STATE OF MICHIGAN

COURT OF APPEALS

FRANK SALI,

Plaintiff-Appellee,

v No. 90837

OLD REPUBLIC LIFE INSURANCE COMPANY,

Defendant-Appellant.

BEFORE: Sawyer, P.J., J.B. Sullivan and E.M. Thomas*, JJ.

PER CURIAM

Following a bench trial, a judgment was entered by the circuit court ordering defendant to pay no-fault benefits to plaintiff. In his written opinion, the trial judge concluded that plaintiff's injury did not occur while he was unloading his vehicle in the course of his employment. Defendant appeals as of right from this decision. We affirm in part and, in lieu of remanding, amend the judgment.

Plaintiff worked as a truck driver making deliveries of freight for Interstate Motor Freight (IMF) for thirty-one years. On February 8, 1984, while stopped for a delivery at Bos Floral in Muskegon, plaintiff slipped and fell off the back end of his trailer and suffered a fracture of his patella (kneecap).

There were conflicting versions as to the factual circumstances surrounding plaintiff's injury. Plaintiff testified that on February 8, 1984, he went to work as usual. After making seven or eight stops, he proceeded to Bos Floral, a florist shop in Muskegon, for a delivery. Plaintiff unloaded the cartons off of the truck, completed the respective paperwork and got into the cab of his truck. He claims that he looked at his "bills" and saw that his next stop was White & White where he was to deliver one carton. As plaintiff did not recall seeing that

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*Recorder's court judge, sitting on the Court of Appeals by assignment.

carton in the trailer, he went back out and climbed into the trailer to check on the carton. Without moving any freight, plaintiff located the carton and then began to exit the trailer when he slipped on the wet steel plate and took a "nose-dive off the back end."

After his injury, plaintiff was given an "Employee's Report of Injury" form to complete. Plaintiff, who went through the ninth grade, filled out part of the form and sought the aid of his neighbor, Phyllis Wolfe, in describing how the injury occurred. After talking with plaintiff and taking notes on what happened, she condensed the information and typed it on the form as follows:

> "Delivery was being made at Bos Floral shop. Area of parking was downhill causing the back end to be high (Highway trailer was used in lieu of city trailer). Since highway trailers do not contain steps or hand rails, I had to crawl up on hands and knees to get inside and transfer the cartons from the rear to the opening for unloading. About to climb down, turned and slipped on the wet steel plate falling head first landing on my hands and knees on blacktop. Stunned for a few minutes and no one around, forced myself up to finish the delivery. Not realizing how badly I was injured and with a numbness in my right leg, I decided to continue my deliveries with White and White Hospital Equipment being my next stop. Unable to continue from there, I called the Terminal reporting I was coming in. My wife was called and took me to the hospital. Examination and xrays (sic) revealed a broken leg at the knee."

Although defendant signed the statement, he denied its accuracy.

David Howard, a director of claims for Total Compensation Services, had been involved in determining the correct rate of workers' compensation benefits for plaintiff and met with plaintiff to discuss the injury on February 14, 1984. Although he had no independent recollection of the interview, his written summary of the circumstances, dated February 20, 1984, was consistent with the facts as given on the injury report.

Likewise, Dennis Carlson, who had been terminal manager for IMF at the time of plaintiff's injury, testified that the facts, as given to him by plaintiff shortly after the injury, were almost identical to the description given on plaintiff's injury report.

On August 1, 1984, plaintiff applied for and received workers' compensation benefits. Thereafter, on August 17, 1984, plaintiff submitted a claim for no-fault benefits to IMF's no-fault insurance carrier, defendant herein. In a letter dated August 23, 1984, insurance adjustors Crawford & Company, acting on behalf of defendant, denied no-fault benefits, claiming that plaintiff's injury occurred during the process of loading or unloading and, therefore, plaintiff was not entitled to no-fault benefits.

Plaintiff then filed the instant action claiming that defendant wrongfully denied his claim for benefits.

