SECREST WARDLE

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08.01.12

Family Provided Attendant Care: What Proofs Are Necessary? When Is An Hourly Rate Unreasonable?

In *Douglas v Allstate Insurance Company*, _ Mich _ (2012), a divided Michigan Supreme Court provided detailed guidance with respect to recurring issues in first party PIP claims involving family provided attendant care. In a 4-3 decision, the majority (Justices Young, Markman, Kelly and Zahra) held that there had been insufficient evidence at the trial court level to support the finding that 67 hours a week of attendant care had been incurred before November 7, 2006 and that 40 hours had been incurred from that date to the trial date. Furthermore, the majority overturned as "unreasonable" the trial court's award of a $40.00 per hour rate of compensation for a wife to monitor, direct, and assist her brain-injured husband. The majority did affirm, however, that a trial court's award of some attendant care damages could be based upon evidence that did not necessarily include a physician's contemporaneous prescription for attendant care.

SECREST WARDLE NOTES:

The slim 4-3 majority of the Michigan Supreme Court has held that there must be better or more detailed evidence in the record to support a determination that suggested or prescribed attendant care *was actually provided*. It overturned an award of 40-67 hours per week of attendant care when the testimony was effectively that the wife kept track of her brain-injured husband whenever she was home. Furthermore, the reasonableness of the rate charged for attendant care must be evaluated by paying more attention to the amount typically paid to the actual caregiver as opposed to the amount charged by a commercial provider in order to put the actual caregiver in place. Finally, although relevant, a contemporaneous prescription for attendant care is not absolutely necessary to justify an award to compensate an attendant care provider.

In *Douglas*, Plaintiff husband suffered "a severe closed head injury" when he was hit by a car as he rode his bicycle in 1996. He went through hospitalization and rehabilitation, but never really returned to regular work. He had behavioral changes and short term memory loss. There was a medical opinion given that he needed 67 hours of weekly attendant care (primarily monitoring) before November 7, 2006 and 40 hours per week thereafter. His wife was the sole provider of attendant care. Her testimony at trial was that, when she was at home, her entire time was spent "babysitting" and "watching James," even while she was performing other household chores. She believed that her presence in the house kept Plaintiff from being hospitalized. She submitted some attendant care forms but admittedly did not itemize much of her claimed time.

The majority reaffirmed *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 (2005) by holding that the plain language of MCL 500.3107 (1) (a) imposes four requirements that a PIP claimant must prove before recovering benefits for allowable expenses. The expenses must be: (1) for an injured person's care, recovery, or rehabilitation; (2) reasonably necessary; (3) incurred; and (4) the charges must be reasonable. The majority did not dispute that there was sufficient evidence to support the first two requirements. The Court then analyzed whether and to what extent attendant care expenses *were actually incurred* and *whether the charges were reasonable*.

The majority noted that the trial court had not made a finding as to whether the charges were actually incurred, including whether Plaintiff's wife expected compensation or reimbursement at the time she provided the services. It also noted that there was an absence of any evidence that the number of hours recommended and/or prescribed were *actually performed*, partially in light of the fact that Plaintiff's wife worked full-time outside the home and partially because a dearth of simultaneously prepared records.

The trial court's award of $40.00 per hour for the wife's watching of her husband was vigorously questioned on the basis of "reasonableness". The trial court apparently noted that the claimed cost of placing such a "watcher" by a commercial provider was $40.00 per hour, but that the evidence was that the wage received by the actual caregiver was $10.00 per hour. The majority held that the award of $40.00 per hour was "clearly erroneous" and favorably cited *Bonkowski v Allstate Ins Co*, 281 Mich App 154 (2008) and *Van Marter v American Fidelity*, 114 Mich App 171 (1982). It noted that the rate actually paid to attendant care providing individuals was much more relevant to the reasonableness calculation than the total agency rate that included amounts for overhead and other extras which were not typically incurred by families.

The dissent, (authored by Justice Cavanagh and joined by Justices Marilyn Kelly and Hathaway), asserted that the majority added a requirement that the caregiver must expect payment *at the time the services were provided,* which does not appear in the language of the statute and is adverse to claimants and their families who are not thinking in terms of remuneration at the moment an auto accident occurs. As to the "reasonableness" analysis, the dissenters suggest that the majority simply decided to act as an appellate fact-finder and that the analysis was simplistic.

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