Volume 2, Issue 6

BUCKFIRE & BUCKFIRE, P.C.

July 2011

The Michigan No-Fault Newsletter

Special points of interest:

- **Can a client who is injured and has pre-existing conditions receive no-fault benefits?**
- **When is the insurer liable for attorney fees?**
- **Free Motorcycle Law Presentation**

Inside this issue:

Insurer Liable For Attorney Fees For Unreasonable Denial of Podiatry Bills

In *Esterhai v. Farm Bureau*, unpublished opinion decided May 24, 2011, (Docket No. 295441) the Plaintiff was injured in 1988 when a semi-truck hit her car from the rear.

She sustained neck, back, and shoulder injuries. She continued to have problems for years afterward. Her injuries eventually necessitated a pair of surgical procedures on her lower back, the second of which involved implanting rods and screws to straighten her back.

In 2006, plaintiff's orthopedic surgeon Dr. Herbert Roth performed an additional surgery to fuse the C6 and C7 vertebrae in plaintiff's neck. During the surgery, Dr. Roth discovered a tear, in plaintiff's C6-C7 ligament.

The surgery successfully relieved many of plaintiff's symptoms. However, Farm Bureau either denied or failed to pay many (but not all) of the bills for the surgery and pre- and post-surgery care.

Farm Bureau also paid two bills and denied two bills for toenail care by a podiatrist, which plaintiff claimed was necessary because the rods in her back prevent her from trimming her own toenails.

Farm Bureau argued that it had reason to deny the bills for toenail care based on the information provided with the bills.

The medical records provided to Farm Bureau stated that the plaintiff couldn't cut her toenails because the injuries from the accident made it very difficult for her to bend over and cut her nails for approximately 2 yrs which resulted in her developing "thick, long, dystrophic, painful nails...a hyperkeratotic lesion" and that plaintiff was "unable to self care."

Dr. Roth also wrote plaintiff a prescription for podiatric care stating plaintiff "is unable to bend to cut her toe nails." Despite this evidence, Farm Bureau's adjuster testified that based on this record she believed that plaintiff sought the podiatric care because of a foot condition unrelated to the car accident.

Farm Bureau also argued that it was not clear that plaintiff's last surgery was necessitated by her original trauma. The parties' trial experts disputed whether plaintiff's last surgery was related to the auto accident.

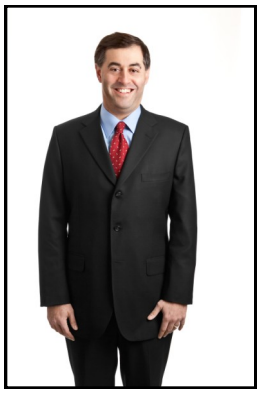
At the conclusion of trial, the jury found defendant liable for plaintiff's medical expenses, but did not find any of the expenses to be overdue under MCL 500.3142 (a prerequisite to obtain attorney fees under MCL 500.3148).

The trial judge overruled the jury's determination that the benefits were not overdue and awarded plaintiff no-fault penalty attorney fees under § 3148 stating that that the original denials were without any support.

On appeal, the Court held that the trial court erred in reversing the jury's finding that the bills for cervical care were not overdue.

However, the Court stated that the trial court was correct in finding that the podiatric bills were in overdue under § 3142.

On the attorney fee issue, the Court held that the denial of the podiatry bills was unreasonable and the Plaintiff was entitled to attorney fees under § 3148 of the No-Fault Act.



Michigan Attorney Daniel L. Buckfire

Michigan car accident attorney Daniel L. Buckfire has devoted his career to representing individuals who have suffered serious injuries in car, truck, and motorcycle accidents. He is recognized as a legal expert throughout the State of Michigan on motor vehicles accidents and cases involving Michigan No-Fault Insurance Benefits. Daniel has an undergraduate degree from the University of Michigan School of Business and a law degree from the University of Michigan Law School.

Benefits Payable To Claimant With Pre-Existing Condition Who Is Injured Exiting Vehicle

In *McCormick v. Progressive*, unpublished opinion per curiam of the Court of Appeals decided June 14, 2011 (Docket No. 297873) the plaintiff broke her leg in 1968 at the age of nine. Her doctors placed a pin in her tibia. An infection started in the bone, which worsened over time and went undiscovered until July 2007.

Once it was discovered, the treatment involved hollowing out the bone. The plaintiff was not allowed to bear weight on her leg until the Fall of 2007.

On December 29, 2007, after plaintiff and her husband returned home in their pickup truck, the plaintiff began to exit the vehicle. As she was twisting out of her seat, she had one hand on the handle next to the passenger door and her right foot on the running board when she felt a snap and pain in her left hip. She had fractured her hip.

