

STATE OF MICHIGAN
COURT OF APPEALS

RICK PETERSEN,

Plaintiff-Appellee,

v

MAGNA CORPORATION and MIDWEST
EMPLOYERS CASUALTY COMPANY,

Defendants-Appellants,

and

BCN TRANSPORTATION SERVICES INC.;
KOLEASECO INC. and CITIZENS INS. CO. OF
AMERICA; KOLEASECO INC. and ACCIDENT
FUND OF AMERICA; BCN
TRANSPORTATION SERVICES and TIG INS.
CO.; MAGNA CORPORATION and TIG INS.
CO.; and SERTA RESTOKRAFT MATTRESS
CO. INC. and HARLEYSVILLE LAKE STATES
INS. CO.,

Defendants-Appellees.

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

These consolidated workers' compensation cases are before us on remand from the Supreme Court for consideration as on leave granted.¹ The Supreme Court directed that the appeal is "limited to the issues regarding insurance coverage and division of liability for payment of the worker's compensation benefits awarded to plaintiff, and the issue of awarding attorney fees on unpaid medical expenses."² We affirm.

¹ *Petersen v Magna Corp*, 477 Mich 871; 721 NW2d 586 (2006).

² *Id.* at 871-872.

I. Overview

Plaintiff Rick Petersen, a truck driver, suffered three injuries, the first occurring in November 1997, when he fell off of a flatbed truck. Questions before the magistrate included: (1) which entity—BCN Transportation Services (BCN) or Koleaseco—employed Petersen at the time of his 1997 injury; (2) whether Midwest Employers Casualty Company (Midwest) was the insurer for workers' compensation purposes; (3) whether Petersen was disabled; and (4) if Petersen was disabled, which injury caused the disability. The magistrate bifurcated the issues into two trials. The initial trial addressed the issues of Petersen's employer and the employer's insurer, while the second trial addressed the nature and extent of Petersen's injuries.

The Worker's Compensation Appellate Commission (WCAC) affirmed the magistrate's ruling that Midwest was the workers' compensation insurer for Petersen's injury in November 1997, affirmed the open award of benefits, and affirmed the assessment of attorney fees. This Court denied leave for lack of merit in the grounds presented. However, the Supreme Court remanded, as stated above.

In accordance with the Supreme Court's order, our consideration of these consolidated appeals is limited to two issues. Defendants Magna Corporation (Magna) and Midwest first ask whether the magistrate erred in ruling that the payment of benefits rested with the carrier for BCN and whether the WCAC erred in failing to review that issue. Magna and Midwest also question whether the magistrate and the WCAC erred in directing them, rather than the medical provider, to pay attorney fees on unpaid medical expenses.

II. Basic Facts And Procedural History

A. Petersen's November 1997 Injury

Rick Petersen began working for Koleaseco, a trucking company, in February 1997, when two of Koleaseco's dispatchers approached him about employment. In March 1997, Koleaseco entered into a contract with BCN, a human resources company, or "employee leasing" company, to be its administrator of employee benefits. As part of that contract, BCN assumed the administration and payment of workers' compensation insurance for Koleaseco. Several weeks after Petersen began working for Koleaseco, he completed an application for employment with BCN. Thereafter, Petersen's paychecks came from BCN, as did his yearly W-2 tax form. Although the magistrate's opinion indicates that "the parties" stipulated that Petersen was a BCN employee in November 1997, the magistrate later noted that only BCN so stipulated and that the parties disputed whether Petersen was an employee of Koleaseco or BCN. Petersen believed that he was a Koleaseco employee, as he had never met anyone from BCN and was supervised by people who worked at the Koleaseco facility.

On November 28, 1997, Petersen was securing a load of Christmas trees on a flatbed truck. In order to secure the load, he got on the bed of the truck and decided to saw off part of a tree. While doing so, he lost his balance and fell approximately 12 feet. Petersen landed on his right foot and then landed on his tailbone. He underwent surgery on his right foot five days after the accident; plates and screws were placed in his heel. Petersen was bedridden for several months as a result of the injury to his right foot. When he began moving around after that, he had back and leg pain.

