SYNOPSIS OF MICHIGAN NO-FAULT LAW

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A. MCL 500.3101(1) – Security for Payment of Benefits

(1) "The owner or registrant of a motor vehicle required to be registered in [Michigan] shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway."

(2)(g) An "owner" means: (i) a person renting or having the use of a motor vehicle for a period that is greater than 30 days; (ii) a person who holds the legal title to a vehicle, other that a person engaged in the business of leasing motor vehicles as a lessor pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days; or (iii) a person who has the immediate right of possession of a motor vehicle under an installment sales contract.

Comments

In *Clevenger v. Allstate Ins.*, 443 Mich. 646 (1993), the Michigan Supreme Court held that the insurer of the insured vehicle owner, who had just sold the motor vehicle to her nephew but had left her license plates on the motor vehicle, remained liable as to the seller as the named insured and to the buyer as a permissive driver. The insurance policy did not require the named insured to have legal title to the vehicle, nor did it terminate coverage upon a transfer of title. Because the insured voluntarily remained the registrant of the vehicle, the court presumed that she complied with the statutory duty to insure it during the brief period she permitted the new owner to operate it on a public highway.

In *Twichel v. MIC Gen. Ins. Corp.*, 469 Mich. 524 (2004), the Michigan Supreme Court held that the purchaser of a truck was the "owner" under MCL 500.3101(2)(g)(i), even though the purchaser had paid only half of the sale price, title had not transferred, and the motor vehicle was not used for a 30-day period before the accident. Because the arrangement contemplated a permanent transfer of ownership, and that the purchaser would have exclusive use of the truck, the buyer was barred from PIP benefits as the owner of an uninsured motor vehicle.

II. MCL 500.3105 and MCL 500.3145 – Personal Protection Insurance

A. MCL 500.3105 – Personal Protection Benefits

(1) "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle."

(2) Personal protection insurance benefits are due "without regard to fault."

(4) A bodily injury is accidental *unless* the injury was caused or suffered intentionally by the claimant. A claimant does not cause or suffer an injury intentionally, even if he knows the accident is substantially certain to occur, if he acts to avert injury.

Comments

In *Morosini v. Citizens Ins. Co.*, 461 Mich. 303 (1999), the Michigan Supreme Court held that personal protection insurance does not cover bodily injury suffered from a physical assault in the aftermath of a minor vehicle collision. Further, bodily injury suffered in connection with a physical assault from a carjacking, robbery, or other assault inside a motor vehicle is not considered a bodily injury "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." However, an insured who is intentionally run over or struck by a driver would arguably be entitled to personal protection insurance benefits, for the motor vehicle is the instrumentality of the injury, rather than merely the *situs* of the injury; the focus is on the relationship between the injury and the use of the vehicle as a vehicle to commit the injury.

Using a motor vehicle as a ladder, stepstool, or other similar device would not be considered use of a motor vehicle as a motor vehicle.

In *Amerisure Ins. Co. v. Auto-Owners Ins. Co.*, 262 Mich. App. 10 (2004), the Michigan Court of Appeals found that in determining whether an insured acted intentionally and thus would be unable to collect personal protection insurance benefits, one must find that the insured intended the act that caused the injury and that he intended the injury itself. "[T]he finder of fact must focus on the person's subjective intent."

B. MCL 500.3145(1) – Statute of Limitations

(1) An action for recovery of personal protection insurance benefits must commence within one year after the date of the accident, unless written notice of the injury is given to the insurer within one year after the date of the accident or unless the insurer previously paid out personal protection insurance benefits for the injury. If the insurer receives notice or makes a payment, the injured party may commence an action any time within one year after the most recent incurrence of an allowable expense, a work loss, or a survivor's loss. The claimant may not recover benefits for any loss incurred more than one year before the action's commencement date. The claimant must provide notice with his name and address and the time, place, and nature of his injury.

Comments

In *Devillers v. Auto Club Ins. Ass'n*, 473 Mich. 562 (2005), the Michigan Supreme Court held that the provision prohibiting recovery of no-fault benefits for any portion of the loss incurred more than one year before commencement of the action is not subject to judicial tolling from the date an expense is presented to the insurer until its denial, abrogating *Richards v. American Fellowship Ins. Co.*, 84 Mich. App. 629 (1978), and overruling *Lewis v. DAIIE*, 426 Mich. 93 (1986). The Michigan Supreme Court held that *Lewis* and its progeny clearly violate the plain language of MCL 500.3145 and thus overruled its application.

In *Amerisure Cos. v. State Farm Mut. Auto. Ins. Co.*, 222 Mich. App. 97 (1997), the Court of Appeals held that the one-year statute of limitations applied to Amerisure's claim as a subrogee of the insured, since it had no greater rights than the insured. Amerisure had filed for subrogation, claiming that it mistakenly paid out PIP benefits to one of Amerisure's insured. The court held that in seeking the recovery of PIP benefits, although the benefits were paid mistakenly, the recovery action was in the form of a subrogation claim and thus subject to the PIP statute of limitations.

In *Titan Ins. Co. v. Farmers Ins. Exch.*, 241 Mich. App. 258 (2000), the Court of Appeals distinguished its decision from that in *Amerisure* and applied the traditional six-year statute of limitations, rather than the PIP one-year statute of limitations. Titan paid PIP benefits to insureds injured in a motor vehicle accident and sought to recoup benefits paid from a second insurer who was at the same order of priority under MCL 500.3115(2). Because Titan sought reimbursement "not as a subrogee of an insured, but independently, pursuant to a statutory right to reimbursement," the one-year statute of limitations under MCL 500.3145 did not apply.

Note: ***MCL 500.3145(1) was amended effective June 11, 2019*** *to provide that where notice of loss as required by that statute is provided to the insurer within one year of the date of the motor vehicle accident for which benefits are sought, and a claim for specific benefits is thereafter made to the insurer, the claimant has one year from formal denial of the claim for specific benefits to commence suit on those benefits, provided that the person making the claim has pursued the claim with reasonable diligence.*

Prior case law, Devillers v ACIA, provided that a claimant had one year from the date any individual expense was incurred to bring suit on that expense, regardless of the denial date.

III. MCL 500.3106 – PARKED VEHICLES

A. MCL 500.3106(1) – Unreasonably Parked Vehicles

(1) "Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:"

(a) "The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred."

Comments

Parking a vehicle in a no-parking zone or parking on the shoulder of a highway for a purpose not allowed by or in violation of a statute does not by itself create an unreasonable risk of bodily injury. Whether an unreasonable risk has been created is determined based on the manner in which the motor vehicle is parked, not on whether a particular parking violation is involved. *Autry v. Allstate Ins. Co.*, 130 Mich. App. 585 (1983); *United Southern Assur. Co. v. Aetna Life & Cas. Ins. Co.*, 189 Mich. App. 485 (1991); *Wills v. State Farm Ins. Co.*, 437 Mich. 205 (1991).

"Factors such as the manner, location, and fashion in which a vehicle is parked are material to determining whether the parked vehicle poses an unreasonable risk." *Stewart v. State*, 471 Mich. 692 (2004).

A vehicle parked so that its rear corner protrudes into traffic further than other parked vehicles may be unreasonably parked. However, a prudently parked vehicle that is out of the flow of traffic is not unreasonably parked. *Wills v. State Farm Ins. Co.*, 437 Mich. 205 (1991). Vehicles stopped in traffic are not parked vehicles.

(b) Except as covered by workers' compensation, "the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process."

Comments

This section typically covers situations in which a cherry picker is mounted on the back of a truck, there is a lift gate, etc. However, an injury sustained while in contact with a passenger door on a vehicle is not contact with equipment permanently mounted on the vehicle, but with "the

vehicle itself." *Frazier v Allstate Ins. Co.*, 490 Mich 381, 386 (2011). A passerby's injuries from escaping engine steam would not be the result of direct contact with permanent equipment and thus precludes no-fault recovery. *McMullen v. Motors Ins. Co.*, 203 Mich. App. 102 (1993).

(c) Except as covered by workers' compensation, "the injury was sustained by a person while occupying, entering into, or alighting from the vehicle."

Comments

For individuals "entering into or alighting from the vehicle," the initial focus is on whether the person had some physical contact with the vehicle at the time of the injury or whether he had finished his movement safely before suffering an injury.

