

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS AND
THE WORKERS' COMPENSATION APPELLATE COMMISSION

RICK PETERSEN,

Supreme Court Docket: 136542-43

Plaintiff-Appellee,

Court of Appeals No: 273293-94

v.

WCAC Docket No.: 03-000036, 03-000260

MAGNA CORPORATION and MIDWEST
EMPLOYERS CASUALTY COMPANY,

Defendants-Appellants

and

BCN TRANSPORTATION SERVICE, INC.;
KOLEASECO, INC. and CITIZENS INSURANCE
COMPANY OF AMERICA; KOLEASECO, INC.
and ACCIDENT FUND OF AMERICA; BCN
TRANSPORTATION SERVICES, INC. AND TIG
INSURANCE COMPANY; MAGNA CORPORATION
and TIG INSURANCE COMPANY; and SERTA
RESTOKRAFT MATTRESS COMPANY, INC. and
HARLEYSVILLE LAKE STATES INSURANCE COMPANY,

Defendants-Appellees.

**BRIEF ON APPEAL-APPELLEES BCN TRANSPORTATION
SERVICES, INC. and TIG INSURANCE COMPANY**

ORAL ARGUMENT NOT REQUESTED

Marc A. Kidder (P29469)
Attorney for Appellees BCN
Transportation Services, Inc. and
TIG Insurance Co.
4519 Cascade Rd.
Grand Rapids, MI 49546
616-942-2060

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BRIEF ON BEHALF OF DEFENDANTS/APPELLEES BCN TRANSPORTATION SERVICES and TIG INSURANCE COMPANY IN SUPPORT OF DEFENDANTS/APPELLANTS MAGNA AND MIDWEST'S APPEAL TO THE MICHIGAN SUPREME COURT

COUNTER STATEMENT OF BASIS FOR JURISDICTION

Defendants-Appellees BCN Transportation Services, Inc. and TIG Insurance Company, a/k/a TIG Specialty Insurance Co., accept Defendants'/Appellants' "Statement for Basis of Jurisdiction" as correct.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

1. Does the Workers' Disability Compensation Act require an employer or its insurer to pay the employee's attorney a fee on unpaid medical expenses, in addition to its liability for the underlying medical expenses themselves?

Defendants/Appellants Magna Corporation and Midwest Employers Casualty Company answer "no."

The Magistrate answered "yes."

The Workers' Compensation Appellate Commission answered "yes."

The Michigan Court of Appeals answered "yes."

Defendant/Appellee BCN Transportation Services, Inc. and TIG Specialty Insurance Company answer "no."

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendants/Appellants seek the reversal of the opinions below, imposing an attorney fee against Defendants/Appellants on unpaid medical expenses in addition to its liability for the underlying medical expenses themselves.

Defendants/Appellees BCN Transportation Services, Inc. and TIG Specialty Insurance Co. herein accept, adopt and incorporate herein by reference the position of Defendants/Appellants with regards to this limited issue before the State of Michigan, in the Supreme Court.

PROCEDURAL HISTORY

Defendants/Appellees BCN Transportation Services, Inc. and TIG Specialty Insurance Co. herein accept, adopt and incorporate herein by reference Defendants'/Appellants' "Appendix."

STATEMENT OF MATERIAL FACTS

As it relates to the present limited issue in the Supreme Court for the State of Michigan, Defendants/Appellees BCN Transportation Services, Inc. and TIG Specialty Insurance Co. hereby accept, adopt, and incorporate herein by reference the "Statement of Material Facts and Proceedings," as presented by Defendants/Appellants.

ARGUMENT

Answer to Question Presented for Review

The Workers' Disability Compensation Act does not require an employer or its insurer to pay the employee's attorney a fee on unpaid medical expenses in addition to its liability for the underlying medical expenses themselves.

The Statute at Issue

At issue in the present matter before the Michigan Supreme Court is the interpretation of language from MCL418.315(1) which reads as follows:

“If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made on behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the workers' compensation magistrate. The workers' compensation magistrate may prorate attorney fees at the contingent fee paid by the employee.”