Dr. Timothy Garvey, an orthopedic surgeon, treated Petersen since June 1998. Dr. Garvey believed that Petersen's back condition resulted from the November 1997 fall. In contrast, Dr. Victor C. Gordon, D.O., board-certified in physical medicine and rehabilitation, testified that Petersen's injury of November 1997 did not cause his back pain. Rather, a genetic condition called Scheuermann's Disease resulted in early disc degeneration. The condition meant that the anterior support in the spine had shifted, causing a predisposition for degenerative disc disease. Dr. Gordon believed that Petersen's activities and injuries after the fall aggravated his preexisting condition. Dr. Donald C. Austin, M.D., board-certified in neurological surgery, also testified that he did not believe the fall in November 1997 caused Petersen's disc problems because of the long delay in the onset of symptoms.

B. Payment Of Workers' Compensation Benefits

After Petersen was injured in November 1997, he received workers' compensation benefits from Midwest. Midwest received notice of Petersen's injury in early December 1997 and began paying benefits on December 12, 1997.

BCN's owner, Gary Houle, testified that he paid for workers' compensation insurance by sending checks to Magna, another "employee leasing" company.³ Houle understood that Magna forwarded the checks to Midwest; hence, Houle believed that Midwest was BCN's workers' compensation insurer. Houle did not, however, have a copy of an insurance policy. He allegedly spoke with a Midwest underwriter, who indicated to him that Midwest insured BCN. A policy of liability insurance issued by the Johnson-Nappier Insurance Agency supports BCN's belief that Midwest was its insurer, as it lists BCN as an insured and Midwest as the insurer. The actual workers' compensation policy, however, lists Magna as the only insured.

Leo Winstead, an Assistant Vice President at Midwest, testified that Midwest did not insure BCN in 1997. Rather, Midwest insured Magna, a fact to which the parties stipulated. Winstead said that Midwest paid workers' compensation benefits to Petersen because Petersen was listed as a Magna employee on certain documents. Despite Midwest's claim that Magna was its only insured, Midwest sent documentation to the State of Michigan in February 1998 indicating that BCN was an additional insured under the workers' compensation policy.⁴ Although Petersen was listed as an employee of BCN on the Employer's Basic Report of Injury, Midwest paid benefits to Petersen through its third party administrator, Key Risk Management.

In 1999, Midwest sued Magna and BCN in federal court, alleging that Magna owed it over \$1 million pursuant to insurance agreements for 1997. Midwest alleged that claims were submitted on behalf of BCN employees who were not covered under the policy. Midwest alleged that Magna and BCN conspired to defraud it. In October 1999, Magna and Midwest settled, and BCN was dismissed with prejudice. In the settlement agreement, Midwest agreed to

³ Magna's connection to BCN is unclear from the materials provided to this Court. The magistrate noted that Magna did not own a majority interest in BCN.

⁴ Further, a Midwest underwriter sent a letter dated November 21, 1997, to the State of Wisconsin identifying BCN as an insured.

pay all claims reported to it as of July 31, 1999, pursuant to the terms of the contract. Midwest agreed to handle claims for Magna employees, but not for employees of any other entity.

C. The First Trial

(1) The Magistrate's Decision

In November 2002, the magistrate presided over a trial limited to two issues: (1) the identity of Petersen's employer as of November 28, 1997, the date of his initial injury; and (2) whether Midwest insured BCN on that date. The magistrate noted that BCN stipulated that Petersen was its employee in November 1997. The magistrate considered whether Petersen also was an employee of Koleaseco under the economic reality test. The magistrate ruled as follows:

When these factors are reviewed as a whole, it is clear that the plaintiff was an employee of Koleaseco on November 28, 1997. Although the plaintiff was paid wages by BCN, he was controlled by Koleaseco. Koleaseco was ultimately responsible for hiring, firing and disciplining him. He was working with Koleaseco, not BCN, toward a common goal or objective. Therefore, based on the totality of the circumstances, the plaintiff was an employee of Koleaseco on November 28, 1997. Because BCN stipulated that it was the plaintiff's employer (sic – employer) on November 28, 1997, I find that both BCN and Koleaseco were the plaintiff's employers on that date and are both liable for the plaintiff's workers' compensation benefits arising out of his alleged injury on November 28, 1997.