To recover, the individual must sustain an injury from the use of a motor vehicle as a motor vehicle. The injury must have a causal relationship to a motor vehicle that is more than incidental, fortuitous, or but for; there must be a sufficiently close nexus between the injury and use of vehicle as motor vehicle. A claimant with one leg in and one leg out of a motor vehicle in the course of getting into the motor vehicle was "entering" the motor vehicle. The necessary causal relationship was met by evidence that the act of shifting weight onto one leg created the precarious position that precipitated the slip and fall on ice. *Putkamer v. Transamerica Ins. Corp. of America*, 454 Mich. 626, 636 (1997). An injury sustained while sleeping in a camper did not occur while the motor vehicle was being used as a motor vehicle but rather occurred while it was being used as sleep accommodations. *McKenzie v. Auto Club Ins. Ass'n*, 458 Mich. 214 (1998).

B. MCL 500.3106(2) – Course of Employment Parked Vehicles

(2) "Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle" if benefits are available under workers' compensation to an employee who suffers an injury during the course of his employment while doing either:

(a) "Loading, unloading, or doing mechanical work on a vehicle unless the injury arose from the use or operation of another vehicle. . . '[A]nother vehicle' does not include a motor vehicle being loaded on, unloaded from, or secured to, as cargo or freight, a motor vehicle."

(b) "Entering into or alighting from the vehicle unless the injury was sustained while entering into or alighting from the vehicle immediately after the vehicle became disabled. This subdivision shall not apply if the injury arose from the use or operation of another vehicle."

IV. MCL 500.3107 – ALLOWABLE EXPENSES, WORK LOSS, AND ATTENDANT CARE

A. Introduction – Questions to Consider

1. Does coverage exist for the type of accidental bodily injury incurred?

2. Is there any exclusion that precludes the claimant from obtaining no-fault benefits?

3. Who are the no-fault insurers and which ones should pay?

4. Which benefits and what amounts are recoverable from the no-fault insurer(s)?

5. With respect to no-fault benefits that are payable to the claimant, are there any reductions, setoffs, or reimbursements permitted by law?

B. MCL 500.3107(1)(a) – Allowable Expenses

(1)(a) This section provides for the allowable expenses payable from personal protection insurance. This includes "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation." Allowable expenses "shall not include charges for a hospital room in excess of a reasonable and customary charge . . . except if the injured person requires special or intensive care," and funeral expenses in the insurance policy "shall not be less than $1,750.00 or more than $5,000.00."

Comments

To be allowable, the expense must be (1) a reasonable amount, (2) actually incurred, and (3) reasonably necessary for care, recovery, or rehabilitation. *See Advocacy Organization for Patients & Providers v. Auto Club Ins. Ass'n*, 257 Mich. App. 365 (2003).

Both reasonableness and necessity of medical expenses are required for the insured to receive benefits under personal protection insurance, and a lack of these elements is a valid defense by the insurer to liability. In fact, it is possible that none of an insured's medical expenses were reasonable or necessary, and thus the insurer would face no liability. *Nasser v. Auto Club Ins. Ass'n*, 435 Mich. 33 (1990). In addition, PIP benefits will be denied if the insured has only planned future expenses but has not yet become liable or incurred them. *Proudfoot v. State Farm Mut. Ins. Co.*, 469 Mich. 476 (2003).

The issue of whether a medical expense is reasonably necessary is generally a question of fact for the jury, and the burden of proof is on the insured. *Nelson v. DAIIE*, 137 Mich. App. 226 (1984); *Owens v. Auto Club Ins. Ass'n*, 444 Mich. 314 (1993).

The charge of the allowable expense cannot exceed the customary amount for similar products, services, and accommodations; the insurer is liable only for the reasonable charge for a product or service, not for the full amount billed. **Caveat:** An insurer that pays the reasonable but not entire amount for services would still be required to defend and indemnify the insured if they were sued by the service providers for the unpaid balance. *McGill v. Automobile Ass'n of MI*, 207 Mich. App. 402 (1994).

In general, some allowable expenses are:

(1) Hospital and doctor services;

Although an insurer may provide managed care health care options, the insurer may not limit the insured's medical options through managed care, because the no-fault act allows for the insured's choice of medical providers. *Michigan Chiropractic Council v. Commissioner of the Office of Fin. & Ins. Svcs.*, 262 Mich. App. 228 (2004).

(2) Medicine;

(3) Orthopedic and prosthetic devices;

(4) Other medically necessary equipment;

(5) Nursing, aid, or similar services other than replacement care services;

Private nursing services constitute allowable expenses if they are reasonably necessary for the insured's home care. *Green v. Federal Kemper Ins. Co.*, 88 Mich. App. 364 (1979). *See also Manley v. DAIIE*, 425 Mich. 140 (1986).

Normally, an insurer requires a doctor's disability prescription before paying out on any medical nursing/aide care claim; however, the No-Fault Act has no such mandate in regard to allowable expenses. A disability slip would appear to be an issue of whether the services being provided are reasonably necessary.

Nursing and other similar medical services performed by family members are compensable at reasonable market costs. Nursing

services provided by the disabled claimant's family member, including feeding, bathing, exercising, medicating, and assisting the claimant, were deemed allowable expenses. *Van Marter v. American Fidelity Fire Ins. Co.*, 114 Mich. App. 171 (1982). Spouses and other family members may perform attendant care services and be compensated for their reasonable value. Attorney Gen. Op. #6155 (June 21, 1983). An insurer failed in its defense that attendant care services performed by the claimant's parents were not incurred because the claimant had not directly billed her parents; the court refused to create such a requirement and left it to the jury to determine the reasonable value of the services performed. *Booth v. Auto Owners Ins. Co.*, 224 Mich. App. 724 (1997). *See also Sharp v. Preferred Risk Mut. Ins. Co.*, 142 Mich. App. 499 (1985).

(6) Modifications to homes that are reasonably necessary for care, recovery, or rehabilitation;

An $88,000 addition to the home of the claimant's parents to improve its handicap accessibility, along with an apartment rental for the claimant during the construction, were deemed allowable expenses. *Sharp v. Preferred Risk Mut. Ins. Co.*, 142 Mich. App. 499 (1985). Modifications to a home to adjust for the special needs of the claimant were an allowable expense. *Manley v. DAIIE*, 425 Mich. 140 (1986).

The insurer and the insured collectively purchased real estate to build a home to meet the special needs of a six-year-old girl rendered quadriplegic from an auto accident. Title to the home was held in a trust for the claimant during her lifetime. The parties paid taxes and insurance pro rata according to their respective contributions to the home purchase. The parents would live with the claimant and pay maintenance and utilities until deceased, at which point the insurer would take over payments. The court held that the payments by the parents were an allowable expense, equating these payments to rent for special housing accommodations. *Kitchen v. State Farm Ins. Co.*, 202 Mich. App. 55 (1993).

It must be noted, however, that home modification expenses must be actually incurred by the insured, and the insured must be liable for the expenses to be covered by no-fault benefits; planning for future home modification is not enough to have incurred these expenses. *Proudfoot v. State Farm Mut. Ins. Co.*, 469 Mich. 476 (2003).

In addition, the insurer is entitled to take a security interest in a new home built to accommodate the paralyzed insured; this enables the insurer to recoup the funds expended. *Payne v. Farm Bureau Ins.*, 263 Mich. App. 521 (2004).

(7) Food and housing expenses incurred in an institutional setting;

The Court of Appeals held that the claimant could recover rent, board, and living expenses as allowable rehabilitation expenses; the expenses were incurred during a vocational training program that required the claimant to spend time away from home. *Tennant v. State Farm Mut. Auto. Ins. Co.*, 143 Mich. App. 419 (1985).

However, the Michigan Supreme Court has held that ordinary, everyday food expenses incurred in the home setting were not allowable expenses because they were not necessary to the claimant's care based on the injuries involved. An insurer would be liable for food only if it met the definition of an allowable expense. *Griffith v. State Farm Mut. Auto. Ins. Co.*, 472 Mich. 521 (2005).

(8) Rehabilitation expenses;

The term "rehabilitation" includes physical, mental, vocational, and occupational rehabilitation. The Michigan Supreme Court has defined rehabilitation as "to bring an [injured person] to a condition of health or ability sufficient to resume his pre-injury life." *Griffith, supra*, 472 Mich. 534-535.