Her doctor testified that she may have had an underlying stress fracture, and that the motion of getting out of the vehicle may have caused it to become a fully displaced fracture. He stated that the bone infection and subsequent disuse of the leg may have contributed to the weakening of the bones in her hip and leg.

Defendant Progressive denied Plaintiff's claim for no-fault benefits on grounds that her injury did not arise out of the operation, use or maintenance of a motor vehicle as a motor vehicle. The trial court rejected Progressive's argument and held that it was obligated to pay the Plaintiff's no-fault benefits.

Under MCL 500.3105 (1), a no-fault insurer is liable for injuries "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle."

In *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998), the Supreme Court held that "whether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles."

On Appeal, the Court stated that a vehicle cannot serve a transportational function unless passengers are able to both enter and exit the vehicle. Thus, the plaintiff's injury arose from the use of the parked vehicle "as a motor vehicle."

The Court went on to distinguish other cases where the injuries were held not to satisfy § 3105.

In distinguishing those cases the Court stated that: "In the present case, getting out of the vehicle forced the plaintiff to twist in her seat, which caused her hip to break. Because getting out of the vehicle was part and parcel of using it as a motor vehicle, plaintiff's use of her motor vehicle as a motor vehicle was causally connected to her injury. This connection is more than incidental, fortuitous or but for."

ASK DAN - The No-Fault Insurance Expert

Q: *Can a no-fault claimant be reimbursed for medical mileage to and from medical appointments?*

Dan: Yes. This is called medical mileage and claimant's can be reimbursed for traveling to and from any appointments which are necessary for their care, recovery or rehabilitation.

Q: How much can a no-fault claimant be paid for medical mileage?

Dan: The law says that the no-fault insurer has to pay a reasonable rate per mile. Often times, insurers will pay the rate established by the IRS for business mileage which is currently $ .51 per mile. Other insurers will pay less unless you can break down the expenses in an itemized fashion (gas receipts, depreciation, maintenance records, etc.)

FREE PRESENTATION

ON MICHIGAN MOTORCYCLE ACCIDENT LAWS

DATE: Tuesday, August 16, 2011

TIME: 4:00—6:00 PM (Registration between 3:30 and 4:00 PM)

WHERE: TBI Solutions located at 24750 Swanson Road, Southfield, MI

SPEAKERS: Buckfire Attorneys, Daniel L. Buckfire & George Burke

Space is limited so make sure to RSVP today!

RSVP DATE: August 5, 2011

To RSVP, please call or email Kathryn Fish
Kathryn@buckfirelaw.com or **248-569-4646**.

This activity has been submitted to the Ohio Nurses Association (OBN-100-91) for approval to award contact hours. The Ohio Nurses Association is accredited as an approver of continuing education by the American Nurses Credentialing Commission on Accreditation.

Application has also been made to the Commission for Case Manager Certification (CCMC).

For more information on contact hours, please contact Kathryn Fish.

Brought to you by:

Buckfire & Buckfire, P.C. Attorneys at Law

TBI Solutions A Journey Towards Independence

Refreshments provided by TBI Solutions.

Buckfire & Buckfire would like to thank our sponsor, TBI Solutions, for their generous support in providing the facilities and refreshments for this activity.

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Our No-Fault Service Provider Spotlight

Pioneer Rehabilitation
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This month we spotlight Pioneer Rehabilitation Specialists, a rehabilitation program specializing in traumatic brain and spinal cord injuries in the no-fault community. From barrier-free homes to their up-scale apartment program, Pioneer Rehabilitation helps clients with their various rehabilitation needs, both physical and cognitive.

Pioneer Rehabilitation believes that quality of care is to never be compromised. To attain this mindset they perform services with a special focus on each individual's current standing, and cater to the goals they look to accomplish.

According to the client's needs, the services they offer include 24 hour supervision, meal planning and preparation, daily activities and recreation, medication administration and management, physical and occupation therapy, speech therapy, nursing services, and many other programs. Some of the amenities Pioneer Rehabilitation offers include private and semi-private bedrooms, barrier-free floor plan, computer and internet availability, fire and security alarm, and transportation.

Pioneer Rehabilitation is currently running tours of its Troy Hills facility located in Troy, MI this month. For more information, please email info@pioneerrehabspecialist.com

To nominate yourself or another no-fault provider for the No-Fault Service Provider Spotlight , please e-mail your nomination to Kathryn@BuckfireLaw.com . Our newsletter is read by 1,000 readers every month!