The magistrate then examined whether Midwest provided insurance for BCN on November 28, 1997. The magistrate made a factual finding that BCN did not have an insurance contract with Midwest and that Magna was the sole insured. The magistrate rejected BCN's argument that it was entitled to coverage from Midwest based on the doctrine of laches, noting that he did not have the legal authority to apply that doctrine. The magistrate also rejected BCN's argument that it was entitled to coverage based on *res judicata*, noting that the federal case did not resolve the issue of whether Midwest insured BCN on November 28, 1997.

The magistrate then ruled that the doctrine of estoppel barred Midwest from denying coverage to BCN based on Midwest's misrepresentations to BCN regarding insurance coverage:

Based on the evidence submitted, I find that the doctrine of estoppel is applicable and that Midwest should be precluded from denying that it provided insurance coverage for BCN on November 28, 1997. First, I find that Midwest made a misrepresentation to BCN regarding insurance coverage. Mr. Houle, one of the owners of BCN, credibly testified that in July or August of 1997, he talked to an underwriter at Midwest who verified that BCN had a policy of workers' compensation insurance in effect with Midwest. Mr. Houle stated that he contacted Midwest to verify that BCN had insurance with Midwest. Moreover, Mr. Houle obtained a document from the State of Wisconsin (Exhibit B), which verified that Midwest had coverage for BCN, effective August 1, 1997. I also find that Mr. Houle, on behalf of BCN, reasonably relied on this misrepresentation by Midwest's underwriter. As Mr. Houle stated on page 105 of

the trial transcript, he wanted to “make sure this was a legitimate deal.” I find that Mr. Houle is an honest and concerned person. I believe that if Midwest denied that it had coverage for BCN, he would have obtained a policy through another insurance carrier. As a result of the misrepresentation by Midwest and Mr. Houle’s reasonable reliance on the misrepresentation, BCN was subject to a change of circumstances which detrimentally affected BCN. BCN obviously will suffer prejudice if Midwest is not responsible for providing insurance coverage because BCN will be directly responsible for paying Mr. Petersen’s workers’ compensation benefits. Therefore, under the totality of the circumstances, I find that Midwest is responsible for insurance coverage for BCN on November 28, 1997, based on the doctrine of estoppel.

(2) The WCAC’s Decision

Midwest and BCN appealed to the WCAC. The WCAC agreed with the magistrate that no contract of insurance existed between BCN and Midwest. Turning to the equitable estoppel issue, the WCAC ruled that it had the power to apply at least some equitable principles. The WCAC concluded:

It appears from the review of the entire record that Magna has engaged in dishonest practices, to say the least. Exhibit O, a June 4, 1998, Memorandum from Matt Jerabek, vice president, client services for Midwest, leaves the reader unsure as to whether or not Midwest actually insured BCN. Exhibits B and K could support a finding that it did. In light of the considerable confusion even among the Midwest underwriters, it is certainly reasonable to accept Mr. Houle’s testimony that he relied on representations from someone at Midwest. The magistrate has appropriately set forth the basis for his finding of equitable estoppel under the circumstances here.

Defendant Magna/Midwest argues at length that equitable estoppel should not apply here, arguing that there was no reasonable reliance by BCN. Again, while its position on this point is eloquently argued, it is based on re-weighing the testimony and exhibits below, and reaching a different conclusion than that of the magistrate. Again, as noted above, that is not our standard of review. We believe the evidence noted by the magistrate supports his decision.

D. The Second Trial

(1) The Magistrate’s Decision

In the second trial, the magistrate considered several issues related to Petersen’s disability and treatment. Of those several issues that the magistrate considered in the second trial, only two are relevant for the purposes of this appeal: (1) whether Petersen’s counsel is entitled to a 30 percent attorney fee on unpaid medical bills, and (2) who was responsible for paying the Petersen’s medical and weekly benefits.