The Court of Appeals held that after an accident rendered the plaintiff physically unable to perform his job, he was entitled to the cost of reasonably necessary vocational rehabilitation as an allowable expense. *Bailey v. DAIIE*, 143 Mich. App. 223 (1985). Similarly, the Court of Appeals awarded rehabilitation expenses, including tuition, room, and board at a full time, out-of-state electronic school, to enable the claimant to pursue a meaningful career. *Tennant v. State Farm Mut. Auto. Ins. Co.*, 143 Mich. App. 419 (1985). *See also Kondratek v. Auto Club Ins. Ass'n*, 163 Mich. App. 634 (1987) (allowing recovery of tuition and expenses as vocational rehabilitation expenses for a college program in sign language and interpretation). However, the Court of Appeals has denied rehabilitation expense reimbursement when the insured has been able to maintain essentially the same career following an accident. *Maxwell v. Citizens Ins. Co. of America*, 245 Mich. App. 477 (2001).

(9) Mileage and transportation.

Medical mileage may be premised on state travel reimbursement rates. Atty. Gen. Op. # 5990 (Oct. 2, 1981).

The Court of Appeals held that reasonable and necessary transportation expenses incurred to obtain medical treatment are recoverable as an allowable expense. *Swantek v. Automobile Club of Mich. Ins. Group*, 118 Mich. App. 807 (1982). Although travel expenses for medical treatment are recoverable, the insurer lacks any duty to create a formula or method to calculate travel expense reimbursement rates or costs. *Neumann v. State Farm Mut. Auto. Ins. Co.*, 180 Mich. App. 479 (1989).

Note: ***For policies effective July 1, 2020, or later,*** *a consumer must be provided a choice of policy limits of $50,000.00, $250,000.00, $500,000.00, or unlimited, medical benefits ultimately payable, for an accident. MCL 500.3107c. Effective July 1, 2020, persons who present proof of health insurance that will pay expenses for persons insured under a no-fault policy in instances in which those persons suffer accidental bodily injury in a motor vehicle accident, may elect not to maintain coverage for medical expenses.* ***MCL 500.3107c (1).***

C. MCL 500.3107(1)(b) – Work Loss

(1)(b) This section provides for work loss payable from personal protection insurance. Work loss consists of "loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." Work loss is not recoverable after the insured dies. Work loss received is not taxable income, and thus the insured may only receive 85% of wages, "unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case." "[T]he benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period" is adjusted annually to reflect the changes in the cost of living.

Comments

(1) General;

The date of the accident fixes the amount of the statutory maximum applicable to that particular claimant. For October 1, 2013 through

September 30, 2016, the statutory monthly maximum was $5398.00. For October 1, 2016 through September 30, 2017, the statutory monthly maximum is $5,452.00. The 15% maximum reduction for taxes is applied to the claimant's actual wages. *Featherly v. AAA Ins. Co.*, 199 Mich. App. 132 (1982).

Work loss benefits compensate an injured person for work he would have performed during the first three as if the person had never been injured and what he would have received but for the accident. *MacDonald v. State Farm Mut. Ins. Co.*, 419 Mich. 146 (1984). The insured has the burden of proof to demonstrate the actual loss of earnings because of the accident. *Sullivan v. North River Ins. Co.*, 238 Mich. App. 433 (1999).

The work loss must be related to the injuries suffered from the accident. For instance, the plaintiff suffered a disabling heart attack two weeks after suffering neck and shoulder injuries in an accident; the court deemed the heart attack an intervening cause of disability that cut off the plaintiff's right to work loss benefits. *MacDonald v. State Farm Mut. Ins. Co.*, 419 Mich. 146 (1984). Similarly, the Court of Appeals held that the plaintiff failed to prove by a preponderance of the evidence that his heart attack two months after his traffic accident was related to the accident, precluding work loss recovery. *Kochoian v. Allstate Ins. Co.*, 168 Mich. App. 1 (1988).

Incarcerated individuals are not entitled to work loss benefits during the period of their incarceration. *Smith v. League General Ins. Co.*, 143 Mich. App. 112, *rev'd* 424 Mich. 893 (1986); *Luberda v. Farm Bureau General Ins. Co.*, 163 Mich. App. 457 (1987).

(2) Items that may be considered part of work loss;

COLA raises, step-wage increases in pay, and a profit-sharing plan that was part of the employee's regular wages are recoverable work loss benefits; however, profit sharing payments, employer pension contributions, social security taxes, health care insurance premiums, and fringe benefits in lieu of salary are not recoverable. *Farquharson v. Travelers Ins. Co.*, 121 Mich. App. 766 (1982); *Krawczyk v. DAIIE*, 418 Mich. 231 (1983).

The "would have performed" language regarding recoverable work loss requires consideration of past employment, employment at the time of the accident, and future employment plans in determining the work loss caused by the accident. One court raised the work loss amount based on the plaintiff's demonstration that he would have changed jobs and earned a higher income if not for the injury suffered. The plaintiff testified that he would have worked for a different employer if not for the injury, and

this employer testified that the plaintiff would have worked for him for at least three years if not for the injury. *Kirksey v. Manitoba Public Ins. Corp.*, 191 Mich. App. 12 (1991).

Work loss benefits may extend beyond the insured's period of disability if the insured continues to lose income as a result of the accident. *Marquis v. Hartford Acc. & Indem.*, 444 Mich. 638 (1994).

(3) Work loss benefits payable and income earned for work during the same period shall not exceed the statutory maximum work loss benefits.
The Court of Appeals held that after the plaintiff returned to lighter duty work and less pay than his prior job, work loss benefits should be calculated by subtracting the post-accident wages from what he would have earned before the accident. *Snellenberger v. Celina Mut. Ins. Co.*, 167 Mich. App. 83 (1988).

(4) Duty to mitigate;

The injured plaintiff has a duty to mitigate damages by seeking alternative employment. *Bak v. Citizens Ins. Co. of America*, 199 Mich. App. 730 (1993); *Marquis v. Hartford Acc. & Indem.*, 444 Mich. 638 (1994).

(5) Special situations; seasonal employees;

Self-employed individuals may recover lost profits as work loss: "[W]ork loss includes not only lost wages, but also lost profit which is attributable to personal effort and self-employment." *Kirksey v. Manitoba Public Ins. Corp.*, 191 Mich. App. 12 (1991).

Self-employed claimants may present difficulties in computing their income. In general, self-employed claimants face substantial business costs. The issue is what costs must be subtracted from gross income to determine actual net income for work loss purposes. In one case, a self-employed plaintiff worked as an independent contractor, paying for all of his business expenses. The Court of Appeals held that the 15% deduction is taken from *net* income, not gross income:

> [P]laintiff's business expenses should be deducted from his gross receipts in determining his lost income. The goal of the no-fault act is to place individuals in the same, but no better position than they were before their automobile accident. Certainly, plaintiff cannot claim that his actual expendable income included even that income which he was required to pay out as business

expenses. *Adams v. Auto Club Ins. Ass'n*, 154 Mich. App. 186 (1986).

One court held that a self-employed plaintiff's income tax returns displaying business income for the prior 7.8 weeks was insufficient to establish his work loss, especially since some items on the tax return were not apportioned over the year. *Brown v. Fireman's Fund Ins. Co.*, 485 F. Supp. 494 (E.D. Mich. 1980).

The Supreme Court held that the sole shareholder of a Subchapter S Corporation who paid himself wages as reflected on a W2 form was entitled to work loss based on his wages regardless of the fact that the corporation was operating at a loss, because the law treats a corporation and its sole shareholder as distinct entities, and there was no evidence that the claimant's remuneration was based on gross receipts of the corporation. *Ross v. ACIA*, 481 Mich. 1 (2008), distinguishing *Adams, supra.*

In regards to the collection of work loss benefits for teachers, who generally do not work during the summer months, teachers may collect work loss benefits during the summer months if they would have collected wages during those months. *Copus v Meemic Ins Co*, 291 Mich App 593 (2011), lv den 489 Mich 975 (2011).

(6) Unemployment;

An insured who is temporarily unemployed at the time of the accident shall receive benefits based on the income earned the last full month of full-time employment prior to the accident. MCL 500.3107a.

Circumstances may arise in which a work loss recipient is fired from his job for reasons unrelated to the motor vehicle accident. Although no case exists directly on point, the existing case law suggests that the plaintiff would be entitled to work loss benefits regardless of the reasons for his employment termination. As an aside, the Michigan Supreme Court held that work loss benefits are meant to compensate the insured for income he would have received "but for" the accident, and the plaintiff has the burden of proving that he would have been employed "but for" the accident. *McDonald v. State Farm Mut. Ins. Co.*, 419 Mich. 146 (1984).

