STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

TRANSAMERICA INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
November 30, 1999

No. 208568
Kent Circuit Court
LC No. 96-001854 CK

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Defendant, a worker's compensation carrier, appeals of right the circuit court's judgment awarding plaintiff reimbursement for no-fault benefits it paid, without limiting the reimbursement pursuant to the cost-containment provisions of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*; MSA 17.237(101) *et seq*. Defendant also challenges the circuit court's determination that plaintiff was entitled to reimbursement for wage-loss benefits it paid, and its award to plaintiff of pre-complaint and pre-judgment interest. We reverse in part, and remand for further proceedings.

I

This case arises from a worker's compensation coverage dispute involving Harry Eversman, an injured employee; Concrete Cutting and Breaking, Eversman's employer; defendant Transamerica Insurance Company (Transamerica), the employer's worker's compensation insurance carrier; and plaintiff Auto-Owners Insurance Company (Auto-Owners), Eversman's no-fault insurance carrier.

Eversman was injured on July 12, 1990, while on a work assignment in Pennsylvania. His employer and defendant Transamerica refused to pay worker's compensation benefits on the basis that Eversman was not injured in the course of his employment. Eversman also filed a claim for medical and wage loss benefits with his no-fault carrier, plaintiff Auto-Owners. Auto-Owners paid benefits pending the resolution of Eversman's worker's compensation claim.

On or about June 9, 1992, in connection with Eversman's worker's compensation trial against Concrete Cutting and Transamerica, Auto-Owners filed a notice and claim of lien in the amount of

$369,940.58 against any worker's compensation benefits awarded Eversman.[1] The magistrate concluded Eversman's injuries occurred in the course of his employment and issued an open award of wage-loss benefits and reasonable and necessary medical expenses. The magistrate did not address plaintiff's reimbursement claim.

Transamerica appealed to the Worker's Compensation Appellate Commission (WCAC) and, during the pendency of that appeal, Transamerica paid Eversman pursuant to MCL 418.862(1); MSA 17.237(862)(1). The WCAC reversed the magistrate's determination that the injury was covered under the act.

Eversman appealed to this Court and, in late February, 1996, Auto-Owners was granted leave to intervene in this Court. Also in February 1996, plaintiff filed this action in circuit court against Transamerica and Eversman, alleging that, should this Court determine Eversman's injuries were work-related, plaintiff would be entitled to reimbursement for medical expenses and wage-loss benefits it paid to Eversman, plus interest, costs and attorney fees.

During the pendency of the worker's compensation appeal in this Court, Eversman redeemed his worker's compensation claim for $185,000, and Eversman and Transamerica executed a hold-harmless agreement in which Transamerica agreed to indemnify Eversman and hold him harmless from any claim brought by Auto-Owners for reimbursement of no-fault benefits paid.[2] The settlement/hold-harmless agreement contained no provision for reimbursing Auto-Owners.

A panel of this Court reversed the WCAC in *Eversman v Concrete Cutting and Breaking,* 224 Mich App 221; 568 NW2d 387 (1997), and remanded for entry of an order awarding benefits. The parties then filed trial briefs in the instant case. Plaintiff's trial brief argued that its reimbursement action was not subject to the cost-containment provisions of the WDCA and it was entitled to reimbursement for reasonable charges; and that it was entitled to reimbursement for wage-loss benefits, pre-complaint interest and pre-judgment interest. Defendant requested that the circuit court stay proceedings until the Supreme Court acted on its application for leave to appeal this Court's decision, and argued that its liability for payment of medical expenses was limited by the WDCA's cost-containment rules. Defendant's trial brief did not address the issues regarding wage-loss benefits or pre-complaint and pre-judgment interest.

On December 2, 1997, the circuit court entered judgment for plaintiff in the amount of $521,197.28, finding plaintiff entitled to reimbursement for reasonable medical expenses and wage-loss benefits, not limited by the cost-containment provisions of the WDCA, as well as pre-complaint interest under MCL 438.31; MSA 19.15(1) and pre-judgment interest under MCL 600.6013(5); MSA 27A.6013 for $81,512.04. The circuit court stayed execution pending appeal to this Court.

II

Defendant argues that the circuit court erroneously interpreted § 315 of the WDCA as providing that the act's cost-containment provisions apply only if the employer/insurer immediately pays the injured employee's medical expenses. Defendant argues that plaintiff is entitled to reimbursement

only of the amounts Transamerica would have been obligated to pay had it provided benefits in the first instance. We agree.

