LEXSEE 438 MICH 330

Luella Gilroy, Plaintiff–Appellee, v. General Motors Corp., Defendant–Appellant

GILROY

No. 87804

Supreme Court of Michigan

1991 MIWCLR (LRP) LEXIS 731; 438 Mich. 330; 475 N.W.2d 271; 4 MIWCLR (LRP) 2030

September 4, 1991

110.005 Representation, Fees
125.070 Insurance Practices and Procedures, Reimbursement
180.010 Effect of Other Benefits, Employer and Individual Insurance Ben
efits

SUMMARY

Claimant incurred attorney's fees in obtaining workers' compensation benefits from her employer after receiving sickness and accident benefits under an employer–provided insurance plan. After the disability insurer failed to obtain an assignment of benefits, the Board ordered the employer to pay a portion of claimant's attorney's fees. In a decision reported at 2 MIWCLR 2016, the Court of Appeals affirmed, finding that the insurance company's failure to obtain an assignment placed the employer in the position of the insurance company, which rendered the employer liable for a portion of claimant's attorney's fees. Ruling that W.C.L. § 821 required the payment of a portion of claimant's attorney's fees only where there was an enforcement of an assignment, the Supreme Court of Michigan reversed. The employer merely coordinated the two types of benefits received by claimant under W.C.L. § 354, the Court reasoned, and the attorney fee requirement was not triggered **[*2]** by the phrase "entitled to repayment" in that section. The Court concluded that the employer was not required to pay a portion of claimant's attorney's fees.

PANEL: Before Griffen, J.

OPINION:

Opinion

GRIFFIN, Justice.

This lawsuit, which arose out of a claim for workers' compensation, is about the award of an attorney's fee and whether it was authorized. The issue presented is one of statutory construction. Because under the circumstances in this case the Workers' Disability Compensation Act**n1 imposes no liability upon the employer for the attorney fee in question, we reverse the decision of the Court of Appeals.

I

Plaintiff Luella Gilroy was injured in an altercation with a fellow employee on May 27, 1982, while employed by defendant General Motors Corporation.**n2 Under a collectively bargained disability benefit plan,**n3 plaintiff first received sickness and accident benefits of $996.66 per month for a year, and then she received extended disability benefits of $830 per month. Under the plan, benefits were not payable for periods of disability compensable under the WDCA.**n4

In order to fund this plan, GM established two trusts which were administered by Metropolitan **[*3]** Life Insurance Company. Under the arrangement, if the total amount of claims paid in a particular month should exceed the amount which GM was required to provide, the excess was to be paid by Metropolitan Life. Accordingly, GM was self–insured up

to a trigger point, and it was insured by Metropolitan Life with regard to excess liability, if any. Because the aggregate of claims did not exceed the trigger point during the period here in question, it is undisputed that all of the disability benefits disbursed during that period were paid out of GM's funds.

While receiving disability benefits under the plan, plaintiff also filed a claim under the Workers' Disability Compensation Act. After initially contesting the claim, GM, in a settlement agreement dated June 22, 1983, conceded plaintiff's entitlement to workers' compensation at the rate of $238.49 per week from the date of her injury. The agreement also recognized that under coordination provisions in § 354**n5 of the act, the total amount of workers' compensation otherwise due plaintiff for the period between the date of her injury and the agreement date would be reduced by the after–tax value of the disability benefits already **[*4]** received by plaintiff under the plan.**n6

In view of the settlement, plaintiff's claim for workers' compensation was dismissed; however, the referee's dismissal order included a requirement that GM pay to plaintiff's attorney a fee equal to thirty percent of the disability benefits already paid to plaintiff under the collectively bargained disability plan.

Protesting that the benefits received by plaintiff under the plan had been paid voluntarily without intervention of plaintiff's attorney, and arguing that no statutory authority existed for the order requiring payment of such a fee to plaintiff's attorney, GM appealed.**n7 However, the order was affirmed, first by the Workers' Compensation Appeal Board, and later by the Court of Appeals.**n8 *166 Mich.App. 609, 420 N.W.2d 829 (1987).*

Initially, this Court denied leave to appeal. *430 Mich. 872 (1988).* However, we reconsidered and remanded to the Court of Appeals with directions for that court to consider its decision again, after remanding to the Bureau of Workers' Disability Compensation for a hearing to obtain additional information concerning the contractual **[*5]** relationship between *GM and Metropolitan Life. 431 Mich. 855, 426 N.W.2d 183 (1988).* Following the hearing, the Court of Appeals again affirmed. *181 Mich.App. 178, 448 N.W.2d 777 (1989).*