The magistrate ruled as follows regarding Petersen's attorney fees:

Plaintiff's counsel represented that he filed the original petition in the case because, although Midwest . . . was paying the plaintiff weekly benefits, it refused to pay medical bills related to the November 28, 1997 injury. Plaintiff's counsel agreed with counsel for Midwest that he is only seeking a 30 percent attorney fee for medical bills incurred between January 16, 2001 and October 22, 2001. The total amount of the medical bills incurred during this time period which defendant refused to pay is \$153,448.54. I find that plaintiff's counsel is entitled to a 30 percent attorney fee for these unpaid medical bills under Section 315(1) of the statute in the amount of \$46,034.56. Although this is a substantial attorney fee, it should be emphasized that plaintiff's counsel has put a substantial amount of work into this case. This case involves complicated legal and medical issues. It also required plaintiff's counsel to travel to Minnesota to take depositions. Plaintiff's counsel would have had no incentive to pursue this case if he was not entitled to an attorney fee. Therefore, because of the significant work plaintiff's counsel has and will continue to put into this case to ensure that his client's medical bills are paid, he is entitled to a 30 percent attorney fee under Section 315(1) of the Act.

The magistrate then addressed whether BCN or Koleaseco would be responsible for paying Petersen's ongoing medical and weekly benefits. The magistrate ruled:

As set forth in Plaintiff's Exhibit 10, there was a contract between BCN and Koleaseco in effect at the time of plaintiff's November 1997 injury. In that contract, BCN agreed to be responsible for the administration and payment of workers' compensation insurance. Therefore, under the contract, BCN and its carrier, Midwest, are primarily responsible for the payment of workers' compensation benefits to plaintiff rather than Koleaseco/Citizens. Moreover, in *Hoffman v National Machine Co*, 113 Mich App 66[; 317 NW2d 289] (1982), the Michigan Court of Appeals quoted a decision from the Michigan Supreme Court, *Solakis v Roberts*, 395 Mich 13[; 233 NW2d 1] (1975). The *Solakis* Court addressed the issue of dual employment and who was responsible for the payment of workers' compensation benefits. The court held that the employer who paid wages to the injured employee was primarily liable for benefits. See *Solakis*, pp 25-26 and *Hoffman*, p 72. It is uncontested that BCN was the employer who paid wages to the plaintiff in this case. Therefore, BCN and its insurance carrier Midwest are primarily responsible for the payment of the plaintiff's workers' compensation benefits. If BCN and Midwest are not financially capable of paying the benefits, plaintiff's benefits must be paid by Koleaseco and Citizens.

(2) The WCAC's Decision

The various parties filed appeals and cross appeals with the WCAC to appeal the magistrate's opinion. The WCAC rejected Midwest and Magna's attempts to reopen the proofs related to the earlier trial as to which entity had employed Petersen on the injury date. The WCAC noted that the earlier and separate trial was not an interlocutory proceeding, but rather was a full ruling on the merits of certain delineated issues. The WCAC noted that it already had

issued an opinion regarding those issues. Finally, the WCAC reiterated that the issue of which entity was Petersen's employer was a factual one and that competent, material, and substantial evidence supported the magistrate's findings.

With regard to the attorney fees, the WCAC stated that the magistrate had awarded the fee not only because Midwest had unreasonably withheld medical expenses, but also because Petersen's counsel had expended hard work and time in collecting the expenses. The WCAC noted that attorney fees were appropriate where the magistrate determined that the carrier knew of the claimed bill, that the Petersen sought reimbursement for it in his original application for benefits or at least by the onset of trial, and that the medical service was reasonable and necessary to treat a work-related injury. The WCAC ruled:

While the magistrate failed to explicitly so find, in this case, it is clear both from the record and the context of magistrate remarks, defendant knew of the medical bills in question well in advance of trial, and simply refused to pay them claiming they were not work related. Once the magistrate so found, given that prior knowledge and refusal to pay, the action in awarding attorney fees was within his discretion and hence proper.

E. The Present Appeal

Magna and Midwest sought leave to appeal both WCAC orders. This Court denied leave to appeal for lack of merit in the grounds presented.⁵ Magna and Midwest appealed to our Supreme Court, which remanded as on leave granted.⁶ This Court consolidated the cases.