This is the language which was used by the Magistrate to impose attorney fees on the unpaid, outstanding medical. This is the language that was reviewed by the Workers' Compensation Appellate Commission and the Court of Appeals in affirming the Magistrate's decision. However, imposing attorney fees on the unpaid medical requires a basic look at the process itself. If a workers' compensation Claimant (employee) seeks medical attention and a medical bill results from that medical attention, the medical provider is entitled to submit that billing invoice to the employer or its insurance carrier for payment. In the event the billing invoice falls within the parameters of what is allowable through cost containment, the employer/insurer may be responsible to pay that invoice, up to the amount cost containment designates.

If that billing invoice is not paid and plaintiff's counsel has to proceed with a petition to enforce payment of the billing invoice, it is appropriate that attorney fees attach, as is required by MCL418.315(1). However, what is the attorney actually collecting, and who is the attorney actually representing? The attorney is trying to collect the total amount of the bill that the employee may be responsible for. The attorney is representing the employee. The attorney may add language to his petition wherein he seeks attorney fees on any outstanding and unpaid medical expenses he is able to collect, through his efforts, as well. Indirectly, he is then representing the medical provider that submitted the billing invoice for payment. That attorney is not representing the employer or its insurer.

The key language in the section of the statute at issue is: “The workers' compensation magistrate may prorate attorney fees at the contingent fee paid by the employee.” If a plaintiff's attorney, while representing a plaintiff and, indirectly, the health care provider, gains a recovery for either or both, then the plaintiff and/or health care provider, out of that recovery, are required to pay the plaintiff's attorney a fee out of the recovery. This procedure is called “prorating the attorney

fee.” The reference in MCL 418.315(1) to a “contingent fee paid by the employee” is governed by statute. MCL 418.858(2) prescribes maximum attorney fees that a plaintiff attorney can receive from an employee. Pursuant to the Worker’s Disability Compensation Act, Administrative Rule, Rule 14, the schedule of fees that apply to plaintiffs’ attorneys is mandated (R408.44-Rule 14).

In Rule 14(2), as it relates to the present matter, in a case tried to completion with proofs closed, the “fee that the Magistrate may approve shall not be more than 30% of the balance.” In cases involving a redemption, Rule 14(3) states, in relevant part: “The fee the Magistrate may approve is as follows: a) of the first \$25,000.00, a fee of not more than 15%, b) of any amount more than \$25,000.00, a fee of not more than 10%.” Rule 14(4), in cases which are tried to completion with proofs closed but before a final order after which a redemption occurs, the “fee the Magistrate may approve shall not be more than 20% of the balance.”

The Rule 14 fee schedule listings referred to above outline the contingencies that plaintiffs’ attorneys are limited by when assessing fees against the plaintiff/employee.

All MCL 418.315(1) is dictating is that, if there is going to be a proration of attorney fees, whether to the employee or persons to whom unpaid expenses may be due and owing, it must be based on the contingency fees to which the plaintiff’s attorney is entitled, under the Workers’ Disability Compensation Act. This is not the imposition of an attorney fee on the employer or its insurance carrier.

Argument Proposed by Defendants/Appellants Magna Corporation and Midwest Employers Casualty Company

Defendants/Appellees BCN Transportation Services, Inc. and TIG Specialty Insurance Co. hereby agree with, accept, adopt and incorporate herein by reference Defendants/Appellants Magna/Midwest’s Arguments on its brief filed with the this Honorable Court on a) Standard of Review (Appellant Brief, page 3), b) Prorate and the American Rule (Appellant Brief, page 4), c) Magistrate’s Authority to Prorate Fees (Appellant Brief, page 7), and d) Status of Healthcare Providers and Medical Insurers (Appellant Brief, page 11).

