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STATE OF MICHIGAN

COURT OF APPEALS

MARK MARUSZA, a legally incapacitated person, by his Coguardians JEFFREY FRIED and NANCY GUCWA,

Plaintiffs-Appellants,

UNPUBLISHED
May 14, 2020

v

No. 348269
Wayne Circuit Court
LC No. 17-015791-NO

DONNA PARHAM SANDERS and ACCIDENT FUND INSURANCE COMPANY OF AMERICA,

Defendants-Appellees.

MARK MARUSZA, a legally incapacitated person, by his Coguardians JEFFREY FRIED and NANCY GUCWA, NANCY GUCWA, Individually, CONSULTING UNLIMITED, INC., and E3 CAREGIVERS, LLC,

Plaintiffs-Appellees,

v

No. 348355
Wayne Circuit Court
LC No. 17-003768-NF

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

Before: JANSEN, P.J., and METER and CAMERON, JJ.

PER CURIAM.

In Docket No. 348269, plaintiff, Mark Marusza, by his coguardians Jeffrey Fried and Nancy Gucwa, appeals as of right the order granting defendants', Donna Parham Sanders and Accident Fund Insurance of America (AF), motion for summary disposition to enforce a workers' disability compensation opinion and order. In Docket No. 348355, defendant, Auto-Owners

Insurance Company (Auto-Owners), appeals as of right the stipulation and order for consent judgment. These appeals were consolidated. *Marusza v Sanders*, unpublished order of the Court of Appeals, entered April 17, 2019 (Docket Nos. 348269 and 348355). We reverse in Docket No. 348269, and affirm in Docket No. 348355. We decide this case without oral argument under MCR 7.214(E)(1)(b).

I. BASIC FACTS

This case arises out of an October 18, 2011 motor vehicle accident, in which a vehicle struck plaintiff as he was crossing the street. At the time of the accident, plaintiff was acting in the course and scope of his employment with Detroit Intermodel Transport, Inc. Auto-Owners was plaintiff's personal no-fault insurance provider, and AF was the workers' compensation carrier for Detroit Intermodel Transport, Inc.

Following the accident, AF paid some of plaintiff's workers' compensation benefits, but denied other payments of benefits. Accordingly, plaintiff filed an action against Auto-Owners for the payment of benefits due under the no-fault act, MCL 500.3101 *et seq*. In June 2014, plaintiff and Auto-Owners settled the claim for personal injury protection benefits (PIP benefits), whereby Auto-Owners agreed to pay plaintiff's PIP benefits.

While plaintiff's claim for PIP benefits was pending, plaintiff filed an application for mediation or hearing with the Worker's Compensation Board of Magistrates (WCBM). The workers' compensation case proceeded for three years while the parties took 23 expert depositions. Auto-Owners intervened in the workers' compensation case to recoup the money it had paid out in the June 2014 settlement. In late 2015, a magistrate held a workers' compensation trial. On May 23, 2016, the magistrate issued a 92-page opinion and order, finding that plaintiff was disabled as a result of the 2011 accident, and ordering AF to pay for "reasonable and necessary medical treatment for plaintiff's employment related injury," including four hours per day of attendant care services paid at a rate of $16.11 per hour.

After the opinion and order was entered, plaintiff alleged that there had been a change of condition that led him to need more than four hours per day of attendant care services. However, AF refused to pay for increased attendant care services. In Docket No. 348269, plaintiff filed a complaint against AF and Sanders, an employee of AF, which, in pertinent part, requested that the trial court enforce the WCBM's opinion and order against AF. Plaintiff alleged that AF was only paying $12 per hour for attendant care services, despite the WCBM's opinion and order requiring payment of $16.11 per hour. AF[1] filed a motion for summary disposition under MCR 2.116(C)(4) and (8), arguing that the WCBM's opinion and order did not specifically order AF to pay $16.11 per hour for attendant care services. Plaintiff argued that the WCBM's opinion and order clearly and unambiguously required AF to pay an hourly rate of $16.11 for attendant care services.

[1] We note that Sanders joined in the motion for summary disposition. However, for the sake of simplicity and to avoid any unnecessary confusion, we will only refer to AF when discussing the procedural history and arguments on appeal relative to Docket No. 348269.