We then granted leave to appeal. *436 Mich. 880 (1990).*

II

As the Legislature has recognized, it is not uncommon for employers to purchase group insurance which provides regular payments to employees who become disabled because of a sickness or injury that is not covered by workers' compensation. We have explained that a sickness and accident policy,
commonly known in the insurance field as an 'S & A,' is an employer–provided fringe benefit meant to supplement, rather than duplicate, the state–mandated workers' compensation protection. It covers non–work–related illnesses [and injuries] and, in effect, helps fill the gap in the workers' disability insurance coverage. *Aetna Life Ins. Co. v. Roose, 413 Mich. 85, 93, n. 5, 318 N.W.2d 468 (1982).*

Although the typical S & A policy does not cover work–related disability, legislation has been put **[*6]** in place to encourage interim payments by the S & A insurer while a disabled employee who may be entitled to workers' compensation pursues a claim. By taking an assignment from the employee–claimant, the insurer becomes entitled to reimbursement for payments made when and if workers' compensation is awarded.

Ordinarily, an employee's entitlement to workers' compensation benefits is not assignable. *M.C.L. § 418.821(1)*; M.S.A. § 17.237(821)(1). However, to encourage interim payments by disability insurers in the circumstances described, the Legislature has provided that the rule against assignment
shall not apply to or affect the validity of an assignment made to an insurance company . . .making an advance or payment to an employee under a group disability or group hospitalization insurance policy which provides that benefits shall not be payable under the policy for a period of disability or hospitalization resulting from accidental bodily injury or sickness arising out of or in the course of employment. *M.C.L. § 418.821(2)*; M.S.A. § 17.237(821)(2).

In *Aetna Life Ins. Co. v. Roose, supra, pp. 93–94, 318 N.W.2d 468,* our Court explained:
The **[*7]** purpose of § 821(2) is to allow and encourage insurance companies carrying sickness and accident policies to step forward and pay immediate benefits to injured workers who are pursuing a claim for workers' compensation. In this manner, the worker, often unable to work and incurring medical expenses, will be better able to weather the storm while waiting for a determination by the bureau.

The focal point of this lawsuit is the final sentence of § 821(2) which provides:
When a group disability or hospitalization insurance company . . .enforces an assignment given to it as provided in this

section, it shall pay, pursuant to rules established by the director, a portion of the attorney fees of the attorney who secured the workers' compensation recovery.

Reference to this language is also incorporated in § 354 which provides for coordination of workers' compensation with certain other employer–funded benefits. Chief Justice Cavanagh recently explained that § 354
was part of a legislative reform package involving a series of related amendments of the workers' compensation statute. The coordination provisions were an essential component of a compromise plan that restructured benefits payable **[*8]** to disabled workers. The resources saved as a result of this coordination were reallocated by the statute to increase benefit levels generally. . . . *Romein v. General Motors, 436 Mich. 515, 521, 462 N.W.2d 555 (1990).*

In pertinent part, § 354 provides:
(1) Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts:
. . .

(b) The after–tax amount of the payments received or being received under a self–insurance plan, a wage continuation plan, or under a disability insurance policy provided by the same employer from whom benefits under section 351, 361, or 835 are received if the employee did not contribute directly to the plan or to the payment of premiums regarding the disability insurance policy. If such self–insurance plans, wage continuation plans, or disability insurance policies are entitled to repayment in the event of a worker's compensation benefit recovery, the carrier shall satisfy such repayment out of funds the carrier has received through the coordination of benefits provided **[*9]** for under this section. Notwithstanding the provisions of this subsection, attorney fees shall be paid pursuant to section 821 to the attorney who secured the worker's compensation recovery. *M.C.L. § 418.354(1)(b)*; M.S.A. § 17.237(354)(1)(b). (Emphasis added.)

In reaching its decision in this case, the WCAB acknowledged that neither GM nor Metropolitan Life had enforced an assignment or received any reimbursement out of plaintiff's workers' compensation award. Declaring, nevertheless, that plaintiff's compensation benefits had been reduced through coordination "in the same manner" as though she had signed a reimbursement agreement, the panel "inferred that the employer . . .stands in the place of the S & A carrier under Section 821, thus becoming responsible for the attorney fee based on the S & A benefits representing the balance of workers' compensation."