Eversman's accident occurred in July 1990. Some language was added to subsections 315(1) and (2) of the WDCA in 1995. The amendments took effect April 12, 1995, and are italicized below:[3]

> (1) The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed. *However, an employer is not required to reimburse or cause to be reimbursed charges for an optometric service unless that service was included in the definition of practice of optometry under section 17401 [of the public health code] as of May 20, 1992.* . . . . After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice . . . The employer or the employer's carrier may file a petition objecting to the named physician selected by the employee and setting forth reasons for the objection. If the employer or carrier can show cause why the employee should not continue treatment with the named physician of the employee's choice, after notice to all parties and a prompt hearing by a worker's compensation magistrate, the worker's compensation magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician from the date the order is mailed. . . . 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 in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. . . .
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> (2) *Except as otherwise provided in subsection (1)*, all fees and other charges for any treatment or attendance, service, devices, apparatus, or medicine under subsection (1), are subject to rules promulgated by the bureau of worker's compensation pursuant to [MCL 24.201 to 24.328]. The rules promulgated shall establish schedules of maximum charges for the treatment or attendance, service, devices, apparatus, or medicine, which schedule shall be annually revised. A health facility or health care provider shall be paid either its usual and customary charge for the treatment or attendance, service, devices, apparatus, or medicine, or the maximum charge established under the rules, whichever is less. [MCL 418.315; MSA 17.237(315). Emphasis denotes language added by 1995 amendments.]

Plaintiff argues that § 315 establishes a statutory scheme that contemplates the application of subsection (2)'s cost-containment provisions only where the worker's compensation carrier promptly and directly furnishes or causes to be furnished to the injured employee all of the reasonable services and treatment contemplated in subsection (1). Plaintiff argues that the statute contemplates full reimbursement for the reasonable expenses incurred, without regard to cost-containment under

subsection (2), whenever the worker's compensation carrier fails to promptly discharge its obligations under subsection (1), without regard to whether the employee actually paid for the needed medical care, or received benefits through a third-party payor. In a supplemental brief, plaintiff argues that the 1995 amendment to subsection (2), which added the introductory phrase "except as otherwise provided in section (1)," made clear that subsection (1) establishes an exception to the cost-containment provisions of subsection (2), the exception being that in the event an employer denies coverage, an employee is entitled to reimbursement for reasonable expenses the employee incurs in obtaining medical services, not limited by the cost-containment provisions. Plaintiff further argues that common-law principles of subrogation dictate that an insurer paying reasonable expenses on behalf of the employee is entitled to reimbursement for reasonable expenses where it is later determined that the employer is liable for medical services. We do not agree with plaintiff's interpretation of § 315 or of the 1995 amendments to that section.

Statutory interpretation is a question of law we review de novo. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Plaintiff cites no support for its interpretation of the statute and we have found none. The language plaintiff relies on refers to reimbursement "for the reasonable expense *paid by the employee*." MCL 418.315(1); MSA 17.237(315). Here, plaintiff, rather than the employee, paid for the medical treatment and services. The statute provides as an alternative to direct reimbursement of the employee for the reasonable expenses paid by the employee, that the magistrate may order that payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing. *Id.* This clause does not use the phrase "reasonable expenses."

Further, except for the language added in 1995, subsection (2) includes no exception to its cost-containment provisions. Plaintiff's argument regarding the 1995 amendment to subsection (2) ignores that the additional introductory phrase, "except as otherwise provided by section (1)," was added to § 315 at the same time the second sentence was added to subsection (1), i.e., "However, an employer is not required to reimburse or cause to be reimbursed charges for an optometric service unless that service was included in the definition of practice of optometry . . . as of May 20, 1992." Thus, it appears that the introductory phrase of subsection (2) was intended to exclude certain optometric services from the rules regarding establishing schedules of fees and charges.

Further, recent decisions of the WCAC undermine plaintiff's interpretation of § 315. See *Auto Owners Ins Co v Amoco Production Co,* 1998 Mich ACO 250 (noting in this reimbursement action by a no-fault automobile insurance carrier against an injured employee's employer that "[r]eimbursement is only required to the extent of required payments under the Worker's Compensation Act. The cost containment rules limit the amount of required payments under the Act, and therefore logically establish the amount of reimbursement."); see also *LaPrairie v Mechanical Insulation Contractors and Standard Fire Ins Co,* 1998 Mich ACO 334 (affirming and adopting the magistrate's determination that the defendant insurer's reimbursement of medical expenses paid on behalf of the injured employee by his union's health and welfare fund was subject to the cost-containment guidelines of the WDCA.)[4] Although statutory interpretation is a question of law, this

Court ordinarily will accord considerable deference to the construction placed on statutory provisions by an agency charged with enforcing them, at least where the agency interpretation is not clearly wrong. *Taylor v Second Injury Fund,* 234 Mich App 1, 13; 592 NW2d 103 (1999).

