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Jury Award Does Not Prove That Insurer's Refusal To Pay Was Reasonable. Also, an Award Of Attorney Fees Cannot Be Added To The Verdict For Purposes Of Determining Whether Case Evaluation Sanctions Apply

By Brandy Kuretich

In a recently published case, *Ivezaj v Auto Club Ins. Assoc.*, the Court of Appeals found that a verdict in which the jury awarded the plaintiff substantially less than the amount being demanded does not prove that the insurer's refusal to pay was reasonable for purposes of determining whether plaintiff is entitled to attorney fees pursuant to MCL § 500.3148. In *Ivezaj*, the plaintiff was injured in a motor vehicle accident that occurred on July 19, 2001. *Ivezaj* filed a lawsuit against her no-fault insurer, Auto Club Ins. Assoc. ("Auto Club"), seeking payment of additional personal protection insurance benefits. The case evaluated for \$150,000. This award was accepted by Auto Club and rejected by plaintiff. As such, for Plaintiff to be the "prevailing" party, she had to receive a jury verdict of at least \$165,000 to avoid case evaluation sanctions.

The jury found that *Ivezaj* was injured and was owed outstanding benefits totaling \$108,000 plus \$13,000 interest for a total award of \$121,000. The trial judge awarded plaintiff \$40,333.33 in attorney fees and added that amount to the \$121,000 jury award to come to the conclusion that plaintiff met her threshold requirement and denied Auto Club case evaluation sanctions. Auto Club appealed the award of attorney fees and the denial of case evaluation sanctions.

MCL § 500.3148 provides for attorney fees if the court finds that the insurer unreasonably refused to pay or unreasonably delayed in making proper payment of the benefits being claimed. Auto Club argued that, because plaintiff only recovered a small portion of the benefits she claimed were owed, the Verdict amount proved that its refusal to pay plaintiff's benefits was reasonable and, therefore, plaintiff was not entitled to attorney fees pursuant to MCL § 500.3148. The Court of Appeals disagreed.

According to *Attard v Citizens Ins Co of America*, 237 Mich App 311; 602 NW2d 633 (1999), a refusal or delay in making no-fault payments creates a rebuttable presumption that the refusal or delay

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There is a presumption that any delay or refusal to pay no fault benefits is unreasonable. The burden of establishing that the initial delay or refusal to pay was, in fact, reasonable belongs to the Insurer. Therefore, both insurers and its attorneys must be able to identify and establish a reasonable basis for initially delaying or refusing to pay benefits or run the risk of incurring statutory attorney fees pursuant to MCL 500.3148(1). Insurers can not rely on a favorable result as evidence that the initial delay or refusal to pay was reasonable.

This case makes it clear that statutory no fault attorney fees awarded pursuant to MCL 500.3148(1) cannot be added to the verdict for purposes of determining whether the party is liable for case evaluation sanctions pursuant to MCR 2.403(O).

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is unreasonable. The burden of rebutting the presumption shifts to the insurer and the insurer must justify the initial refusal or delay. A “legitimate question of statutory construction, constitutional law, or factual uncertainty” is not unreasonable. Attard, supra at 317.

However, the Court of Appeals, relying on *McCarthy v Auto Club Ins Ass’n*, 208 Mich App 97, 105; 527 NW2d 524 (1994), stated that the appropriate time frame for determining whether the refusal or delay was unreasonable is at the time of the insurer’s initial refusal to pay and not whether the insurer is ultimately found responsible for the expense. The insurer is required to establish that it had properly investigated the need for the expense before refusing to pay. According to McCarthy, the verdict should indicate whether the jury thought the insurer had a reasonable basis for refusing to pay. In McCarthy, attorney fees were not awarded because the insurer presented evidence that, at the time the expense was denied, it had received information from the plaintiff’s treating doctor indicating that the surgery was unnecessary and, thus, not compensable.

In the Ivezaj case, the Court of Appeals noted that Auto Club was only relying on the jury verdict. It had no other evidence supporting its decision that its refusal or delay in paying the expenses was reasonable at the time it made the decision. The Court of Appeals noted that Auto Club could not have known of the jury’s verdict at the time it made the decision to delay or refuse payment. Therefore, Auto Club cannot use the jury’s verdict as evidence to support its position that its initial refusal to pay plaintiff’s expenses was reasonable.

With regard to case evaluation sanctions, the Court of Appeals reversed the trial judge’s denial of Auto Club’s request for case evaluation sanctions. Pursuant to MCR 2.403(O), a party who rejects a case evaluation award is required to pay the opposing party’s costs unless the verdict is more favorable to the rejecting party than the case evaluation award. Assessable costs and interest are added to the verdict. If that adjusted amount is more than 10% above the case evaluation award, it is more favorable to the plaintiff. If that adjusted amount is more than 10% below the case evaluation award, it is more favorable to the defendant.

The Court of Appeals found that the trial court in Ivezaj erred when it added the statutory no-fault attorneys as an assessable cost and holding that the plaintiff was not obligated to pay case evaluation sanctions. “As our Supreme Court noted, the term ‘costs’ does not encompass attorney fees unless a statute or court rule defines this term as such, and MCR 2.403(O) does not define ‘assessable costs.’ In the absence of authority to the contrary, we conclude that the ‘assessable costs’ by which a verdict may be adjusted do not include MCL 500.3148(1) attorney fees.”

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