III. Responsibility For Payment Of Petersen's Benefits

A. Standard Of Review

This Court's review of a WCAC decision is limited.⁷ In the absence of fraud, if there is any competent evidence in the record to support them, we consider the WCAC's findings of fact conclusive.⁸ This Court may not independently weighed the evidence,⁹ nor may this Court independently review the magistrate's decision.¹⁰ If it appears that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the

⁵ *Petersen v Magna Corp*, unpublished order of the Court of Appeals, entered April 11, 2006 (Docket No. 266037); *Petersen v Magna Corp*, unpublished order of the Court of Appeals, entered April 11, 2006 (Docket No. 266177).

⁶ We presume that the Supreme Court's order had the effect of vacating our prior orders so that the law of the case doctrine does not bind us.

⁷ *Rakestraw v Gen Dynamics Land Systems*, 469 Mich 220, 224; 666 NW2d 199 (2003).

⁸ MCL 418.861a(14); *Rakestraw*, *supra* at 224.

⁹ *Ruthruff v Tower Holding Corp*, 261 Mich App 613, 616; 684 NW2d 888 (2004).

¹⁰ *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000).

magistrate, did not “misapprehend or grossly misapply” the “substantial evidence” standard, and gave an adequate reason grounded in the record, the judicial tendency should be to affirm.¹¹

B. Analysis

Midwest and Magna argue that Koleaseco paid all of Petersen’s wages and that BCN merely served as a conduit to the funds. Thus, they contend, liability should rest with Koleaseco and Citizens, its carrier, not with BCN or Midwest and Magna. Accordingly, they argue that the magistrate erred by ruling that Koleaseco’s carrier would not be responsible for paying benefits to Petersen. Midwest and Magna also contend that the WCAC erred in failing to review the issue and, if this Court does not resolve the issue in their favor immediately, it at least should remand the matter to the WCAC for it to resolve.

Contrary to Midwest and Magna’s arguments, the WCAC did review the issue. The WCAC noted that the inquiry regarding which entity employed Petersen was a factual one. The WCAC specifically ruled that competent, material, and substantial evidence supported the magistrate’s findings. We therefore reject Midwest and Magna’s argument that the case requires remand on this point.

Midwest and Magna then argue that the record facts show that BCN was only a “conduit” for wages paid by Koleaseco. In this case, competent evidence on the record supports the magistrate’s and the WCAC’s finding that BCN paid Petersen’s wages. Indeed, BCN so stipulated. Where competent evidence on the record supports the magistrate’s and the WCAC’s findings, we decline Midwest and Magna’s invitation to revisit those factual findings.

IV. Attorney Fees

A. Standard Of Review

Midwest and Magna argue that the WCAC erred as a matter of law in assessing attorney fees against them for unpaid medical expenses. This Court reviews *de novo* questions of law requiring statutory interpretation.¹² We will not reverse a decision to award attorney fees absent an abuse of discretion.¹³

B. Analysis

The statute governing attorney fees provides, in pertinent part:

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

¹¹ *Id.* at 703.

¹² *Frank W Lynch Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001).

¹³ *Windemere Commons I Assoc v O’Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006).

attendance or treatment recognized by the laws of this state as legal, when they are needed. . . . 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 workers' compensation magistrate. *The workers' compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.*¹⁴

When reviewing a statute, Courts consider the statutory language to determine if an ambiguity exists.¹⁵ Where statutory language is ambiguous, judicial construction is permitted.¹⁶ In contrast, where ambiguity exists, this Court may reasonably construe the statute, while considering the statute's purpose and the Legislature's intent.¹⁷ "In statutory interpretation, the primary goal must be to ascertain and give effect to the Legislature's intent, and the judiciary should presume that the Legislature intended a statute to have the meaning that it clearly expresses."¹⁸ Statutory provisions are to be read in the context of the entire statute to produce a harmonious whole and to implement the purpose of the legislation.¹⁹

Midwest and Magna contend that the language of the statute indicates that the attorney fee payable regarding medical expenses is prorated between the parties receiving those expenses—here, Petersen or the provider. They argue that an attorney fee on medical expenses should not be imposed against an employer. We disagree.

The final sentence of § 315 provides that "[t]he workers' compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee." That language could be considered ambiguous because it does not identify the entity upon which the magistrate should assess attorney fees. We further observe that the final sentence regarding the prorated fees follows the sentence discussing the employer's failure to pay medical benefits. The preceding sentence notes that the employer or its insurance carrier may make payment to the providers. Thus, § 315 involves an employer's payment of reimbursement to medical providers. In light of that, we cannot conclude that the Legislature intended to make the medical providers pay attorney fees on the reimbursement. Had the Legislature intended otherwise, it could have expressly so stated.

