

no-fault newsline

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

7.11.07

THE MICHIGAN COURT OF APPEALS UPHELD AN AWARD OF ATTORNEY FEES SIGNIFICANTLY DISPROPORTIONATE TO THE AMOUNT OF BENEFITS WHICH WERE OVERDUE.

By Michael Jolet

On July 3, 2007, The Michigan Court of Appeals released the published opinion entitled *Hattie Moore and James Moore v Secura Insurance*, __ Mich App __; __ NW 2d __ (2007). In this opinion, the Court reinforced the notion that trial courts are to look at the insurer's initial refusal to pay First Party Benefits when awarding attorney fees pursuant to MCL 500.3148(1) as opposed to whether or not the insurer is ultimately held responsible to pay such benefits. This inquiry "is not whether the insurer ultimately is held responsible for a given expense, but whether its initial refusal to pay expenses was unreasonable." It is therefore possible for an insurer to unreasonably refuse to pay benefits even if the insurer is later deemed not to be liable for them. Additionally, the Court of Appeals ruled that the trial court properly found the denial of benefits unreasonable where the Defendant made no inquiry beyond the opinion of its own IME doctor. Finally, the court upheld an award of \$79,415 in attorney fees despite the jury's award of only \$98.71 in penalty interests. The Court reasoned that since the jury found penalty interest, this was indeed an action for overdue benefits.

Plaintiff was injured in a motor vehicle accident on September 27, 2000 when she was sideswiped by a passing pickup truck. Plaintiff filed an application for first-party benefits and sought uninsured motorist benefits pursuant to her policy of insurance. Defendant paid Plaintiff first-party benefits including wage loss benefits for approximately a year. Secura appointed a nurse manager to help determine Plaintiff's ability to work. Following the failure of Plaintiff's treating physicians to respond to the nurse's request, Secura sent Plaintiff to an independent medical examination. The result of the examination showed that Plaintiff's condition was preexisting and not related to the motor vehicle accident. Secura denied benefits claiming that there was no reasonable proof that Plaintiff's injuries were related to the motor vehicle accident.

SECRET WARDLE NOTES:

The decision to suspend no-fault benefits based solely on the opinion of an independent medical examiner, without an attempt to reconcile the examiner's opinion with plaintiff's treating physician's is not an acceptable practice. If there is no effort to resolve the conflicting opinions, a trial court may award plaintiff attorney fees and costs pursuant to MCL 500.3148 which may significantly exceed the dollar amount of the overdue benefits. Additional reasons for denial of no-fault benefits at the claim level will reduce the likelihood that the trial court will conclude that the defendant unreasonably terminated an insured's no-fault benefits.

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As a result of Defendant's denial, Plaintiff filed suit seeking both First-Party Benefits as well as Uninsured Motorist Benefits. At trial, the jury awarded Plaintiff \$50,000 in uninsured motorist benefits. The jury also awarded Plaintiff's first-party benefits for wage loss totaling \$42,755. In addition to the wage loss award the jury awarded \$98.71 of penalty interest for the wage loss. This meant that the jury found that \$822.52 or one week of wage loss was overdue. The trial court awarded Plaintiff \$79,415 in attorney fees under MCL 500.3148(1). Defendant has appealed the award of attorney fees as well as the amount awarded.

First, the Court of Appeals addressed the issue of the unreasonableness of the denial. The Court concluded that the Plaintiff's benefits were denied without the insurer attempting to reconcile the differences between the Independent Medical Examiner's opinions and the Plaintiff's treating physician's opinions. The court relied upon the case of *Liddell v Detroit Automobile Inter-Ins Exch*, 102 Mich App 636, 650; 302 NW2d 260 (1981). In that case, the Court of Appeals upheld the trial court's award of attorney fees under MCL 500.3148 based on the refusal of the defendant insurer to reconcile the opinion of one doctor finding that the defendant's injuries from an accident no longer precluded him from employment with the contradictory opinions of the plaintiff's treating physicians. *Liddell, supra* at 641.

The Court of Appeals opined that Defendant should have sent the Independent Medical Examiner's report to Plaintiff's physicians so that the difference of opinions could be reconciled.

Finally, the Court addressed the amount of attorney fees awarded. The Court held that despite the fact that the jury found a minimal amount of the benefits were overdue, this was still an action for overdue benefits and under MCL 500.3148, attorney fees are available "for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue." Thus, the first condition for an award of attorney fees is that *the action is for overdue benefits*. The Court reasoned that the mere fact that it is disproportionate to the amount of penalty interest is not relevant to the time and effort expended by plaintiff's attorney, the amount of the jury award on plaintiff's PIP claim or the expenses incurred by plaintiff's attorney in securing that award.

The Court concluded that attorney fees may be awarded for the entire case and not only those benefits which were deemed overdue. This does appear to be inconsistent with *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484-485; 673 NW2d 739 (2003), which limited plaintiff's award of attorney fees to the actual benefits found to be overdue. The court rationalized this inconsistency by focusing on the fact that the remainder of the benefits in *Proudfoot* were found to be "not an incurred expense."

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