

no-fault newsline

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

That's Absurd! Section 3148 Attorney Fees: Rebutting the Presumption that a Refusal to Pay or Delay Paying Benefits was Unreasonable

By: Julie A. Brainer

October 10, 2016

SECRET WARDLE NOTES

When determining whether post-judgment attorney fees are allowed in a no-fault first-party action, the trial court must determine whether an insurer either unreasonably refused to pay a claim or unreasonably delayed in making payments. The inquiry is a combination of law and fact. Whether a denial was reasonable is a question of law. However, the refusal to pay a particular claim is a question of fact.

It is commonplace and statutorily allowed for an insurer to retain medical specialists to conduct an independent evaluation of a claimant by a specialist of the insurer's choosing. Following receipt of the examiner's report the claim is reevaluated and a decision to either pay or suspend payments may be made. The Court of Appeals in *Quick* held that reliance upon such a report as a basis to deny benefits is substantive evidence to rebut the presumption that a denial was unreasonable.

* * * *

In *Quick v Farm Bureau Gen Ins Co of Mich*, an unpublished opinion per curiam of the Court of Appeals issued on September 22, 2016 (Docket No. 328006), the Court discussed the mixed fact-law inquiry that is required when interpreting and applying imposition of attorney fees under Section 3148 of the No-Fault Act. Although it is an unpublished opinion and therefore not binding authority, the Court in *Quick* vacated the trial court's decision to award post-judgment attorney fees finding that there was a reasonable basis for the carrier to deny the claim based upon independent medical examination reports.

In *Quick*, the injured plaintiff was evaluated by emergency personnel following an August 2013 motor vehicle accident and later transported to an emergency room for complaints of neck and back pain. The hospital records revealed notations that the plaintiff exhibited a "full range of motion of arms and legs with no discomfort" and that corresponding radiological films were negative. The plaintiff was discharged from the emergency room with a diagnosis of "[c]ervical and lumbar strain." He returned to a second hospital the same day he left the first emergency room. After an evaluation, he was diagnosed with a concussion, given pain medication and discharged.

The next day, the plaintiff began treating with Dr. Frederick Lewerenz, a physician whom defense counsel argued was known to provide treatment to persons involved in motor vehicle accidents. This post-accident physician immediately referred the plaintiff for subsequent medical care including x-rays, the results of which were negative. Dr. Lewerenz totally disabled plaintiff from work and prescribed eight-hour a day provider care assistance.

In November 2013, Dr. Lewerenz disagreed with a reviewing radiologist's opinion that plaintiff's MRIs were negative and continued to treat the plaintiff. The inconsistent reports concerning the plaintiff's medical condition led Farm Bureau to request an independent examination of the plaintiff with Dr. Oney-Marlow. In addition to an examination, Dr. Oney-Marlow reviewed the plaintiff's medical records as well as his loss notice, application for benefits, and the police report. Based upon Dr. Oney-Marlow's initial and addendum reports Farm Bureau suspended payment of the plaintiff's no-fault benefits. He ultimately filed suit, which resulted in a jury award in favor of the plaintiff for overdue no-fault benefits and assessed interest.

At the post-judgment hearing regarding the plaintiff's request for attorney fees, the trial judge disagreed that Dr. Oney-Marlow's report created a bona fide factual dispute stating it was "absurd" to suggest an IME was a sufficient basis to create a bona fide factual dispute. The judge concluded that Dr. Oney-Marlow's testimony was "unbelievable," that she was "horrible," "offensive," and "bought and paid for." The trial court awarded post-judgment attorney fees to the plaintiff.

On appeal, the Court of Appeals vacated the trial court's decision. The Court concluded that an independent evaluation by a medical specialist with requisite training and expertise who conducts a physical examination of a claimant, reviews relevant medical and legal records concerning the insured, and thereafter renders an opinion based upon objective findings - consistent with at least some other medical opinions relating to the insured - created a bona fide factual dispute. Thus, the Court held that there was a reasonable basis to deny the claim. Importantly, the Court further reiterated the standing law that an insurer need not reconcile conflicting medical opinions but instead must evaluate all of the evidence presented and make a reasonable decision in regard to the benefits sought.

**PLEASE CLICK HERE TO SIGN UP FOR SECREST WARDLE
NEWSLETTERS PERTINENT TO OTHER AREAS OF THE LAW**



**We welcome your questions -
Please contact Julie A. Brainer at
jbrainer@secrestwardle.com
or 248-539-2832**





Troy 248-851-9500
Lansing 517-886-1224
Grand Rapids 616-285-0143
www.secretwardle.com

CONTRIBUTORS

Motor Vehicle Litigation Practice Group Chairs

Mark C. Vanneste

Alison M. Quinn

Editors

Linda Willemsen

Sandie Vertel

This newsletter is for the purpose of providing information and does not constitute legal advice and should not be construed as such. This newsletter or any portion of the newsletter is not to be distributed or copied without the express written consent of Secret Wardle.

Copyright © 2016 Secret Wardle. All rights reserved.