In reaching this conclusion, we have not overlooked the term "prorate" in the statute: "The workers' compensation magistrate may *prorate* attorney fees at the contingent fee rate paid

¹⁴ MCL 418.315(1) (emphasis added).

¹⁵ *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 538; 565 NW2d 828 (1997).

¹⁶ *Deschaine v St Germain*, 256 Mich App 665, 669; 671 NW2d 79 (2003).

¹⁷ *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001).

¹⁸ *McClellan v Collar (On Remand)*, 240 Mich App 403, 409; 613 NW2d 729 (2000) (citation omitted).

¹⁹ *Macomb Co Prosecuting Attorney*, *supra* at 159.

by the employee.”²⁰ “Prorate” is defined in part as “1. to divide, distribute or calculate proportionately.”²¹ Where the remainder of that statutory provision discusses the employer and/or the carrier, it follows that the attorney fees are to be calculated or divided between those entities. The plain language of the statute does not mandate that the health care provider assume responsibility for any portion of those fees.

The WCAC has expressed similar reasoning. In *Alber v Big Rapids Automotive*,²² the WCAC ruled that the language of the statute indicated that the employer/carrier should pay the fee:

The last sentence must be read in conjunction with the previous one. In doing so it becomes clear that the prorated attorney fee referred to should be paid by the employer/carrier, and not the health care provider. The health care provider is not guilty of any breach of duty, and in fact would find itself in a position of having provided medical care in good faith and having to accept a discounted payment in addition to the limitations set by the Cost Containment Rules. . . .

We believe that the attorney fee provision of Section 315 was designed to promote the assistance of counsel in medical dispute cases where there are minimal or no wage loss benefits from which to obtain an attorney fee. We read that language as the remedy, set forth by the Legislature. A remedy is something that cures, relieves or corrects. We cannot see any other interpretation of this language than to cure, relieve or correct the expenses thrust upon an injured worker, as the direct result of an employer’s failure, neglect or refusal, by requiring the employer to bear such expenses, including attorney fees.

This Court first addressed the apportioning of attorney fees in *Boyce v Grand Rapids Asphalt Paving Co.*²³ The *Boyce* plaintiff argued that the hospital should be responsible for a portion of his attorney fees, an argument that this Court summarily rejected. This Court cited 7 Am.Jur.2d, Attorneys at Law, § 238, pp 277-278, for the proposition that an attorney generally may not recover fees from one who did not employ the attorney, however valuable the result of the attorney’s services. The Court then cited a 1937 case from the Michigan Supreme Court, *Stewart v Auditor General*,²⁴ which held that a party does not become liable for attorney fees merely by accepting the benefits of the attorney’s services.²⁵

²⁰ (Emphasis added.)

²¹ *Random House Webster’s College Dictionary* (1992), p 1083.

²² *Alber v Big Rapids Automotive*, 2006 Mich ACO 281 (2007).

²³ *Boyce v Grand Rapids Asphalt Paving Co.*, 117 Mich App 546; 324 NW2d 28 (1982).

²⁴ *Stewart v Auditor Gen.*, 280 Mich 272; 273 NW2d 566 (1937).

²⁵ *Boyce*, *supra* at 549-550.

The *Boyce* Court then considered the statutory language of § 315(1), ruling that the final sentence could be construed to require either the employer or the insurance carrier to pay a plaintiff's attorney fees. The Court also noted that Administrative Rule 14 of the Bureau of Workers' Compensation,²⁶ in effect on the date of the plaintiff's injury in 1974, precluded attorneys from recovering a percentage fee for accrued medical expenses.²⁷ The Court questioned the soundness of Rule 14, noting that requiring employers or insurance carriers to pay attorney fees when they refuse to pay mandatory medical benefits would serve justice. The Court acknowledged, however, that neither the statute nor Rule 14 so provided.²⁸