In its first review of this case, the Court of Appeals reasoned that Metropolitan Life could not "be characterized as an insurer independent of defendant since no truly independent insurance company would intentionally fail to take an assignment from a worker for reimbursement of sickness and accident payments in the event of **[*10]** the worker's entitlement to workers' compensation benefits." *166 Mich.App. at 615, 420 N.W.2d 829.* The panel concluded that defendant GM "stands in the place of the disability insurance carrier [Metropolitan Life]," and for that reason, "under § 821, is required to pay a portion of plaintiff's attorney fees. . . ." *166 Mich.App. at 614–616, 420 N.W.2d 829.*

Upon remand, and after a hearing at which the relationship between GM and Metropolitan Life was explored, the Court of Appeals applied similar reasoning and reached the same result. It opined that "[t]o disallow the payment of a portion of such fees, particularly in a case such as this in which the employer reaped the substantial benefit of a coordination credit for the disability benefits paid to plaintiff, would be unjust." *181 Mich.App. at 184, 448 N.W.2d 777.*

Against that background, we turn now to consider the applicability in this case of the § 821 attorney–fee provision.

III

As in any other civil litigation, a workers' compensation claimant is ordinarily responsible for personal attorney fees. **[*11]** 3 Larson, Workmen's Compensation Law, § 83.11, pp 15–1270. Generally, attorney fees are paid out of the workers' compensation awarded. Of course, the established weekly benefit rate for a claimant represented by an attorney is the same as for one not so represented. Section 858(2)**n9 of the act provides, in part, that "[t]he director, by rule, may prescribe maximum attorney fees and the manner in which the amount may be determined or paid by the employee. . . ." *M.C.L. § 418.858(2)*; M.S.A. § 17.237(858)(2). (Emphasis added.)

Clearly, if this plaintiff had filed for and recovered workers' compensation without receiving disability benefits under the GM plan, or if there had been no such plan in effect, she would have been responsible for the fees charged by her attorney in connection with the workers' compensation claim.**n10

Section 821(2) provides only a narrow exception to this general rule. It provides that when a

group disability or hospitalization insurance company . . .enforces an assignment given to it as provided in this section, it shall pay, pursuant to rules established by the director, a portion of the attorney fees of the attorney who secured the worker's compensation **[*12]** recovery. *M.C.L. § 418.821(2)*; M.S.A. § 17.237(821)(2). (Emphasis added.)

We are, of course, guided in our interpretation of § 821 by certain fundamental rules of construction. Where the provisions of a statute are clear and unambiguous, they are to be applied as written without construction. *Selk v. Detroit Plastic Products, 419 Mich. 1, 9, 345 N.W.2d 184 (1984).* The language of the exception set forth in § 821(2) is clear and precisely limits its application. Finding that this provision looks to the realization of reimbursement, we conclude that it requires payment of a portion of the claimant's attorney fees only where there is enforcement of an assignment.

GM argues that neither it nor Metropolitan Life is a "disability or hospitalization insurance company" within the meaning of § 821(2). We need not address that contention. Even assuming arguendo that GM "stands in the place of the disability insurance company," *166 Mich.App. at 614, 420 N.W.2d 829*—as characterized by the panel below—it is undisputed that neither GM, nor its agent, Metropolitan Life, enforced an assignment.

Rather than enforcing **[*13]** an assignment, as contemplated by § 821(2), GM acted pursuant to § 354, which allowed it to reduce its workers' compensation liability by coordinating sickness and accident and extended disability benefits previously paid to plaintiff. The distinction between coordination under § 354 and enforcement of an assignment under § 821(2) is not without an important difference. Under § 354(1)(b), after an employee recovers a workers' compensation award, the employer may adjust or credit its liability for workers' compensation only by the after–tax amount of the group benefits previously paid.**n11 However, under § 821(2), an insurer enforcing an assignment is entitled to reimbursement for the entire pretax amount of group benefits paid but less "a portion of the attorney fees of the attorney who secured the worker's compensation recovery."

We are convinced that our construction of the attorney–fee provision is consistent with the policy which underlies it. In addition to encouraging disability insurers to make advance interim payments to disabled employees, § 821 allows a claimant's attorney to collect part of his fee from the insurer where, through reimbursement, it has benefited from **[*14]** the attorney's successful prosecution of the workers' compensation claim. To require the reimbursed insurer to pay a proportionate share of the attorney fee under those circumstances is fair and avoids giving the insurer a "free ride."

However, in the situation presented by this case, it cannot be said that a benefit was conferred by claimant's attorney on either GM or Metropolitan Life. Neither of them enforced an assignment or received any reimbursement.

Contrary to the panel's view that GM reaped a "substantial benefit" by coordinating the disability benefits paid to plaintiff, *181 Mich.App. 178, 448 N.W.2d 777,* it is apparent that the only benefit received by GM was the right not to pay twice for the same disability. That "right" is provided by law in § 354 and was recognized in the bargained benefit plan agreed to by the United Auto Workers Union on plaintiff's behalf.