The trial court found that the opinion and order only required AF to pay Gucwa, plaintiff's attendant care provider, $16.11 per hour while Gucwa was employed by Centria. Because Gucwa was no longer employed by Centria, AF did not have to pay the hourly "agency rate" of $16.11. Thus, the trial court determined that AF paid for plaintiff's attendant care services according to the "clear and unambiguous" language of the opinion and order, and granted summary disposition in favor of AF.

In Docket No. 348355, plaintiff and his service providers, Gucwa, Consulting Unlimited, Inc., and E3 Caregivers, LLC, filed suit against Auto-Owners for payment of attendant care and nurse care management services. Plaintiff asserted that Auto-Owners was obligated to pay for the services after AF refused to pay the full hourly rate. Auto-Owners filed a motion for partial summary disposition under MCR 2.116(C)(7), arguing that the WCBM's opinion and order clearly stated that AF was required to pay for plaintiff's attendant care services, and therefore, plaintiff could not seek payment from Auto-Owners under the doctrine of res judicata. In response, plaintiff filed a competing motion for partial summary disposition under MCR 2.116(C)(10), arguing that Auto-Owners was required to pay for the attendant care services while plaintiff's application to the WCBM, which requested an order to require AF to pay for the services, was pending.

Following a hearing on the parties' opposing motions for partial summary disposition, the trial court denied both motions. The trial court denied Auto-Owners' motion because Auto-Owners could not withhold payment of PIP benefits while the workers' compensation case was pending before the WCBM. The trial court denied plaintiff's motion without prejudice to allow Auto-Owners time to conduct discovery.

Auto-Owners filed an application for leave to appeal with this Court, challenging the trial court's denial of Auto-Owners' motion for partial summary disposition. This Court denied Auto-Owners' application for leave to appeal. *Marusza v Auto-Owners Ins Co*, unpublished order of the Court of Appeals, entered May 11, 2018 (Docket No. 341355). Thereafter, plaintiff and Auto-Owners entered into a consent judgment, which was entered by the trial court. This appeal follows.

II. DOCKET NO. 348269

Plaintiff argues that the WCBM opinion and order awarding attendant care at an hourly rate of $16.11 was clear and unambiguous, and therefore, enforceable by the circuit court under MCL 418.863. We agree.

AF moved for summary disposition under MCR 2.116(C)(4) and (8). This Court reviews the grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust its administrative remedies." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000). "[I]f the Legislature has expressed an intent to make an administrative tribunal's jurisdiction exclusive, then the circuit court cannot exercise jurisdiction over those same areas." *Id*. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Maiden*, 461 Mich at 119. A court considering a motion under MCR 2.116(C)(8) must accept all well-pleaded factual

allegations as true and construe the factual allegations in the light most favorable to the nonmovant. *Id*.

MCL 418.863 provides:

> Any party may present a certified copy of an order of a worker's compensation magistrate, an arbitrator, the director, or the appellate commission in any compensation proceeding to the circuit court for the circuit in which the injury occurred, or to the circuit court for the county of Ingham if the injury was sustained outside this state. The court, after 7 days' notice to the opposite party or parties, shall render judgment in accordance with the order unless proof of payment is made. The judgment shall have the same effect as though rendered in an action tried and determined in the court and shall be entered and docketed with like effect.

Under MCL 418.863, entry of a judgment is mandatory absent proof of payment. *Cook v Hearthside, Inc*, 162 Mich App 236, 238; 412 NW2d 276 (1987). However, the order sought to be enforced must be a final order, and, if an appeal is pending with the appellate commission, the circuit court cannot enter judgment. *Id*. at 242.

The parties agree that the WCBM opinion and order is a final order. Where the parties disagree is whether the opinion, wherein attendant care benefits were awarded, is positive, unqualified, and fixes the amount of compensation to be paid. See *Harris v Castile Mining Co*, 222 Mich 709, 711-712; 193 NW 855 (1923). The circuit court lacks jurisdiction to interpret a final order of the WCBM, so the opinion and order must be clear and unambiguous. See MCL 418.841(1) ("[A]ll questions arising under [the Worker's Disability Compensation Act] shall be determined by the bureau or a worker's compensation magistrate, as applicable."); *Holcomb v Ford Motor Co*, 108 Mich App 61, 66-67; 310 NW2d 275 (1981) ("This Court has emphasized that resolution of all disputes relating to workers' compensation is vested exclusively in the [WCBM] . . . .").