Cases favoring work loss benefits for terminated workers

In one case, the plaintiff was fired for absenteeism two months before his accident and had received no job offers from other employers. The Court of Appeals found the plaintiff to be temporarily unemployed and thus entitled to work loss benefits. The court noted the lack of statutory

language excluding this class, finding that work loss benefits were not meant only for those unemployed because of seasonal employment or layoffs. *Szabo v. DAIIE*, 136 Mich. App. 9 (1984).

After the plaintiff was injured in an accident, his physician consulted that he could return to work, but the plaintiff's employer had already replaced him. The Court of Appeals found that the plaintiff was entitled to work loss benefits because the job loss came as a result of the accident injuries. *Nawrocki v. Hawkeye Sec. Ins. Co.*, 83 Mich. App. 135 (1978).

After a hand injury during an accident prevented the plaintiff from returning to work, the insurer stopped work loss benefits following the closure of the plaintiff's prior work facility. The court held that the plaintiff was entitled to wage loss benefits despite the plant's closure and temporary unemployment. *O'Neal v. Allstate Ins. Co.*, 176 Mich. App. 390 (1989).

Work loss benefits do not depend on the insured's employment on the date of the accident, if the insured can prove that he would have had other, better employment had he not been injured in the accident. *Sullivan v. North River Ins. Co.*, 238 Mich. App. 433 (1999).

Cases opposing work loss benefits for terminated workers

The injured plaintiff was charged with and convicted of negligent homicide, and the court held that the insurer need not pay work loss benefits during the period of incarceration. *Luberda v. Farm Bureau General Ins. Co.*, 163 Mich. App. 457 (1987).

The plaintiff was unemployed for four years and began sending out resumes about four months before his accident. The court held that the insurer did not have to pay work loss benefits. *Frazier v. Allstate Ins. Co.*, 231 Mich. App. 172 (1998). Similarly, the plaintiff was unemployed for four years before his accident but testified that he had intended to find employment; the court denied work loss benefits. *Oikarinen v. Farm Bureau Mut. Ins. Co. of Mich.*, 101 Mich. App. 436 (1980).

D. MCL 500.3107(1)(c) – Personal/Replacement Services

(1)(c) This section provides for personal services payable from personal protection insurance. The expenses for personal services may not exceed $20 per day and must be reasonable and necessary services that the injured individual would have performed for himself or a dependent if not for the accident. The individual may recover these benefits for up to three years following the date of the accident. These benefits compensate the plaintiff for services that he can no longer perform

due to the accident. **These benefits differ from and are in addition to the allowable expenses under MCL 500.3107(1)(a).**

Comments

These replacement services include lawn maintenance, cooking, snow shoveling, housekeeping, laundry, babysitting, household repairs, vehicle repairs, etc.

Replacement services differ from medical, nursing, and attendant care services that are reimbursable under MCL 500.3107(1)(a) as an allowable expense. The latter are expenses incurred for care, for recovery and rehabilitation from, accident-related injuries. *Douglas v. Allstate*, 492 Mich. 241, 262 (2012). Cooking and maintaining a checkbook are replacement services because they are services the injured party would have performed for his own benefit or the benefit of his dependents had the accident not occurred. *Douglas*, 492 Mich 261 (the service is of a type that a family member might perform for the benefit of the household as a whole).

Replacement services must be reasonably incurred, yet courts tend to have rather lax requirements in proving this element. For instance, an oral or implied agreement between family members to provide replacement services has been enough to prove they were reasonably incurred. *Youmans v. Citizens Ins. Co. of America*, 89 Mich. App. 387 (1979). Similarly, a replacement services ledger along with an agreement satisfied the reasonably incurred requirement. *Fortier v. Aetna Cas. & Sur. Co.*, 131 Mich. App. 784 (1984).

Replacement service benefits have been denied on occasion. In one instance, the court held that the plaintiff failed to establish that an agreement for replacement services had been entered into, and she only estimated the amount of services provided. The statute states that the expenses must be "incurred," which "justifies recovery to the extent of amounts expended or for which one has become liable." *Adkins v. Auto Owners Ins. Co.*, 105 Mich. App. 431 (1981).

Similarly, a court denied the plaintiff's claim for replacement services after admitting that he had not paid any relatives for their provision of services; further, the plaintiff failed to prove that he expended any money or incurred any liability for replacement services. *Schaible v. Mich. Mut. Ins. Co.*, 116 Mich. App. 116 (1982).

The maximum recovery is $20 per day, regardless of how many people perform replacement services, and the maximum duration is three years. Most insurance carriers require a disability slip from a medical provider

during the replacement services period, but the statute does not specifically require such a slip. As a matter of proof, most plaintiffs provide a disability slip. However, a question of fact might arise as to whether replacement services were recoverable absent a disability slip if the jury believed the evidence demonstrated the necessity for replacement services.

The phrase "not for income" excludes receiving replacement service benefits for activities that are income or profit motivated, like a grocer hiring a worker to stock shelves or a foster care proprietor hiring an employee at $20 a day. *Lewis v. DAIIE*, 90 Mich. App. 251 (1979); *Kerby v. Auto Owners Ins. Co.*, 187 Mich. App. 552 (1991).

V. MCL 500.3109 – GOVERNMENTAL BENEFIT SETOFFS

A. Introduction

The variety of benefits provided by the government and variety of case law interpreting particular benefits prohibits an extensive discussion here of the extent and type of benefits that can be setoff under MCL 500.3109. In handling a no-fault claim, one must remember the no-fault goal: assure prompt payment to the injured person to make the person whole and keep insurance costs affordable and reasonable.

Generally, setoffs of governmental benefits by the no-fault carrier are permissible only in cases where the no-fault benefits would duplicate governmental benefits pursuant to MCL 500.3109.

B. MCL 500.3109(1) – Setoff of Government Benefits

(1) This section states that state and federal government benefits are to be subtracted from personal protection insurance benefits due to the insured.

Comments

The test to determine whether a state or federal benefit must be offset from PIP benefits is (1) the government benefits serve the same purpose as the no-fault benefits and (2) the government benefits are provided or required to be provided as a result of the same accident. This eliminates duplicative benefits. Government benefits that have no relationship to the accident need not be set off from no-fault PIP benefits. *Jarosz v. DAIIE*, 418 Mich. 565 (1984).

Insurer could setoff Social Security benefits from no-fault benefits because they were required to be provided as a result of the accident.

Popma v. Auto Club Ins. Ass'n, 446 Mich. 460 (1994); *Wolford v. Travelers Ins. Co.*, 92 Mich. App. 600 (1979).

In general, a no-fault insurer may setoff workers' compensation benefits from PIP benefits stemming from an employment-related automobile accident. *Mathis v. Interstate Motor Freight System*, 408 Mich. 164 (1980).

Social Security retirement benefits and similar benefits due to age cannot be setoff because they do not serve the same purpose as no-fault benefits and are not provided or required to be provided as the result of an accident. *Jarosz v. DAIIE*, 418 Mich. 565 (1984).

According to a federal provision, Medicare benefits are only paid if no-fault coverage is not available, thus precluding the need to setoff from no-fault benefits. Medicare benefits will not be paid to the extent that an item or service will be covered by an automobile insurance plan. *John Hancock Property & Cas. Ins. Cos. v. Blue Cross & Blue Shield of Michigan*, 437 Mich. 368 (1991).

Medicaid benefits are not subject to setoff because they are payable only to the medically indigent. A person is not medically indigent if he has no-fault insurance coverage. *Workman v. DAIIE*, 404 Mich. 477 (1979); *Johnson v. Michigan Mutual Ins. Co.*, 180 Mich. App. 314 (1989). **Caveat:** To the extent that Medicaid benefits are paid, the Department of Social Services may recover via subrogation or reimbursement and can sue to recover the same. Thus, Medicaid may seek recovery from the no-fault insurer. *Workman v. DAIIE*, 404 Mich. 477 (1979); MCL 400.106.

