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From the Co-Editors

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MICHIGAN SUPREME COURT HOLDS THAT MCL 500.3148(1) DOES NOT REQUIRE AN INSURER TO RECONCILE CONFLICTING MEDICAL OPINIONS AND REJECTS REASONING OF *LIDELL V DAIIE*

In one of the last opinions of the Clifford Taylor-led Michigan Supreme Court, the Court reversed the Michigan Court of Appeals published decision in *Moore v Secura Ins*, 276 Mich App 195; 741 NW2d 38 (2007), holding that the circuit court reversibly erred in awarding the plaintiff insured attorney fees under MCL 500.3148(1) because the jury did not find any of the benefits awarded to be overdue under MCL 500.3142(2) and because the insurer did not act unreasonably in terminating benefits. Garan Lucow attorneys Peter Diesel and Megan Cavanagh represented Secura Insurance in this case.

Importantly, the Supreme Court specifically rejected the Court of Appeals holding that the insurer acted unreasonably under MCL 500.3148(1) because it did not attempt to reconcile the report of its IME with the plaintiff's treating doctors. The Court noted that nothing in the plain language of the statute requires an insurer to reconcile conflicting medical opinions and reaffirmed that the burden to establish reasonable proof of the fact and amount of loss always rests with the insured, rejecting the reasoning of the Court of Appeals in this case, as well as in *Lidell v DAIIE*, 102 Mich App 636; 302 NW2d 260 (1981).

While the dissenting Justices predict that the decision will prompt insurers to abruptly deny benefits and holds insureds to an unnecessarily high standard of proof, the majority's holding simply reiterates that the determinative issue in awarding attorney fees under MCL 500.3148(1) will always be the reasonableness of the insurer's conduct in terminating or delaying payment of

benefits, based upon the information available to the insurer at the time of termination. While the majority rejected the Court of Appeals' hard and fast rule that an insurer is always obligated to try and reconcile the opinion of its IME with the plaintiff's treaters, it cautioned that an insurer who relies solely upon the opinion of its IME risks being found unreasonable, depending upon the specific facts of the case. The inquiry of what is and is not reasonable will always be factually specific and the majority's opinion does not hold otherwise.

The plaintiff, Hattie Moore, fractured her right kneecap in an automobile accident, resulting in a bone chip. Ms. Moore had a preexisting osteoarthritic condition in her knees and, prior to the accident and upon the advice of her treating physician, had been considering having knee replacement surgery and injection treatments. Following the accident, Ms. Moore underwent surgery to remove the bone fragment from her knee. Following the surgery, Ms. Moore's treating physician was uncertain whether continued problems with her knees were attributable to the accident or were attributable to the preexisting arthritis.

Secura had Ms. Moore undergo an IME which initially confirmed the injury, its causal relationship to the accident and Ms. Moore's inability to return to work. Secura paid wage loss and injury benefits for over a year following the accident. Eventually, Secura retained a nurse case manager to evaluate whether Ms. Moore could return to work, . After the nurse case manager was unable to obtain a reply from the treating physician, Secura had the plaintiff undergo a second IME. The IME doctor concluded that Ms. Moore could return to work with certain restrictions and that her continuing knee problems were not related to the accident. Secura terminated benefits and Ms. Moore brought suit.

During the trial, a representative for Secura admitted that, due to a computer glitch, Secura admittedly made a wage loss payment late to Ms. Moore but the late benefits were paid prior to suit. At trial, counsel for Secura suggested to the jury that, even though Ms. Moore was not entitled to benefits, Secura owed her, at most, about $120 dollars in interest for the admittedly late payment.

The jury awarded the plaintiff $42,755 in unpaid wage loss benefits but awarded her only $98.71 in penalty interest under MCL 500.3142. The plaintiff moved for attorney fees under MCL 500.3148(1) and the trial court granted the plaintiff's request. The trial court concluded that Secura acted unreasonably in terminating the plaintiff's benefits because it relied solely upon the report of its IME doctor, without attempting to reconcile the findings with the plaintiff's treating physicians. Secura appealed to the Michigan Court of Appeals.

The Court of Appeals affirmed the circuit court's award of attorney fees. Judge Wilder dissented. The majority concluded that the jury's award of $98 in penalty interest evidenced that the jury found at least some of the benefits to be "overdue" under MCL 500.3142(2). In addition, the majority concluded that Secura unreasonably terminated benefits when it relied upon the second IME of Dr. Xeller and did not attempt to contact Ms. Moore's treating physicians to confirm or reconcile their opinions. Finally, the Court of Appeals majority concluded, even if only a portion of the benefits awarded were determined to be "overdue," the plaintiff was not required to apportion those attorney fees incurred in securing the overdue benefits from those attorney fees incurred in securing benefits which were not overdue.