Plaintiff also argues that § 354 independently requires payment by GM of the attorney fee in question. We turn now to consider that contention.

IV

In pertinent part, § 354(1)(b) provides:
If such self–insurance plans, wage continuation plans, or disability insurance **[*15]** policies are entitled to repayment in the event of a worker's compensation benefit recovery, the carrier shall satisfy such repayment out of funds the carrier has received through the coordination of benefits provided for under this section. Notwithstanding the provisions of this subsection, attorney fees shall be paid pursuant to section 821 to the attorney who secured the worker's compensation recovery. *M.C.L. § 418.354(1)(b)*; M.S.A. § 17.237(354)(1)(b) (emphasis added).

Although it is undisputed that neither GM nor Metropolitan Life enforced an assignment, plaintiff contends that § 354 requires payment of part of a claimant's attorney fees by a self–insured or disability insurer if it is merely "entitled to repayment" in the event of a workers' compensation benefit recovery. However, this argument ignores the words of § 354 which require that such fees "be paid pursuant to section 821."

We hold that the attorney fee requirement is not triggered solely by "entitlement to repayment"; rather, it is also conditioned, "pursuant to section 821," upon enforcement of an assignment.

Recognizing that this is a strict construction of the exception to the general rule that workers' compensation **[*16]**

claimants pay their own attorney fees, we believe it accords with the purpose and legislative history underlying § 354. As already noted, that section was designed to increase workers' compensation benefit levels generally by reallocating costs saved through coordination. The Legislature believed it was imperative that the increasing workers' compensation burden on Michigan employers be lightened.**n12 Accordingly, the package of bills which included § 354 sought to cut the high cost of workers' compensation by regulating and limiting medical expenses**n13 and attorney fees,**n14 tightening the definitions of disabilities**n15 and compensable injuries,**n16 and coordinating workers' compensation benefits with social security and other collateral benefits.**n17

It is noteworthy that while the WDCA allows the bureau's director to set maximum attorney fees for hearings of workers' compensation disputes,**n18 *1981 P.A. 196*, enacted as part of the 1981 reform package, directed that if the director based maximum attorney fees on a weekly benefit rate, the rate used could not, after coordination of benefits, be greater than two-thirds of the state **[*17]** average weekly wage at the time of the injury. In light of the increase in weekly benefits then scheduled for 1982, it appears that this amendment was aimed at preventing a "windfall for attorneys."**n19

We believe that the ruling of the board and the panel below, if left in place, would result in a windfall for plaintiff's attorney. To require GM to pay plaintiff's attorney a fee based on thirty percent of the disability payments already paid to plaintiff under the plan ignores the fact that this attorney played no part in securing those benefits for plaintiff. Furthermore, such a result would undermine the salutary purpose sought to be achieved by § 821(2)—encouraging advance payments to help workers' compensation claimants "weather the storm."

Section 354 clearly requires that attorney fees are to be paid pursuant to section 821. "It is a well settled rule of construction that the courts should not undertake to make the legislature say what it has not said." *Burdick v. Harbor Springs Lumber Co., 167 Mich. 673, 681, 133 N.W. 822 (1911).*

V

For the reasons set forth, we reverse the decision of the Court of Appeals.

CAVANAGH, C.J., **[*18]** and GRIFFIN, MALLETT, RILEY, LEVIN and BRICKLEY, JJ., concur.

————————BEGIN FOOTNOTE————————

1. *M.C.L. § 418.101* et seq.; M.S.A. § 17.237(101) et seq.

2. As amicus curiae has pointed out, events in this case are governed by provisions of the Workers' Disability Compensation Act that were in effect between March 31, 1982, and July 30, 1985.

3. The benefit plan was part of a collective bargaining agreement between GM and the United Auto Workers, of which plaintiff was a member.

4. The plan provided in part:
Benefits payable for any period shall be reduced by any payments for time lost from work in that period to which the employe is entitled under any Workers Compensation law. . . .
The plan also provided:
If it is determined that any benefit(s) paid to an employe under this Article should not have been paid or should have been paid in a lesser amount, written notice thereof shall be given to such employe and he shall repay the amount of the overpayment to the insurance company.

5. § 354 provides in part:
(1) Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits **[*19]** . . .shall be reduced by these amounts:
(b) The after-tax amount of the payments received or being received under a self-insurance plan . . .or under a disability

insurance policy provided by the same employer. . . . If such self–insurance plans . . .or disability insurance policies are entitled to repayment in the event of a worker's compensation benefit recovery, the carrier shall satisfy such repayment out of funds the carrier has received through the coordination of benefits provided for under this section. *M.C.L. § 418.354*; M.S.A. § 17.237(354).