The portion of the WCBM opinion addressing the hourly rate of attendant care services states:

> Ms. Nancy Gucwa provides attendant care to plaintiff and initially billed at a rate of $11.00 to $12.00 an hour and submitted the bill to [AF] and Auto[-]Owners. After Auto-Owner[s] began paying for cognitive care she became an employee of Centria. Mr. Hammonds, the Auto-Owners representative, negotiated with Chris Wilcox of Centria for a rate of $25.00 an hour for Ms. Gucwa. He said $25.00 an hour is not unreasonable and it was more reasonable to pay Nancy Gucwa $25.00 an hour when earlier she was receiving $12.00 and performed the same services. The only reason given for the increase in the charge for attendant care was the charges were billed to Auto-Owners rather than [AF]. The provider Nancy Gucwa's duties did not change, plaintiff's condition did not worsen, and the only change was the party paying the bill. I therefore accept the defendant's reasoning of $16.11 per hour which is half the difference between $12.00 per hour the price Nancy Gucwa initially was paid and $20.11 per hour, the reasonable agency rate for 11 Jackson agencies.

The opinion clearly states that Gucwa is to be paid $16.11 each hour for her attendant care services. This clear statement is not conditioned on the fact that Gucwa was performing attendant care services as a Centria or agency employee. If the figure were intended to be an "agency rate" only, presumably the magistrate would have awarded $20.11 per hour, a figure it found to be a "reasonable agency rate for 11 Jackson agencies." Thus, as the WCBM opinion is clear and unambiguous, the circuit court erred when it refused to enter an order enforcing the WCBM opinion and order.

III. DOCKET NO. 348355

Auto-Owners argues that the trial court erred when it denied Auto-Owners' motion for partial summary disposition because the WCBM opinion and order held that AF "shall pay" for all medical treatment related to plaintiff's work-related motor vehicle accident. We disagree.

Auto-Owners sought summary disposition under MCR 2.116(C)(7). This Court reviews de novo the trial court's decision to deny a defendant's motion for summary disposition. *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 419; 684 NW2d 864 (2004). "In making a decision under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Id*. Summary disposition is appropriate under MCR 2.116(C)(7) because of a prior judgment. *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015). "The determination whether res judicata will bar a subsequent suit is a question of law that we review de novo." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

Auto-Owners first argues that it is not required to pay plaintiff's no-fault benefits because of the setoff provision contained in MCL 500.3109, which provides: "Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury under this chapter." "The plain language of § 3109 obliges the no-fault insurer to subtract from benefits payable under that statute other benefits which are required by law to be paid for the injury." *Gregory v Transamerica Ins Co*, 425 Mich 625, 631; 391 NW2d 312 (1986). The setoff provision applies in cases involving workers' compensation benefits. *Id*.

However, this Court has repeatedly explained that a no-fault insurer cannot delay payment of benefits while a workers' compensation case is pending. In *Adanalic v Harco Nat Ins Co*, 309 Mich App 173, 197; 870 NW2d 731 (2015), this Court explained:

> Where workers' compensation benefits are denied, they are not "at hand," and the no-fault insurer must pay benefits to the injured party while it litigates the priority dispute with the injured party's employer. If the no-fault insurer prevails in the workers' compensation claim, it will be made whole. If it does not prevail in the workers' compensation matter, then its entire basis for denying the no-fault claim was without merit.

In *Specht v Citizens Ins Co of America*, 234 Mich App 292, 296; 593 NW2d 670 (1999), this Court explained:

> Where, as here, a claim for worker's [sic] compensation benefits is still pending when the no-fault carrier is sued for benefits, the no-fault carrier will be unable to prove its entitlement to a setoff. Indeed, except with regard to payments already made, a setoff cannot be made until the amount of workers' compensation benefits to which plaintiff is entitled is finally determined. Nevertheless, the no-fault carrier is not entitled to delay payments in order to wait for the bureau's determination. Rather, this Court has held that the no-fault carrier is entitled to intervene and actively participate in the worker's [sic] compensation proceeding in order to protect its reimbursement interest. [Quotation marks, citations, and brackets omitted.]