We also reject plaintiff's argument that subrogation principles apply here and that the WCAC erroneously decided *Amoco* and *LaPrairie, supra,* by not applying those principles. Plaintiff is subrogated only to the employee's rights, and if the employee does not pay for the services directly, there is no right in the employee to complete reimbursement, without regard to cost containment, for the insurer to assert by way of subrogation.

We further observe that the result we reach is consistent with both the WDCA and the no-fault act. MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.* Plaintiff's claim for reimbursement stems from § 3109 of the no-fault act. As relevant here, this section provides, in essence, that benefits provided or required to be provided under the WDCA shall be subtracted from no-fault benefits otherwise payable by plaintiff. MCL 500.3109; MSA 24.13109. In *Munson Medical Ctr v Auto-Club Ins Assoc,* 218 Mich App 375, 390; 554 NW2d 49 (1996), this Court held that no-fault carriers are not entitled to invoke the cost-containment provisions of the WDCA and may not limit reimbursement to medical providers according to the worker's compensation scheme. Thus, plaintiff's liability for medical services provided Everson is determined by the reasonableness standard of the no-fault act. The amount to be subtracted from the benefits owing under the no-fault act is then determined by reference to the WDCA, including the cost-containment provisions of § 315. The statutes contemplate that worker's compensation benefits will be primary only to the extent they are payable under the act (WDCA).

Because we conclude that the circuit court's interpretation of § 315 of the WDCA as prohibiting application of the cost-containment provisions in determining plaintiff's reimbursement was erroneous, we reverse and remand for further proceedings consistent with this opinion.

III

With regard to defendant's contentions regarding the timeliness of plaintiff's assertion of its lien, we note that defendant had notice of plaintiff's claim for reimbursement well before Eversman's redemption and his entering into the hold-harmless agreement with defendant. Under these circumstances, "the employer must take the additional claim into account and make arrangements for payment in the event that liability is ascertained at a later time." *Ptak v Pennwalt Corp,* 112 Mich App 490, 495; 316 NW2d 251 (1982). To the extent defendant challenges the circuit court's jurisdiction, we reject this claim of error as inconsistent with *Westchester Fire Ins Co v Safeco Ins Co,* 203 Mich App 663, 670, 673; 513 NW2d 212 (1994).

IV

Defendant's remaining claims of error, regarding plaintiff's entitlement to reimbursement for wage-loss benefits and to pre-complaint and pre-judgment interest, are raised for the first time on appeal and are not preserved. Plaintiff very clearly asserted these claims in the circuit court, and defendant, in its trial brief and in argument before the circuit court, very clearly challenged only whether

the circuit court should proceed while an appeal of the worker's compensation case was pending, [5] and whether the cost-containment provisions of § 315 applied. We therefore will not disturb these aspects of the circuit court's ruling, except as the numbers must be recalculated consistent with this Court's opinion.

Regarding defendant's argument that the circuit court's judgment was premature because defendant was appealing the underlying *Eversman* decision, we conclude that the circuit court did not err in refusing to stay these proceedings given the uncertainty of the outcome of the underlying litigation. However, on remand, after recalculating the proper reimbursement award, the circuit court shall entertain a new motion for stay of proceedings, if filed, taking into account the then-current state of the underlying litigation. See n 5, *infra*.

Reversed and remanded for recalculation of the proper reimbursement award. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jane E. Markey

[1] Plaintiff's Motion for Enforcement of Lien stated that plaintiff had filed a notice of lien and claim of lien pursuant to MCL 500.3109; MSA 24.13109, which provides in pertinent part, "(1) Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."

[2] The settlement/hold-harmless agreement stated in pertinent part that Auto-Owners had filed a notice of lien at the time of trial but did not participate in the trial; that Auto-Owners did not formally intervene before the WCAC reversed the magistrate's order; and that Eversman agreed to withdraw the claim of appeal before this Court as part of the agreement to redeem for $185,000; and that in consideration of Eversman's dismissal of the appeal, they agreed to indemnify and hold Eversman harmless for claims brought by or obtained by Auto Owners. In May 1996, plaintiff voluntarily dismissed its claim against Eversman.

[3] A subsequent amendment of MCL 418.315; MSA 17.237(315) took effect on December 30, 1998, and is not reflected in the statute as quoted.

[4] Plaintiff argues that we should not rely on *LaPrairie*, because the WCAC's analysis on issues pertinent here was dictum. Assuming that to be the case, we note that *LaPrairie* is not necessary to our disposition.

