision is to ensure prompt payment to the insured.").]

Under a plain reading of this statute, a plaintiff's lawyer is entitled to have the insurer pay his or her reasonable fee, as "a *charge* against the insurer", if: (1) the lawyer advises and represents the claimant in an action for insurance benefits that are overdue, and (2) the court finds that "the insurer unreasonably refused to pay the claim or "unreasonably delayed making proper payment." MCL 500.3148(1) (emphasis added). If an insurer fails to timely pay benefits, the insurer also becomes obligated to pay the claimant "simple interest at the rate of 12% per annum" on the benefit. MCL 500.3142(3); see also *Fortier v Aetna Cas and Sur Co*, 131 Mich App 784, 793; 346 NW2d 874 (1984) (stating that an insurer is liable to pay the interest for untimely payment without regard to the reason for the delay). That is, once the payment of a benefit becomes overdue, the claimant obtains the statutory right to additional compensation in the form of interest.

Here, the majority errs by not taking into consideration the last sentence in § 3148(1). There the Legislature provided that an insurer is obligated to pay attorney fees when the insurer is found to have unreasonably delayed making "proper payment." In context, the adjective proper must be understood to refer to the correct payment—that is, the full payment required under the no-fault act. Here, defendant originally refused to pay the mandatory interest. By failing to make the payment required under MCL 500.3142(2), defendant "unreasonably delayed in making proper payment", because "proper payment" necessarily included the payment of interest. For this reason, I would hold that defendant's failure to pay the mandatory interest along with the payment of the PIP benefits triggered MCL 500.3148(1).

Finally, I would hold that the interest award need not have been apportioned between the time allocated to the collection of the interest and the time allocated to other aspects of the case that may have been reasonably in dispute. *Tinnin v Farmers Ins Exchange*, 287 Mich App 511, 521-522; 791 NW2d 747 (2012); *Cole v Detroit Auto Inter-Insurance Exchange*, 137 Mich App 603, 613-615; 357 NW2d 898 (1984).

For these reasons, I would affirm the trial court's award of attorney fees.

/s/ Michael J. Kelly