Out-of-state insurance benefits provided under the laws of any state or the federal government can be setoff by the no-fault insurer. Medical benefits paid by the out-of-state carrier for the same accident could be offset by the Michigan no-fault carrier, but the no-fault carrier would be responsible for whatever benefits are required under Michigan no-fault law beyond the amount of medical benefits required to be paid by the out-of-state insurer. *DeMeglio v. Auto Club Ins. Ass'n*, 449 Mich. 33 (1995).

A workers' compensation redemption may be setoff against past and future wage loss benefits. The setoff is not limited to amounts allotted for future workers' compensation benefits. *Gregory v. Transamerica Ins. Co.*, 425 Mich. 625 (1986). This setoff is allowed for the full amount of payable benefits, even though the redemption was for less than the total of such payments. *James v. Allstate Ins. Co.*, 137 Mich. App. 222 (1984).

Other benefits that may be set off generally must be explored on a case-by-case basis, keeping in mind the *Jarosz* two-part test and applicable case law.

C. MCL 500.3109(3) – Deductible Coverage Provisions

(3) An insurer may offer, at reduced premium rates, a deductible of a specified amount. The deductible can apply to all or any of the PIP benefits that are payable to the person named in the policy, a spouse, or any relative of either of these who is domiciled in the same household.

VI. MCL 500.3109a – COORDINATION OF BENEFITS / OTHER HEALTH AND ACCIDENT COVERAGE

A. MCL 500.3109a

Insurers providing PIP benefits shall offer, at adjusted premium rates, deductibles and exclusions reasonably related to other health and accident coverage. The deductibles and exclusions shall be subject to prior approval from the commissioner and shall apply only to those named on the policy, his spouse, and any relative domiciled in the same household.

Comments

Coordinated coverage was designed to contain and reduce the cost of insurance. The insured elects whether to accept or reject coordinated coverage. Generally, an insured buys no-fault coverage only for those benefits that are not provided by his other health and accident insurance. Subject to certain exceptions, under coordinated coverage, the insured's other health and accident insurance takes the primary role while the no-fault insurance acts in the secondary position to cover what the primary insurance does not.

The phrase "other health and accident coverage" describes insurance other than no-fault. Thus, a no-fault carrier with a primary uncoordinated policy on an insured and a no-fault carrier with a secondary coordinated policy on the same insured cannot coordinate benefits. Instead, the no-fault carrier must split the liability of no-fault benefits. *Dep't of Social Services v. American Commercial Liability Ins. Co.*, 435 Mich. 508 (1990).

The general rule, subject to exceptions, is that the other health and accident coverage is the primary insurer, and the no-fault insurer is the secondary insurer, when there are competing coordination of benefits clauses. **Caveat:** An ERISA plan may preempt state law, because an unambiguous coordination of benefits clause in the ERISA plan must be given its plain meaning, despite the existence of a similar clause in the no-

fault policy. *Auto Club Ins. Ass'n v. Frederick & Herrud, Inc.*, 443 Mich. 358 (1993). The Michigan Court of Appeals held that an ERISA plan did *not* preempt the no-fault policy where the ERISA plan was not self-funded but instead had purchased insurance coverage. *American Medical Security, Inc. v. Allstate Ins. Co.*, 235 Mich. App. 301 (1999).

Blue Cross and Blue Shield Plan Benefits could be coordinated with no-fault benefits under the No-Fault Act, despite Blue Cross and Blue Shield's argument that they were not insurers. The court held that the statutory language referred to other "coverage." *Nyquist v. Aetna Ins. Co.*, 84 Mich. App. 589 (1978). The Court of Appeals also held that "coverage" is broader than "insurance." *Lewis v. Transamerica Ins. Corp. of America*, 160 Mich. App. 413 (1987).

An HMO plan constitutes other health and accident coverage with which the no-fault insurer coordinates benefits. *U.S. Fidelity & Guar. Co. v. Group Health Plan of Southeast Michigan*, 131 Mich. App. 268 (1983); *West Michigan Health Care Network v. Transamerica Ins. Corp. of America*, 167 Mich. App. 218 (1988); *Westfield Cos. v. Grand Valley Health Plan*, 224 Mich. App. 385 (1997). As to an HMO, a claimant must treat within his plan, with providers designated by the plan, unless he can show that the care he needs is not reasonably available within the plan. *Tousignant v. Allstate*, 444 Mich 301 (1998).

Michigan Conference of Teamsters Welfare Plan payments made for medical expenses on behalf of its union members, who also purchased coordinated no-fault coverage, constituted benefits paid pursuant to other health and accident coverage. *Lewis v. Transamerica Ins. Corp. of America*, 160 Mich. App. 413 (1987).

In general, the no-fault carrier will be secondary and the other health carrier will be primary. This may not apply for all ERISA plans. However, an unambiguous coordination of benefits clause is given its plain meaning, despite a similar clause in a no-fault insurance policy, because to hold otherwise would allow state regulation of an ERISA plan. *Auto Club Ins. Ass'n v. Frederick & Herrud, Inc.*, 443 Mich. 358 (1993) (*overruling Federal Kemper Ins. Co. v. Health Ins. Admin., Inc.*, 424 Mich. 537 (1986)).

Where there is a coordinated no-fault policy and the other health and accident coverage plan contains an exclusionary clause ("Michigan No-Fault Exclusion Benefits are not payable under this plan for injuries received in an accident involving a car or other motor vehicle"), the exclusion in the health care plan is valid, and the no-fault carrier was liable for the insured's medical expenses. *Auto Owners Ins. Co. v. Autodie Corp. Employee Benefit Plan*, 185 Mich. App. 472 (1990). An

exclusionary clause is valid when the phrasing of an exclusion of coverage is stated absolutely in the other health and accident insurance policy without reference to other insurance and when the clause is not conditioned on the existence or non-existence of other insurance. A court held an exclusionary clause valid where the plan provided for payment for "injuries sustained in an automobile accident, in an amount not to exceed $5,000 per accident"; the no-fault carrier had to pay medical expenses in excess of $5,000, regardless of a coordinated policy provision. *Transamerica Ins. Co. of America v. IBA Health and Life Assur. Co.*, 190 Mich. App. 190 (1991). The Court of Appeals reached the same conclusion when the ERISA plan was self-insured, and the exclusionary provision stated, "Michigan No-Fault Exclusion-Benefits are not payable under this plan for injuries received in an accident involving a car or other motor vehicle." *Wolverine Mut. Ins. Co. v. Rospatch Corp. Employee Ben. Plan*, 195 Mich. App. 302 (1992).

When a coordinated no-fault policy is present, sickness and accident benefits substituting for work loss obtained from another non-no-fault health and accident carrier are deducted from the statutory maximum rather than the plaintiff's actual wage loss if the loss of income exceeds the statutory maximum. *Zmudczynski v. League Gen. Ins. Co.*, 99 Mich. App. 442 (1980).

In calculating the work loss benefits payable, one applies a 15% tax adjustment (from MCL 500.3107(1)(b)) to the insured's actual loss of income before application of the statutory maximum limitation on benefits payable. *Featherly v. AAA Ins. Co.*, 119 Mich. App. 132 (1982).

Government benefits duplicating work loss benefits from a state or federal government are deducted from the statutory maximum if the wage loss, after the 15% tax adjustment, would exceed the statutory maximum. If the wage loss after the adjustment does not exceed the maximum, then the duplicate benefits would be deducted from the amount of the wage loss. For example, the statutory wage loss maximum per month was $4,027 from October 1, 2001, though September 30, 2002. If the claimant made $6,000 in a 30-day period, the 15% reduction would yield $5,100. If the claimant received workers' compensation benefits as a duplicative benefit, and the amount received was $300, the no-fault carrier could deduct $300 and create a maximum wage loss payable of $3,727. Further, if the no-fault policy was coordinated, and the claimant received sickness and accident benefits of $500, the no-fault carrier could deduct $500 and create a maximum wage loss payable of $3,227. However, if after the 15% tax adjustment the claimant's wage loss was below $4,027, say $3,000, then the $300 and $500 benefits would be subtracted from the $3,000 to yield a $2,200 no-fault work loss benefit. *Snellenberger v. Celina Mut. Ins. Co.*, 167 Mich. App. 83 (1988).

VII. MCL 500.3113 – PERSONS NOT ENTITLED TO PERSONAL PROTECTION INSURANCE BENEFITS

A. MCL 500.3113(a) – Unlawful Use

(a) A person is not entitled to PIP benefits for accidental bodily injuries if the person was using a motor vehicle that he had unlawfully taken, unless the person reasonably believed that he was entitled to take and use the vehicle.