Secura filed an application for leave to appeal to the Michigan Supreme Court. The Supreme Court granted oral argument on Secura's application, and ordered the parties to address four specific issues: (1) whether the benefits at issue were "overdue" under MCL 500.3142(2) and MCL 500.3148(1); (2) whether Secura unreasonably refused to pay the claim under MCL 500.3148(1); (3) assuming Secura unreasonably refused to pay the claim, but also assuming that only some of the benefits awarded were overdue, whether MCL 500.3148(1) allows recovery of attorney fees for all benefits sought; and (4) whether the Court of Appeals properly concluded that "it is . . . possible for an insurer to unreasonably refuse to pay benefits even if the insurer is later deemed not liable for them." The Supreme Court majority reversed the Court of Appeals decision, specifically addressing each of the four issues raised in the Court's order granting oral argument on the application.

First, the majority concluded that the jury's award of only $98 in penalty interest logically meant that the jury found only one week of benefits to be overdue, not the $42,755 in work loss benefits awarded. Second, the majority concluded that Secura did not unreasonably terminate Ms. Moore's benefits and specifically rejected the Court of Appeals majority's holding that an insurer is obligated under MCL 500.3148(1) to reconcile conflicting medical opinions. While rejecting the rule announced by the Court of Appeals, the majority cautioned that, depending upon the specific facts of the case, an insurer who relies solely upon the opinion of its IME, does so at the risk of being found to have acted unreasonably. In this case, Secura's IME did not directly conflict with the opinion of Ms. Moore's treater and Secura did more than the insurer in *Lidell* by conducting two IMEs and hiring a nurse case manager to determine whether Ms. Moore was capable of returning to work.

Third, the majority concluded that under the plain language of MCL 500.3148(1) and *Proudfoot v State Farm Mutual Ins Co*, 469 Mich 476; 673 NW2d 739 (2003), a plaintiff is only entitled to collect attorney fees on benefits which were determined to be overdue, not merely due. However, because the majority concluded that the overdue benefits awarded by the jury were already paid prior to trial and that none of the benefits awarded by the jury were overdue, Ms. Moore was not entitled to any attorney fees under the statute. Finally, the majority rejected the Court of Appeals conclusion that it is possible for an insurer to unreasonably deny benefits even though it is later deemed not liable for them. The majority concluded that if an insurer does not owe benefits, the benefits cannot be "overdue" and attorney fees cannot be awarded.

While this decision will likely survive any motion for reconsideration, the issue of whether an insurer has an obligation under MCL 500.3148(1) to reconcile conflicting medical opinions could possibly be revisited in subsequent cases put in front of the newly constituted Michigan Supreme Court.

WINTER CONFERENCE

FEBRUARY 19, 2009

KELLOGG HOTEL & CONFERENCE CENTER

AT MICHIGAN STATE UNIVERSITY

7:45 - 8:25 am	**Registration and Continental Breakfast**
8:25 - 8:30 am	Opening Remarks **Paul E. Tower**
8:30 - 9:15 am	**Evaluation of Reasonable Accommodations in Housing and Transportation after *Griffith v State Farm*, *Hoover v Michigan Mutual* and the Supreme Court Decision in *USF&G*** Speaker: **David N. Campos**
9:15 - 9:40 am	**Strict Compliance with Medicare Administrative Rules and Suits Against the Government** Speaker: **Kelly M. Kluting**
9:40 - 10:20 am	**Medicare Secondary Payor Statute; Limitation of Actions; Medicare's Off Set Program - Automatic Withdrawal and Retaking of Monies Without Judgment; Right to Dispute** Speaker: **Lori A. Ittner**
10:20 - 10:30 am	Break
10:30 - 11:15 am	**The SCHIP Extension Act - What it Really Means for Insurance Carriers Throughout the Country** Speaker: **Lori A. Ittner**
11:15 - 11:45 am	***Kriener*, *Benefiel vs Auto-Owners* and the Implications of the New Supreme Court** Speaker: **Gregory A. Light**
11:45 - 12:45 pm	**No-Fault Update** Speaker: **James L. Borin**
12:45 - 1:00 pm	**Questions and Answers**

Garan Lucow Miller P.C. is pleased to present this Seminar on **February 19, 2009** at the **Kellogg Hotel & Conference Center at Michigan State University**, located at 55 South Harrison Road in East Lansing {(517) 432-4000}. The day will begin with a Continental Breakfast from **7:45 - 8:25 am**, followed by the seminar. Comprehensive written materials will be distributed to all program attendees.

If you are able to attend this **complimentary** event, please register via e-mail to: **lbeatty@garanlucow.com** or phone Lynn Beatty at **(616) 742-5500 or (800) 494-6312** for reservations.

We hope you will be able to join us!