Two years later, in *Zeeland Community Hosp v Vander Wal*,²⁹ this Court rejected the defendant's argument that the plaintiff provider should be responsible for a portion of the attorney fees. The defendant cited case law from the no-fault arena indicating that providers would be unjustly enriched if they were not required to pay fees. This Court noted that it found merit in the unjust enrichment argument, but could find no legislative intent to require a provider to pay a portion of the injured worker's attorney fees.³⁰

The *Zeeland* Court then examined the statutory language of § 315 and ruled:

Since the clause concerning attorney fees follows the clause concerning the employer's refusal to pay the employee's reasonable medical expenses, the final sentence is logically construed to require either the employer or the insurance carrier to pay a portion of defendant's attorney's fees. Contra, MCL 418.821; MSA 17.237(821), which expressly authorizes the assessment of a pro rata share of a claimant's attorney's fees against an insurance company which seeks to enforce an assignment given it by the claimant-employee in exchange for an advance payment under a group hospitalization insurance policy.

Our reading of the relevant statutory provisions does not indicate that the Legislature intended to require plaintiffs to pay a portion of defendant's attorney's

²⁶ 1974 AC, R 408.44.

²⁷ Rule 14 provides that, before computing the fee, the plaintiff's attorney shall deduct "reasonable expenses." The rule then contemplates the assessment of fees on the remaining balance. Before 1979, reasonable expenses in Rule 14(5)(a)-(d) included expenses from: hospitals, surgery, medical providers, and statutorily-mandated burial expenses. In 1979, sections 5(a)-(d) were deleted. *Boyce, supra* at 551 n 1. Rule 14(5) now provides for the deduction of only the following expenses: "(a) Medical examination fee and witness fee. (b) Any other medical witness fee, including cost of a subpoena. (c) The cost of a court reporter service. (d) Appeal costs." Thus, after the 1979 amendment, Rule 14 no longer precludes attorneys from recovering a percentage attorney fee based on recovery of medical provider services. *Watkins v Chrysler Corp*, 167 Mich App 122, 131 n1; 421 NW2d 597 (1988).

²⁸ *Boyce, supra* at 551-552.

²⁹ *Zeeland Community Hosp v Vander Wal*, 134 Mich App 815; 351 NW2d 853 (1984).

³⁰ *Id.* at 824-825.

fees, notwithstanding that plaintiffs may have derived some benefits from the attorney's efforts. . . .^[31]

This Court also followed *Boyce* in *Duran v Sollitt Construction Co.*³² The *Duran* plaintiff argued that the hospital should be required to pay a portion of his attorney fee. This Court agreed with *Boyce* that the hearing referee lacked statutory authority to order the hospital to pay the plaintiff's attorney fees. The *Duran* Court added that § 315 "seems to refer to payment by the employer or his insurer and not by the medical provider."³³

Similarly, *Nezdropa v Wayne Co (On Remand)*,³⁴ relied on *Boyce* in denying the plaintiff's request to have Blue Cross pay a portion of his attorney fees. The WCAC initially ordered Blue Cross to pay attorney fees on the amount reimbursed. This Court reversed that award pursuant to *Boyce* and remanded. The WCAC then determined that the plaintiff's attorney sought fees after the amendment of Rule 14 and ordered the employer to pay attorney fees.

Upon review, this Court in *Nezdropa* acknowledged that the employer and Blue Cross had an agreement where the employer reimbursed Blue Cross where the employer paid workers' compensation benefits. This Court approved of that agreement as sound public policy. The Court thus did not believe that Blue Cross should be liable for attorney fees, particularly where Blue Cross had never sought an assignment.³⁵ Further, this Court concluded that the employer was not liable for attorney fees under Rule 14. The Court opined that the WCAC had erred in using the date when the attorney sought the fees rather than the date the plaintiff was injured. Where Rule 14 had been in effect on the date of the plaintiff's injury, the employer was not liable for the payment of attorney fees on medical expenses.³⁶

In *Watkins v Chrysler Corp.*,³⁷ the magistrate did not award attorney fees. As in *Nezdropa*, the magistrate noted that Blue Cross had not petitioned for reimbursement and indeed had indicated that the plaintiff's attorney was not authorized to represent it in obtaining reimbursement. The WCAC reversed and assessed the fees.³⁸ This Court noted that Rule 14 did not apply to the case given the plaintiff's injury date. This Court stated, however, that the WCAC had ignored the policy aspect of *Boyce* that noted that an employer should bear attorney fees when it fails to pay for medical care in a timely fashion. In contrast, the *Watkins* employer had quickly paid the medical expenses. Thus, Blue Cross had not sought reimbursement of medical expenses. This Court ruled: "To now impose an unearned attorney fee on Chrysler

³¹ *Id.* at 824-825.