Comments

A thief is not entitled to PIP benefits.

The lack of a driver's license or use beyond the scope of the permission granted does not necessarily disqualify the person from PIP benefits. *Bronson Methodist Hosp. v. Forshee*, 198 Mich. App. 617 (1993); *State Farm Mut. Auto. Ins. Co. v. Hawkeye-Security Ins. Co.*, 115 Mich. App. 675 (1982).

An unlicensed, intoxicated driver who had taken a vehicle unlawfully, but reasonably believed she had permission to use the vehicle, could not reasonably believe she was entitled to use the vehicle, in light of her intoxication and lack of a driver's license. *Amerisure Ins Co v. Plumb*, 282 Mich. App. 417 (2009), *lv den* 485 Mich. 909 (2009).

B. MCL 500.3113(b) – Uninsured Owner/Registrant

(b) A person is not entitled to PIP benefits for accidental bodily injuries if he was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

Comments

Owners of uninsured motor vehicles who are injured in an accident are entitled to PIP benefits if the uninsured motor vehicle is not involved in the accident. *Ardt v. Titan Ins. Co.*, 233 Mich. App. 685 (1999).

A person seeking PIP benefits may be deemed the "owner" of an uninsured motor vehicle, depending on the nature of that person's right to use the vehicle; the focus is not on the actual vehicle usage. *Twichel v. MIC General Ins. Corp.*, 469 Mich. 524 (2004).

C. MCL 500.3113(c) – Non-Michigan Resident

(c) A person is not entitled to PIP benefits for accidental bodily injuries if he was not a resident of Michigan, was occupying a motor vehicle or motorcycle not registered in Michigan, and was not insured by an insurer that had filed a certificate in compliance with section 3163.

Note: ***Effective June 11, 2019,*** *MCL 500.3113(c) was amended to provide among the group of persons not entitled to be paid personal protection insurance benefits, a person who was not a resident of this state unless the person owned a motor vehicle registered and insured in this state. MCL 500.3113 (c). Previously, an insurer authorized to transact automobile insurance in this state had to certify that it would pay personal protection insurance benefits to its insured out-of-state residents, and claimants injured as a result of those out-of-state residents' ownership, operation, maintenance or use of a motor vehicle, in accordance with the No-Fault Act.*

VIII. MCL 500.3114 and MCL 500.3115 – PRIORITY PROVISIONS

A. MCL 500.3114(1) – General Priority Rule

(1) A no-fault PIP policy applies to accidental bodily injury from a motor vehicle accident to the person named in the policy, his spouse, and a relative of either if domiciled in the same household.

Comments

In general, an injured party must seek PIP benefits from his own insurer first, regardless of whether his vehicle is involved in the accident. *Farmers Ins. Exchange v. AAA of Michigan*, 256 Mich. App. 691 (2003).

Estranged spouses who do not live in the same household as the named insured, but who are not yet legally divorced, are covered by the insured's no-fault policy. However, relatives of the named insured or his or her spouse must live in the same household as the named insured to be covered. *Auto Club Ins. Ass'n v. State Farm Ins. Cos.*, 221 Mich. App. 154 (1997).

College students who depend on their parents for support are covered by their parents' no-fault policy when they return home for the summer.

In determining whether a relative is domiciled with the name insured, courts look at (1) whether the relative maintains possessions at the home;

(2) whether the relative has the insured's address on his driver's license; (3) whether the relative receives mail at the insured's address; (4) whether the relative maintains a separate room at the insured's home; and (5) whether the relative depends on the insured for support.

B. MCL 500.3114(2) and (3) – Exceptions

(2) A person suffering accidental bodily injury as an operator or passenger of a motor vehicle that is operated in the business of transporting passengers shall receive no-fault benefits from the insurer of the motor vehicle. This rule does not apply to passengers of a school bus, a bus operated by a common carrier, a bus operating under a government transportation program, a bus for a non-profit organization, an insured taxicab, and a bus operated by a canoe, watercraft, bicycle, or horse livery used only to transport passengers to and from a destination point.

(3) An employee, his spouse, or a relative of either domiciled in the same household who suffers accidental bodily injury as an occupant of a motor vehicle owned or registered by the employer shall receive PIP benefits from the insurer of the vehicle.

Comments

A primary purpose test is applied to determine whether the motor vehicle was "operated in the business of transporting passengers" at the time of the accident. Therefore, a daycare provider's act of transporting children in their care to school incidental to her daycare business was not operating her personal car in the business of transporting passengers. *Farmers Ins. Exchange v. AAA of Michigan*, 256 Mich. App. 691 (2003).

C. MCL 500.3114(4) – Occupants of Motor Vehicles

(4) Except as provided in MCL 500.3114(1), (2), or (3), a person suffering accidental bodily injury from a motor vehicle accident as an occupant of a motor vehicle shall recover no-fault benefits first from the insurer(s) of the owner of the motor vehicle that was occupied, and then from the insurer(s) of the operator of the motor vehicle that was occupied. Where an owner owns more than one vehicle, insured by more than one company, all insurers of the owner are in equal priority for payment of benefits, regardless of which insurer insured the vehicle involved. *Pioneer State Insurance Company v Titan Insurance Company*, 252 Mich App 330 (2002).

Note: MCL 500.3114(4) was amended effective June 11, 2019 *to provide that the occupant of a motor vehicle not covered under a personal injury protection policy shall claim personal protection insurance benefits from the Assigned Claims Facility. Previously, such an occupant claimed*

benefits from the insurer of the owner(s) or, if none, insurers of the operator of the vehicle occupied.

D. MCL 500.3114(5) – Motorcyclists

(5) A person suffering accidental bodily injury as an operator or passenger of a motorcycle involved in an accident with a motor vehicle shall recover PIP benefits first from the insurer of the owner or registrant of the motor vehicle, then from the insurer of the operator of the motor vehicle, then from the insurer of the operator of the motorcycle, and then from the insurer of the owner of the motorcycle.

Comments

"Involved in an accident" means more than being in the wrong place at the wrong time. It generally includes a moving vehicle or a stopped vehicle that is struck by a moving vehicle and propelled into a motorcyclist. A motor vehicle that cuts off a motorcyclist may be "involved in the accident", even in the absence of actual physical contact. *Bromley v. Citizens Ins. Co. of America*, 113 Mich. App. 131 (1982). A stopped motor vehicle that a thrown motorcyclist lands upon is not "involved in the accident" if it did not contribute to the accident. *Bachman v. Progressive Casualty Ins. Co.*, 135 Mich. App. 641 (1984).

E. MCL 500.3115(1) & (2) – Pedestrians/Bicyclists/Other Non-Occupants

(1) A person suffering accidental bodily injury while not an occupant of a motor vehicle shall collect PIP benefits in the following order of priority:

1. First from insurers within their own household per MCL 500.3114(1);
2. Then, if there is no coverage per MCL 500.3114(1), from the insurers of owners or registrants of motor vehicles involved in the accident;
3. Finally from insurers of operators of the motor vehicles involved in the accident.

(2) If more than one motor vehicle is involved, and two or more insurers from the same priority level are paying PIP benefits, an insurer is entitled to partial recoupment from the other insurers on the same level of priority, along with a reasonable amount for processing the claim.

Note: ***MCL 500.3115 was amended effective June 11, 2019*** *to provide that persons injured in motor vehicle accidents who are not covered by a personal injury protection policy while not an occupant of a motor vehicle, i.e., bicyclists, pedestrians, shall claim their benefits from the assigned claims facility. Previously, such persons claimed benefits from*

the insurers of the owner(s) or operator(s) of motor vehicles involved in the accident.

IX. MCL 500.3121 and MCL 500.3123 – PROPERTY PROTECTION INSURANCE

A. MCL 500.3121 – Property Protection Benefits

(1) "Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to the provisions of this section and sections 3123, 3125, and 3127. However, accidental damage to tangible property does not include accidental damage to tangible property, *other than the insured motor vehicle*, that occurs within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles." (Emphasis added)

(2) Property protection benefits are due without regard to fault.

(3) "Damage to tangible property consists of physical injury to or destruction of the property and loss of use of the property so injured or destroyed."

(4) "Damage to tangible property is accidental, as to a person claiming property protection insurance benefits, unless it is suffered or caused intentionally by the claimant. Even though a person knows that damage to tangible property is substantially certain to be caused by his or her act or omission, he or she does not cause or suffer such damage intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property."