In *LaPrairie*, the magistrate had given an open award to the plaintiff, providing that all treatment was subject to cost containment. On appeal to the WCAC, the plaintiff claimed that the magistrate "erred as a matter of law in holding that the defendant-carrier's reimbursement of medical expenses paid on

behalf of the plaintiff by his union health and welfare fund was subject to the cost containment guidelines" of the WDCA. The WCAC noted in *La Prairie*:

> Originally, defendant Standard Fire Insurance Company, on behalf of the employer, refused to pay for plaintiff's asbestosis/lung cancer as not work-related. Plaintiff then obtained payment of his medical bills by his union's . . . Health and Welfare Fund (HWF). In order to obtain this benefit, the HWF required plaintiff and his wife to execute an assignment whereby plaintiff agreed, that should he be successful in a workers compensation suit, any reimbursement for medical expenses would be paid to the HWF.
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> As stated, the plaintiff was successful. However, the magistrate ordered that medical expense reimbursement was subject to the cost containment rules and the HWF had paid for treatment without such reduction. The magistrate ruled, in the decision under appeal, that the HWF was not permitted 100% reimbursement from Standard, but only reimbursement subject to the cost containment rules. Further, the magistrate ruled here that, despite the language to the contrary in the assignment agreement, the HWF could not pursue plaintiff personally to collect the difference in expenses.
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> Although both plaintiff and the HWF filed applications for mediation or hearing, the HWF did not participate any further in the proceedings below. Neither did HWF give plaintiff the authority to appear on its behalf. Thus, as a preliminary matter to assessing plaintiff's appeal on its merits, we find that plaintiff has no reason or standing to pursue this appeal. Plaintiff was successful in bringing his appeal; he was given an open award and medical expenses. . . HWF's continued silence indicates to us that it is willing to accept such findings. We note that defendant Standard represents, undisputedly, that it tendered to HWF reimbursement for all of the medical expenses as reduced by cost containment. The only explanation that we, as a Commission, have for plaintiff's bringing this appeal is plaintiff's mistaken belief that, pursuant to the assignment agreement, he is obligated to do so. There is language which states that should plaintiff not be successful in bringing his worker's compensation suit, he must appeal. However, plaintiff did receive an open award and all reasonable and necessary medical was ordered paid. That was not a lack of success.
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> But, for the sake of completeness, in response to plaintiff's three issues on appeal, all of which are reasons to order 100% reimbursement for HWF, we adopt the magistrate's reasoning as to why the HWF is to receive reimbursement subject to the cost containment rules. Her very thorough opinion states as follows:
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> > Rule 2102 of the Health Care Rules states:
> >
> > "Notwithstanding any other provision of these rules, if an employee has paid for a health care service and at a later date a carrier is determined

to be responsible for the payment, then the employee shall be fully reimbursed by the carrier."

Although the plaintiff has taken the position that the [union's fund] steps into the shoes of the plaintiff because they made payment on behalf of the plaintiff, this is not entirely true. Rule 2102 of the Health Care Rules specifically deals with reimbursement to an employee for benefits that the employee actually paid. It does not deal with reimbursement to any entity which made payment on the employee's behalf. The purpose of this rule was to make whole the employee who had paid medical expenses for a work-related injury. An employee usually would not have the money to proceed against a medical care provider who had overcharged under cost containment. The burden for obtaining any overpayment was placed upon the worker's compensation carrier since the insurance company or carrier has the necessary funds and means to proceed against a provider. The Bureau specifically intended that the employee should be made whole and that the burden for recovering an overpayment was placed on the carrier. The Bureau did not intend that a welfare fund or an insurance company paying on behalf of the plaintiff was to be made whole. . . . Rule 2102 does not apply to the [union health fund] despite the fact that the plaintiff executed an Assignment to them. . . they do not step into the shoes of the plaintiff as it pertains to this Rule.

* * *

Finally, Section 315 of the Act pertaining to medical care supports the reimbursement under cost containment. This section states that the employer shall furnish to an individual who receives a personal injury reasonable medical [sic]. This Court must decide what was reasonable treatment for [LaPrairie]. In order to determine reasonableness, this Court will look to the Health Care Rules as established by the legislature and the Worker's Compensation Bureau. . . these rules were put into effect to control rising medical costs . . . [and] are an absolute guideline for reasonableness. Based upon this section of the Act, I find that the medical paid on behalf of [LaPrairie] is subject to the reasonableness of the Act and therefore is subject to cost containment. Therefore, the only amount of money to be reimbursed to the Welfare Fund by [LaPrairie] or by the defendants is subject to the reasonableness of the Health Care Rules and cost containment. Any money paid by the Welfare Fund over and above the cost containment

guidelines is the responsibility of the Welfare Fund and is not the responsibility of the plaintiff or the defendants.

[5] The Supreme Court initially denied leave to appeal in *Eversman v Concrete Cutting & Breaking*, 224 Mich App 221; 568 NW2d 387 (1997), on December 8, 1998. See 459 Mich 915 (1998). However, on October 12, 1999, the Court vacated its order denying leave and granted reconsideration. ___ Mich ___, (1999).