6. According to plaintiff, the after–tax value of the $230.00 per week sickness and accident benefit received for one year by plaintiff was $190.13 per week, as calculated by the Bureau of Workers' Disability Compensation. The after–tax value of the $830.00 per month extended disability benefit received by plaintiff after the first year to June 22, 1983, amounted to $161.91 per week.

7. GM also argued that its self–funded employee benefit plan is governed by the Employee Retirement Income Security Act of 1974, *29 U.S.C. § 1101* et seq., and that application of WDCA, insofar as it related **[*20]** to attorney fees, is precluded by § 514, the preemption provision of ERISA, *29 U.S.C. § 1144*(a). Because we reverse on other grounds, we do not reach this issue.

8. The board and the panel relied upon § 354 and § 821 of the WDCA. Section 354(1)(b) provides in part:
If such self–insurance plans, . . .or disability insurance policies are entitled to repayment in the event of a worker's compensation benefit recovery, the carrier shall satisfy such repayment out of funds the carrier has received through the coordination of benefits provided for under this section. Notwithstanding the provisions of this subsection, attorney fees shall be paid pursuant to section 821 to the attorney who secured the worker's compensation recovery.
Section 821(2) provides in part:
When a group disability or hospitalization insurance company . . .or any successor organization enforces an assignment given to it as provided in this section, it shall pay, pursuant to rules established by the director, a portion of the attorney fees of the attorney who secured the worker's compensation recovery. *M.C.L. § 418.821(2)*; M.S.A. § 17.237(821)(2).
Section 821(3) provides in part:
[*21] As used in this section, 'insurance company' includes a self–insurer.

9. This section has been construed as governing attorney fee disputes between attorneys and their clients and not disputes over attorney fees between the parties. See *McDougall v. General Motors Corp., 185 Mich.App. 509, 463 N.W.2d 151 (1990); Gross v. A. & P. Co, 87 Mich.App. 448, 274 N.W.2d 817 (1978).*

10. *M.C.L. § 418.858*; M.S.A. § 17.237(858). See also 1980 AACS, R 408.44(2), which provides:
In a case tried to completion with proofs closed or compensation voluntarily paid, an attorney, before computing the fee, shall deduct from the accrued compensation the reasonable expenses incurred on plaintiff's behalf. The fee that the administrative law judge may approve shall not be more than 30% of the balance.

11. The employer's workers' compensation liability shall be reduced by "[t]he after–tax amount of the payments received or being received under a self–insurance plan, a wage continuation plan, or under a disability insurance policy provided by the same employer from whom benefits under section 351, 361, or 835 are **[*22]** received if the employee did not contribute directly to the plan or to the payment of premiums regarding the disability insurance policy." *M.C.L. § 418.354(1)(b)*; M.S.A. § 17.237(354)(1)(b).

12. See Senate Analysis Section, SB 573, First Analysis (January 7, 1982).

13. See 1981 SB 582. See also Senate Analysis, n 12 supra. SB 582 was enacted into law by *1981 P.A. 195.*

14. See 1981 SB 583. See also Senate Analysis, n 12 supra. SB 583 was enacted into law by *1981 P.A. 196.*

15. 1981 SB 589 and 1981 SB 590. See also Senate Analysis, n 12 supra. SB 589 was enacted into law by *1981 PA 199,*

SB 590 by 1981 PA 200.

16. 1981 SB 590. See also Senate Analysis, n 12 supra. SB 590 was enacted into law by *1981 PA 200.*

17. 1981 SB 591 and 1981 SB 595. See also Senate Analysis, n 12 supra. SB 595 was enacted into law by *1981 PA 203.* SB 591 was enacted into law by *1981 PA 201.*

18. *M.C.L. § 418.858(2)*; M.S.A. § 17.237(858)(2).

19. See Senate Analysis, n 12 supra. After January **[*23]** 1, 1982, the maximum weekly benefit rate increased from $210 per week to $300 per week. Thus, if the director based the maximum attorney fees on a weekly benefit rate, attorney fees would have substantially increased.

BOYLE, Justice (concurring).

I do not agree with the majority that *M.C.L. § 418.821*; M.S.A. § 17.237(821) and *M.C.L. § 418.354*; M.S.A. § 17.237(354) are unambiguous. Nevertheless, I do agree with the result the majority reaches because the purpose underlying § 821 is to eliminate free riders. Since this is not a situation where General Motors Corporation benefits by virtue of the efforts of plaintiff's attorney, it is not a free rider.

————————————END FOOTNOTE————————————