(5) "Property protection insurance benefits consist of the lesser of reasonable repair costs or replacement costs less depreciation and, if applicable, the value of loss of use. However, property protection insurance benefits paid under 1 policy for damage to all tangible property arising from 1 accident shall not exceed $1,000,000.00."

Comments

Under subsection (1), damage that occurred "within the course of a business" included damage caused to a car mechanic's business due to a faulty wire in an automobile unrelated to the reason the motor vehicle was in for repairs. Thus, under subsection (1) the no-fault insurer was not liable for the damage because it occurred within the course of the

mechanic's business. *Universal Underwriters Ins. Group v. Auto Club Ins. Ass'n*, 256 Mich. App. 541 (2003).

Turner v. Auto Club Ins. Ass'n, 448 Mich. 22 (1995), held that "involved in the accident" means that the motor vehicle being operated or used as a motor vehicle must actively, rather than passively, contribute to the accident. A "but for" connection between the motor vehicle's use and the damage resulting from the accident is insufficient to establish the motor vehicle's involvement in the accident. However, neither physical contact nor fault is necessary to show involvement. Only one of the motor vehicles needs to be linked to the damage, and the liability of the other motor vehicles depends on whether or not each had an active link to the accident, regardless of whether that particular motor vehicle's use actually gave rise to the tangible damage. The insurer of a stolen motor vehicle being operated by the thief is still responsible for the damage that occurred to tangible property and for the payment of property protection benefits.

The "arising out of" language from subsection (1) has the same meaning as in other sections of the No-Fault Act; there must be more than a fortuitous, incidental, or "but for" connection between the ownership, maintenance, use, or operation of the motor vehicle as a motor vehicle and the accident causing the damage. In essence, once the accident arises out of the operation, maintenance, ownership, or use of at least a single motor vehicle as a motor vehicle, and tangible property damage occurs, the insurers of all motor vehicles involved in the accident are potentially liable for property protection benefits. Thus, the insurers of the truck that collided with the building, the police car involved in the chase, and the other motor vehicles involved were responsible for sharing in the payment of property protection benefits.

Filing suit against the named insured does not preserve the remedy against the insurer since the action is properly brought only against the insurer. *Matti Awdish, Inc. v. Williams*, 117 Mich. App. 270 (1982); *Home Ins. Co. v. Rosquin*, 90 Mich. App. 682 (1979).

Under subsection (3), "loss of use" is not defined and thus must be construed according to its ordinary and commonly understood meaning. Thus, "loss of use" includes lost profits from business interruption. *Michigan Mut. Ins. Co. v. CNA Ins. Cos.*, 181 Mich. App. 376 (1989).
The Court of Appeals held that the trial court erred in striking the plaintiff's claim for loss of use of the vehicle and the resulting loss of profits, when the insurer failed in good faith to timely settle the insurance claim. The plaintiff sued his insurance carrier due to the handling of his claim for collision damage involving his tractor rig. The plaintiff claimed the loss of use of the vehicle resulted in loss of business revenue normally

generated by the vehicle. *Wendt v. Auto Owners Ins. Co.*, 156 Mich. App. 19 (1986).

Based on *Michigan Mut.* and *Wendt*, the phrase "loss of use" of tangible property, i.e. a reasonably parked motor vehicle, may include the cost of renting a replacement vehicle during the loss of use and while the vehicle is being repaired since these damages are not excluded under MCL 500.3123. As yet there are no reported cases directly on point regarding this matter.

B. MCL 500.3123 – Property Protection Benefits Exclusion

(1) Damage to the following types of vehicles is excluded from property protection benefits:

(a) Vehicles and their contents, including trailers, operated or designed for operation upon a public highway by power other than muscular power, unless the vehicle is parked in a manner as not to cause unreasonable risk of the damage which occurred.

C. MCL 500.3145(2) – Property Protection Statute of Limitations

The statute of limitations for a lawsuit seeking property protection insurance benefits is one year from the date of the accident. MCL 500.3145(2).

Comments

The Michigan Supreme Court allowed recovery on a claim for loss of business interruption after a business was damaged by a motor vehicle and applied the doctrine of equitable estoppel to extend the statute of limitations due to the defendant's negotiation tactics that caused the plaintiff to defer its claim in good faith reliance on the defendant's representations. *Cincinnati Ins. Co. v. Citizens Ins. Co.*, 454 Mich. 263 (1997).

X. MCL 500.3151 - MCL 500.3153 – PROCEDURE FOR QUESTIONING CLAIMS FOR PERSONAL AND PROPERTY PROTECTION INSURANCE BENEFITS

A. MCL 500.3151 – Mandatory Mental or Physical Independent Examinations

When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians. These examinations are commonly referred to as independent medical examination. A

personal protection insurer may include reasonable provisions in a personal protection insurance policy providing for such examinations.

Note: ***MCL 500.3151 was amended, effective June 11, 2019****, to provide that the physician who conducts the examination must be licensed in the State of Michigan, board certified or board eligible to practice in the area appropriate to the injured party's condition, and that during the year immediately preceding the examination, the physician must have devoted the majority of his professional time to clinical practice appropriate to the injured party's condition, or the instruction of students in an accredited medical school, or accredited residency or clinical research program for physicians, in the applicable specialty. Additionally, if care is being provided to the person to be examined by a specialist, the examining physician must specialize in the same specialty as the physician providing the care, and if the physician providing the care is board certified in the specialty, the examining physician must be board-certified in that specialty. MCL 500.3157(2). These are new requirements.*

B. MCL 500.3152 – IME Reports and Waiver of Privilege

If requested by a person examined (i.e. the claimant), a party causing an examination to be made (i.e. the insurer) shall deliver to him a copy of every written report concerning the examination rendered by an examining physician, at least 1 of which reports shall set out his findings and conclusions in detail. After such request and delivery, the insurer is entitled upon request to receive from the claimant every written report available to him or his representative concerning any examination relevant to the claim, previously or thereafter made, of the same mental or physical condition, and the names and addresses of physicians and medical care facilities rendering diagnoses or treatment in regard to the injury or to a relevant past injury, and shall authorize the insurer to inspect and copy records of physicians, hospitals, clinics or other medical facilities relevant to the claim. By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the claimant waives any privilege he may have, in relation to the claim for benefits, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

C. MCL 500.3153 – Refusal to Submit to IME or to Make Records Available

A court may make any such orders in regard to the refusal to comply with sections 3151 and 3152 "as are just," except an order to arrest a person for disobeying an order to submit to a physical or mental examination. The orders that may be made in regard to such a refusal include, but are not limited to:

(a) An order that the mental or physical condition of the disobedient person shall

be taken to be established for the purposes of the claim in accordance with the contention of the party obtaining the order.

(b) An order refusing to allow the disobedient person to support or oppose designated claims or defenses, or prohibiting him from introducing evidence of mental or physical condition.

(c) An order rendering judgment by default against the disobedient person as to his entire claim or a designated part of it.

(d) An order requiring the disobedient person to reimburse the insurer for reasonable attorneys' fees and expenses incurred in defense against the claim.

(e) An order requiring delivery of a report, in conformity with section 3152, on such terms as are just, and if a physician fails or refuses to make the report a court may exclude his testimony if offered at trial.

Comments

The Court of Appeal held that where an insured "repeatedly" breached his duty to appear for an independent medical examination, an insurer may properly suspend benefits pending completion of any requisite independent medical examination. *Roberts v. Farmers Ins Exch,* 275 Mich. App. 58 (2007).

D. Examination Under Oath

Examinations under oath (EUO) are frequently performed prior to suit to investigate and assess the value of claims. The Michigan Court of Appeals recently held that as a matter of first impression, an EUO provision in a personal protection insurance policy was invalid as contrary to the no-fault statutes with respect to a claim for first-party no-fault benefits. Thus, the court held that the insurer could not deny the claim for first-party no-fault benefits based on the insured's refusal to submit to an EUO. However, the court also held that the EUO provision was enforceable as part of the uninsured motorist policy, and therefore, the trial court appropriately dismissed the claim for uninsured motorist benefits *without prejudice*. As an aside, uninsured motorist coverage is an optional coverage in Michigan controlled by the policy language and not mandated no-fault coverage controlled by statute. *Cruz v. State Farm Mut. Auto. Ins. Co.*, 241 Mich. App. 159 (2000).

