



Motor Vehicle - No-Fault Practice Group

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SUPREME COURT STRIKES DOWN REQUIREMENT THAT FIRST PARTY NO-FAULT INSURERS MUST TRY TO RECONCILE CONFLICTING MEDICAL OPINIONS TO AVOID AWARD OF ATTORNEY FEES

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In a recent first-party no-fault decision, *Moore v. Secura*, --- NW2d ---, 2008 WL 5505410 (Mich., Dec. 30, 2008), the Michigan Supreme Court held that, because a jury awarded the plaintiff only \$98 in penalty interest and failed to award any penalty interest on \$42,755 of unpaid work loss benefits, those benefits could not qualify as overdue under MCL 500.3124(2). Therefore, the plaintiff was not entitled to recover the attorney fees awarded by the trial court.

The Supreme Court also held that the defendant insurer was not unreasonable in denying payment of benefits in reliance upon the report of its own Independent Medical Examination (IME) physician; the fact that it conflicted with the opinion of the plaintiff's treating physician created a bona fide factual uncertainty. Furthermore, the court rejected the Michigan Court of Appeals' conclusion that an insurer's initial refusal to pay benefits could be deemed unreasonable despite the fact that such payment is ultimately determined by the jury to have not been required.

The plaintiff suffered a knee injury in a motor vehicle accident in September 2000. She had pre-existing osteoarthritis in both knees, and her doctor had discussed replacement surgery and injections with her prior to the accident. As a result of her injury, the plaintiff could not continue her employment as a custodian.

The defendant-insurer began paying work-loss and other no-fault benefits in December 2000. As the result of a computer error, the defendant subsequently failed to pay benefits until March 2001. Prior to trial, the defendant paid the missed payments, including a 12 percent penalty interest.

In January 2001, the plaintiff underwent surgery to repair the injured knee. The plaintiff's physician, after consultation with a case manager hired by the defendant, determined that the plaintiff would never be able to return to her regular employment.

In September 2001, a physician retained by the defendant performed an IME on the plaintiff and determined that she no longer needed treatment for the accident-related injury and could return to work with restrictions. The defendant subsequently discontinued payments based on the results of the IME. The plaintiff then filed

suit demanding first-party no-fault benefits.

At trial, the jury awarded the plaintiff \$42,775 in work loss benefits, but only \$98 in penalty interest. The plaintiff subsequently sought attorney fees and costs under MCL 500.3148(1), which provides for the award of such fees if the court finds that an insurer unreasonably refused to pay a claim or unreasonably delayed in making payment. The trial court awarded \$79,415 in attorney fees. The defendant appealed.

The Michigan Court of Appeals, in a divided opinion, affirmed the trial court's decision. The majority based its reasoning on the definition of unreasonableness found in *Lidell v. Detroit Automobile Inter-Ins Exchange*, 102 Mich. App. 636; 302 NW2d 260 (1981), and held that the defendant's denial of benefits was unreasonable in that the defendant relied solely on the opinion of its own IME doctor and made no further inquiry to resolve the conflict between the IME report and the conclusion of the treating physician. The defendant appealed.

The Michigan Supreme Court reversed the appellate court's ruling, holding that the jury, by only awarding penalty interest of \$98.71, must have concluded that only one week of work loss benefits, amounting to \$822.52, were overdue. The majority held that, because the defendant had paid the plaintiff for these overdue benefits before trial and the plaintiff had not attributed any of the requested attorney fees and costs to collecting this amount, the plaintiff was not entitled to attorney fees.

The majority further held that the defendant's reliance upon only its IME physician's report in discontinuing no-fault benefits was not unreasonable under the plain language of MCL 500.3148(1). The majority held that the defendant was not required to go beyond the IME in determining the plaintiff's eligibility for benefits.

In the course of its analysis, the majority overruled the appellate court's decision in *Liddell*, concluding that nothing in the plain language of the statute required an insurer to reconcile the conflicting opinions of its IME physician and those of a plaintiff's treating physician.

The majority also rejected the appellate court's conclusion that "it is ... possible for an insurer to unreasonably refuse to pay benefits even if the insurer is later deemed not liable for them" as an erroneous statement of law. The majority stated that, while it is possible for an insurer to reasonably deny benefits, and they are subsequently determined to be required, nothing in Michigan jurisprudence suggests that an insurer's initial denial of benefits can be unreasonable if payment is later determined to have not been required.

The dissent argued that the appellate court correctly analyzed the facts of the case, that the majority improperly substituted its judgment for that of the trial court, and that the decision in *Liddell* should not have been overruled. The dissent observed that the majority ignored the jury verdict form in which the jury, when asked if payment for any expenses or losses to which the plaintiff was entitled were overdue, answered in the affirmative. Although agreeing that if the entire amount of benefits awarded were overdue, the proper amount of penalty interest should have been \$11,000 rather than \$98. The dissent declined to speculate as to the reasons for the amount of this portion of the jury verdict.

Furthermore, the dissent maintained that the insurer's reliance upon nothing more than its own IME physician's opinion in discontinuing benefits, rather than attempting to reconcile conflicting medical opinions, was unreasonable, as this opinion, standing alone, did not amount to a bona fide factual uncertainty. Citing the legislative intent of the No-Fault Act of providing motor vehicle accident victims with "assured, adequate and prompt reparation for certain economic losses," the dissent expressed concern that the majority's decision would provide "further opportunity for insurers to abruptly deny claims" by simply relying on a

favorable report from a retained IME physician.

The dissent contended that, because the jury clearly found that some portion of the benefits claimed by the plaintiff were overdue, it was, in fact, “an action for personal or property insurance benefits which are overdue” and, therefore, it was within the trial court’s discretion to award the entire amount of attorney fees requested by the plaintiff.

The Supreme Court’s decision in *Moore* is noteworthy because it rejects the rule previously set by the Michigan Court of Appeals in *Liddell* that required first-party no-fault insurers to endeavor to reconcile conflicts between the opinions of claimants’ treating physicians and the reports prepared by their own IME physicians in order to avoid a determination that they unreasonably denied benefits. However, as observed by the Supreme Court majority, the reasonableness of any decision to deny benefits will always be a fact-intensive issue, which should be decided on a case-by-case basis.