³² *Duran v Sollitt Construction Co*, 135 Mich App 610; 354 NW2d 277 (1984).

³³ *Id.* at 615.

³⁴ *Nezdropa v Wayne Co (On Remand)*, 152 Mich App 451; 394 NW2d 440 (1986).

³⁵ *Id.* at 468.

³⁶ *Id.* at 470-471.

³⁷ *Watkins v Chrysler Corp*, 167 Mich App 122; 421 NW2d 597 (1988).

³⁸ *Id.* at 127.

based on a percentage of the voluntary and timely medical benefits afforded its employees would be unconscionable and would likely give rise to the very type of problem that § 315 seeks to preclude.”³⁹

Recent cases from the WCAC also cite public policy in support of holding the employer/carrier responsible for attorney fees. For example, in *Harvlie v Jack Post Corp*,⁴⁰ the WCAC cited with approval the plaintiff’s arguments in favor of holding the employer responsible for attorney fees, as well as the underlying purpose of the legislation:

Plaintiff responds that defendants’ argument overlooks the purpose of attorney fee provisions, which is not merely to assure that a claimant’s attorney is paid, but also *to deter employers from breaching their statutory duty to provide medical treatment to injured workers*. Immunizing employers from liability for attorney fees whenever the claimant or a third-party payer can afford to hire an attorney would hardly give employers an incentive to pay legitimate bills in a timely manner.

We find plaintiff’s argument consistent with our own view of the statute. One of the underlying bases for developing workers’ compensation legislation in Michigan was to provide for prompt medical treatment for workers injured on the job:

The act was originally adopted to give employers protection against common-law actions and to place the burden upon industry, where it properly belongs, not only the expense of the hospital and medical bills of the injured employee, but place upon it the burden of making a reasonable contribution to the sustenance of that employee and his dependents during the period of time he is incapacitated from work. This was the express intent of the legislature in adopting this law.^[41]

Further, the WCAC observed that providers might be less inclined to object to paying a portion of the attorney fees had the statutory cost-containment provisions taken such payment into account.⁴²

³⁹ *Id.* at 132.

⁴⁰ *Harvlie v Jack Post Corp*, 2005 Mich ACO 69.

⁴¹ *Id.*, citing *Lahti v Fosterling*, 357 Mich 578; 99 NW2d 490 (1959) (emphasis added).

⁴² See *Alden v Gen Motors Corp*, 2006 Mich ACO 314. The WCAC stated: “[W]hen cost containment was instituted in MCL 418.315(2) to (9), no factor appears to have been included in the process of containing medical costs to take into account the cost a provider may incur (over and above its own employees, which presumably though not necessarily would not include an attorney) in receiving payment for the services the provider has rendered. Perhaps, if the adjustment in the medical bill to meet the objectives of cost containment included an amount the
(continued...)

We conclude that the rulings in the above cases are sound and may be applied to this case. In contrast to *Watkins*, this is not a case where the insurer timely and quickly paid the employee's medical expenses such that no neglect, no breach of duty, and no failure to provide medical care existed. Rather, here, Midwest failed to pay medical expenses, despite the fact that it was paying other benefits to Petersen. Further, as the magistrate noted, Petersen's attorney was entitled to a fee given the amount of time and effort he had expended on behalf of his client. Further, the WCAC commented that Midwest knew of the medical bills well in advance of trial, yet simply refused to pay them. Under these circumstances, we cannot find an abuse of discretion in the magistrate's award or in the WCAC opinion that affirmed that award.

Affirmed.

/s/ William C. Whitbeck

(...continued)

provider might be obligated to pay in attorneys fees, . . . provider objections to paying an amount equivalent to an attorney fee might lessen or be eliminated.”