XI. MCL 500.3135(3)(e), (4), (5), AND (6) – MINI-TORT

A. Introduction

Mini-tort economic damages should not be confused with property protection insurance benefits pursuant to MCL 500.3121 through MCL 500.3127. MCL 500.3123 specifically excludes damages to vehicles and their contents "unless the vehicle is parked in a manner as not to cause unreasonable risk of the damage which occurred." MCL 500.3123 specifically refers to "vehicles," which is broader than the term "motor vehicle."

Mini-tort economic damages are recoverable only for damage to motor vehicles as defined in the no-fault statute and to the extent that the damages are not covered by insurance up to $3,000. Damages shall be on the basis of comparative fault but shall not be assessed in favor of a party more than 50% at fault.

B. Applicability of Mini-Tort

(3)(d) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to . . . [d]amages up to $3,000.00 to a motor vehicle, to the extent that the damages are not covered by insurance.

(1) In an action for damages in mini-tort:

(a) "Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault." MCL 500.3135(4)(a).

(b) Coverage for mini-tort is not a required component of residual liability pursuant to MCL 500.3131.

(5) Actions in mini-tort "shall be commenced, whenever legally possible, in the small claims division of the district court or the municipal court. If the defendant or plaintiff removes the action to a higher court and does not prevail, the judge may assess costs." Notably, parties proceeding in the small claims division *cannot* be represented by attorneys, and thus removal from small claims to the general civil docket of the district court is routinely granted once a party retains counsel.

(6) A decision of a court made as to a mini-tort has no res judicata, or binding, effect on any other proceeding or litigation.

Comments

In a situation involving two motor vehicles, neither of which are reasonably parked at the time of the accident, recovery under mini-tort is limited on the basis of comparative fault and, to the extent that the damages are not covered by insurance, up to $1,000. An issue may be whether the motor vehicle involved has broad, standard, or limited form collision coverage. For example, the motor vehicle insured with broad form collision coverage that is 50% or less than 50% at fault *arguably* has no uninsured loss since by the terms of the insurance contract the deductible is in essence waived and/or covered by the policy. Standard form collision usually means that there will be a deductible. The limited form collision may or may not have a deductible, but the insured must be 50% or less or less than 50% at fault *generally* before the deductible is waived and/or covered by the insurance policy. There are no known published cases in Michigan addressing this issue.

Mini-tort does not apply to a reasonably parked motor vehicle because under MCL 500.3123(1)(a), the reasonably parked motor vehicle is not considered a vehicle. However, a claimant of a reasonably parked motor vehicle is entitled to get all damages to tangible property, including loss of use of the property injured or destroyed, as a component of no-fault property protection damages (MCL 500.3121) rather than under mini-tort (MCL 500.3135(3)(d)). The priority of recovery for a reasonably parked vehicle that is considered a tangible piece of property, such as a mailbox or house, would be in the priority set forth in MCL 500.3125. Under MCL 500.3123(1)(a), "a properly parked motor vehicle was thus treated under the act as non-vehicular property for the purposes of payment of property protection insurance benefits." *Miller v. Auto Owners Ins. Co.*, 411 Mich. 633 (1981).

Since a motorcycle is not a motor vehicle, there is no recovery for damage to a motorcycle under the mini-tort provision as a result of a collision with a motor vehicle. *Nerat v. Swacker*, 150 Mich. App. 61 (1986). However, a reasonably parked motorcycle, as set forth in MCL 500.3123(1)(a), is not a vehicle and may be entitled to recover property protection benefits pursuant to MCL 500.3121. *Miller v. Auto Owners Ins. Co.*, 411 Mich. 633 (1981).

Since mini-tort is in essence a tort action, the statute of limitations would be three years from the accrual date of the claim, which is usually the date of the accident.

XII. COLLISION DAMAGE

Other than in a mini-tort situation, collision damage is not a part of the no-fault statutory scheme. **MCL 500.3101 *et. seq.***

Collision coverage is *not* mandatory in Michigan. However, pursuant to **MCL 257.520(g)**, any policy which grants the coverage mandated by Michigan's No-Fault Act may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy, and any such excess or additional coverage shall not be subject to the provisions of Michigan's Financial Responsibility Act.

Under **MCL 500.3037**, when a new applicant for no-fault insurance completes a written application to the insurer, the insurer must offer both limited collision coverage and broad-form collision coverage. **MCL 500.3037(1)(a)** defines limited coverage as coverage "which shall pay for collision damage to the insured vehicle without a deductible amount when the operator of the vehicle is not substantially at fault in the accident from which the damage arose." **MCL 500.3037(1)(b)** defines broad-form collision as "coverage which shall pay for collision damage to the insured vehicle regardless of fault, with deductibles in such amounts as may be approved by the Commissioner, which deductibles shall be waived if the operator of the vehicle is not substantially at fault in the accident from which the damage arose." Collision damage does not include losses customarily insured under comprehensive coverage. **MCL 500.3037(7)(a).** Further, "substantially at fault" is defined as "a person's action or inaction was more than 50% of the cause of the accident." **MCL 500.3037(7)(b).**

If the applicant chooses to reject collision coverage, the applicant must sign a written rejection either on a separate form or as part of the application, or some combination thereof, as approved by Michigan's Insurance Commissioner. At least annually, or at the time of vehicle addition or deletion on a policy, and on a form approved by the Insurance Commissioner, the insurer must inform the policyholder of the current status of the collision coverage, the collision coverage available under the policy, the rights of the insured in the event of damage to the insured vehicle under each collision option, and procedures for the policyholder to follow if he wishes to change the current collision coverage. **MCL 500.3037(6).**

As described in Section XV, *supra*, mini-tort economic damages are recoverable only for damage to motor vehicles as defined in the no-fault statute *to the extent the damages are not covered by insurance*. Mini-tort damages may only be recovered up to $1,000. Thus, if the insurance company waives the deductible, it arguably cannot sue the responsible party in a subrogation action for mini-tort because mini-tort is only for damages to motor vehicles to the extent that damages are not covered by insurance. In the alternative, an insurance company can argue that the responsible party should not benefit from the insured's payment of his premium and the terms of his insurance contract. There are no known cases addressing this issue in Michigan.

XIII. MCL 500.3163 – CERTIFICATION

(1) "An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act."

(4) If an insurer of an out-of-state resident is required to provide benefits under subsections (1) to (3) to that out-of-state resident for accidental bodily injury for an accident in which the out-of-state resident was not an occupant of a motor vehicle registered in this state, the insurer is only liable for the amount of ultimate loss sustained up to $500,000.00. Benefits under this subsection are not recoverable to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits.

Comments

MCL 500.3163, through its language "occurring in this state," clearly holds that the statute only applies to accidents occurring in the state of Michigan. Liability for non-resident no-fault benefits under MCL 500.3163 is analyzed in terms of ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by a non-resident, "rather than according to the terms of the foreign policy." MCL 500.3163 certification mandates full compliance with the Michigan No-Fault Act without regard to the provisions of the foreign contract of insurance. *Transport Ins. Co. v. Home Ins. Co.*, 134 Mich. App. 645 (1984).

The injury need not be sustained by an out-of-state resident so long as the injury arises from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident. *Tevis v. Amex Assurance Company*, 283 Mich. App. 76, 84 (2009), *lv den* 485 Mich. 926 (2009). In *Tevis*, it was suggested that ownership, alone, by an out-of-state resident, may trigger the duty of a certified insurer to pay Michigan no-fault benefits, although in that case the operator was also an out-of-state resident.

MCL 500.3163(4) is a provision that places a cap on the amount of benefits which an insurer would be required to pay to a non-Michigan resident who is injured as an occupant of a non-Michigan registered motor vehicle.

Note: ***MCL 500.3163 was amended, effective June 11, 2019*** *to provide that an insurer authorized to transact automobile liability and personal protection insurance in this state is not required to provide personal protection*

insurance or property protection benefits for accidental bodily injury occurring in this state arising from the operation, maintenance, or use, of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under that insurer's liability insurance policies, unless the out-of-state resident is a the owner of a motor vehicle that is registered and insured in this state. Previously, an insurer authorized to transact automobile insurance in this state had to certify that it would pay personal protection insurance benefits to its insured out-of-state residents, and claimants injured as a result of those out-of-state residents' ownership, operation, maintenance or use of a motor vehicle in accordance with the No-Fault Act.