Additional Argument Regarding Proration of Attorney Fees

Defendants/Appellees BCN Transportation Services, Inc. and TIG Specialty Insurance Co. point out to this Honorable Court that, on page 5 of Defendants’/Appellants’ Brief, Appellants’ attorney directed the Court’s attention to Commissioner Leslie’s discussion in a concurring opinion in Stankovic v. Kasle Steel Corp, 2000 ACO 124. Commissioner Leslie explained his rationale thoroughly that the proration of attorney fees does not impose on the employer an additional obligation beyond the medical benefit when he stated:

“I submit that defendant in this case is perfectly correct when it argues that the proration of the fees is between the employee and the provider of services and does not impose an additional obligation on the employer the last sentence which permits the proration of attorney fees relates to

the next to last sentence. That sentence states that reimbursement of medical expenses is to be made to the employee or to the party to whom the unpaid expenses may be owing. In no way does this language, reasonably interpreted, create an obligation on the part of the employer to pay fees over and above the obligation to pay the medical benefit. It clearly provides for a division of the fee based on the interests of those who recover. To the extent that the employee paid for medical expenses, he or she owes the fee. To the extent that medical providers are paid directly, they owe the fee.

Although there may be valid reasons for the legislature to impose fees on the employer, I cannot see in the wording of section 315(1) that they did so. I am confirmed in this view by reviewing the history of section 315(1).

Prior to May 15, 1963, the last portion of this section read:

‘If the employer shall fail, neglect or refuse so to do (pay medical benefits specified earlier in the section) *such employee* shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the Commission (emphasis added).’

This language only allowed for payment of the reasonable medical expense to the employee. Even in situations where the medical bill was, as yet, unpaid, the provider could not be reimbursed directly. In response, in 1963, the legislature amended this section to provide for direct payment to medical providers. The new language read:

‘If the employee shall fail, neglect or refuse so to do, such employee shall be reimbursed for the reasonable expenses paid by him, *or payment may be made on behalf of such employee to persons to whom such unpaid expenses may be owing*, by an award of the commission. *The commission may prorate attorney fees in such cases at the contingent fee rate paid by such employee and it may also prorate such payments in the event of redemptions* (emphasis added).’

Thus, when the legislature amended the statute to allow for direct payment to medical providers, it added the provision which is currently under consideration. The only purpose for such an addition was to make sure that the provider, which could now be reimbursed directly, would pay its proportionate share of the attorney fee.”

In Lesner v Liquid Disposal, Inc., 466 Mich 95, 101-102; 642 NW2d 553 (2002), the Court held that it may construe a statute but it may not add to the language:

“Our duty is to apply the language of the statute as enacted, without addition, subtraction or modification. See, e.g., Helder v. Sruba, 462 Mich 92, 99; 611 NW2d 309 (2000); Robinson v Detroit, 462 Mich 439, 459; 613 NW2d 307 (2000). We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. Omne Financial, Inc. v Shacks, Inc., 460 Mich 305, 311; 586 NW2d 591 (1999). In other words, the role of the judiciary is not to engage in legislation. Tyler v Livonia Public Schools, 459 NW2d 560 (1999).”

In the instant case, the supplemental obligation of an attorney fee would be a judicial addition to the language of the statute. Accordingly, the Court of Appeals’ decision (123a) and the WCAC’s Opinion in Decision #2 (99a) regarding assessing an attorney fee against Defendant/Appellant for unpaid medical should be reversed.¹

RELIEF REQUESTED

Defendants/Appellees BCN Transportation Services, Inc. and TIG Specialty Insurance Company hereby request that this Honorable Supreme Court reverse the holding below, and find that no Defendant, whether employer or insurance carrier, should be assessed a fee for plaintiff’s attorney on outstanding medical.

Respectfully Submitted,

DATED:

MARC A. KIDDER (P29469)
Attorney for Defendants BCN Transportation
Services, Inc. and TIG Specialty Insurance
Company

¹Collaboration with Marsha M. Woods (P25145) of Giarmarco, Mullins & Horton, P.C. for additional argument regarding Proration of Attorney Fees