In *Conway v Continental Ins Co*, 180 Mich App 447, 450; 447 NW2d 761 (1989), this Court noted, "[I]t would defeat the purpose of no-fault insurance if we were to allow an insurance company to delay payments in its hope that it was entitled to reimbursement." Therefore, it is well established that a no-fault insurer cannot deny no-fault benefits because a workers' compensation carrier may be a higher priority insurer.

Defendant Auto-Owners' argument regarding the "required to be provided" language of MCL 500.3109 also lacks merit. In *Perez v State Farm Mut Auto Ins Co*, 418 Mich 634, 645; 344 NW2d 773 (1984), our Supreme Court stated that "[t]he 'required to be provided' clause of § 3109(1) means that the injured person is obliged to use reasonable efforts to obtain payments that are available from a workers' compensation insurer." Here, plaintiff has filed an application for a hearing with the WCBM based on the change of condition. This application is pending. Thus, plaintiff has used reasonable efforts to obtain payments from AF. While AF refuses to pay benefits to plaintiff, pursuant to *Adanalic*, *Specht*, and *Conway*, Auto-Owners is required to make payments.

This is true even though plaintiff is seeking additional workers' compensation benefits, rather than an original award. In *Conway*, 180 Mich App at 450, as is the case here, the plaintiff sought "additional workers' compensation benefits." As the plaintiff's additional workers' compensation benefits had not yet been determined, this Court noted that, "[i]ndeed, a setoff cannot be made until the amount of workers' compensation benefits to which plaintiff is entitled is finally determined." *Id*. Furthermore, Auto Owners' attempt to distinguish *Perez* is unpersuasive. Auto-Owners relies on a narrow reading of *Perez*, that is unsupported by the language in *Perez*, to argue that *Perez* only applies when an employer failed to obtain workers' compensation coverage.

Auto-Owners also argues that plaintiff's claim is barred by the doctrine of res judicata because the magistrate issued a final resolution on the issue of which insurer was responsible for plaintiff's attendant care and nurse care management services.

> The doctrine of res judicata applies where: (1) there has been a prior decision on the merits, (2) the issue was either actually resolved in the first case or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought it forward, and (3) both actions were between the same parties or their privies. [*Paige v Sterling Hts*, 476 Mich 495, 521 n 46; 720 NW2d 219 (2006).]

However, res judicata does not preclude a reevaluation of a claimant's benefits when there has been a change in his condition. *Reiss v Pepsi Cola Metro Bottling Co, Inc*, 249 Mich App 631, 640; 643 NW2d 271 (2002). "The doctrine of res judicata is limited in its operation when sought to be applied to man's physical condition which constantly changes and under a statute which provides that weekly payments may be reviewed and ended, diminished, or increased as the facts warrant . . . ." *Houg v Ford Motor Co*, 288 Mich 478, 481; 285 NW 27 (1939). Thus, even though the issue of which insurer was responsible for payment of plaintiff's attendant care and nurse care management services was decided by the magistrate in the workers' compensation case, the claim at issue in this case has never been litigated because plaintiff alleges a change in circumstances has occurred.

For similar reasons, Auto-Owners' argument that collateral estoppel bars relitigation of the issue here also lacks merit. "For collateral estoppel to preclude relitigation of an issue, the ultimate issue to be concluded must be the same as that involved in the first action. The issues must be identical, and not merely similar." *In re Bibi Guardianship*, 315 Mich App 323, 332; 890 NW2d 387 (2016) (quotation marks and citations omitted). Here, the issue of whether plaintiff is entitled to additional benefits based on a change of circumstances has never been litigated. The workers' compensation case only addressed the issue of which insurer was responsible for the benefits that plaintiff was seeking at that time. Thus, as the issues in the two cases are not identical, the issues raised by plaintiff in this case are not barred by collateral estoppel.

In Docket No. 348269, we reverse and remand for further proceedings. We do not retain jurisdiction. In Docket No. 348355, we affirm.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Thomas C. Cameron