Defendant argues that the trial court clearly erred in finding that the injury occurred as claimed by plaintiff at trial. Rather, the trial court should have found that the injury occurred under the circumstances described by plaintiff in the injury report. Accepting this latter account, workers' benefits under the no-fault act were clearly barred by MCL 500.3106; MSA 24.13106. However, even if plaintiff's in-court version of the circumstances were accepted as true, the injury still occurred while plaintiff was in the process of loading or unloading within the meaning of the statute. Specifically, plaintiff's action in checking on the White and White carton was preparatory to the unloading of the freight at his next stop and thus §3106 was applicable.

We agree with the trial court that the crux of this case was to determine which of the factual circumstances, as given in plaintiff's in-court testimony or as described on his injury report, was the accurate statement of the events. Although recognizing inconsistencies, the court ultimately resolved the credibility issue in favor of plaintiff. While we are not persuaded that we would have reached the same result and indeed, we have reservations based upon our review of the record, we nonetheless accord due deference to the trial judge who had

the opportunity to judge the credibility of the witnesses and cannot conclude that his findings of fact were clearly erroneous. MCR 2.613(C).

With this in mind, we conclude that under the facts as found by the trial court, plaintiff had completed the unloading process prior to his injury. Cf. Bell v F J Boutell Driveway Co, 141 Mich App 802; 369 NW2d 231 (1985); Marshall v Roadway Express, Inc, 146 Mich App 753; 381 NW2d 422 (1985); Gray v Liberty Mutual Ins Co, 149 Mich App 446; 386 NW2d 210 (1986), lv den 425 Mich 885 (1986); MacDonald v Michigan Mutual Ins Co, 155 Mich App 650; 400 NW2d 305 (1986); Crawford v Allstate Ins Co, 160 Mich App 182; ___ NW2d ___ (1987). We recognize that in furthering the legislative intent, the terms "loading" and "unloading" have been broadly construed so as to encompass activities preparatory to the actual lifting onto or lowering of property, Gray, supra, at 808; or incidental to the completion of the loading or unloading process, Gibbs, supra, at 305. However, we cannot include activities which were not incidental to the unloading of cartons at Bos Floral nor preparatory to the actual unloading of property at plaintiff's next stop, White and White. See Gibbs v United Parcel Service, 155 Mich App 300; 400 NW2d 313 (1986); cf Dowling v Auto Club Casualty Ins Co, 147 Mich App 482; 383 NW2d 233 (1985). We therefore conclude that §3106(2) did not preclude plaintiff from receiving no-fault benefits.

Defendant also challenges the trial court's finding that plaintiff was disabled from performing truck driving duties after his injury and through the date of trial. We have carefully reviewed the record and in particular the testimony of plaintiff and the examining physicians, and conclude that the evidence supports the court's finding. MCR 2.613(C). Consequently, work-loss benefits were recoverable through the date of trial under MCL 500.3107(b); MSA 24.13107(b).

Next, defendant argues that the trial court erred in ruling that plaintiff was entitled to no-fault benefits for the period after he retired on August 1, 1984, or, alternatively, after his anticipated retirement on March 16, 1986. We find that work-loss both prior to and subsequent to plaintiff's retirement was a direct result of the injury he sustained and accordingly, work-loss benefits were recoverable under §3107(b).

We also reject defendant's claim that plaintiff was not entitled to no-fault benefits after his anticipated date of retirement. Although plaintiff stated that he would retire in a year, at age 62, we find that such plans were not firmly established but merely speculative.

Defendant's next argument is that he is entitled to a setoff of $40,000, the total amount of workers' compensation redeemed on July 18, 1985.

Section 3109(1) of the No-Fault Act provides:

"(1) 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."

Our Supreme Court has held that workers' compensation benefits fall within the scope of §3109(1) and therefore must be set off against the no-fault benefits otherwise due. Mathis v Interstate Freight, 408 Mich 164, 187; 289 NW2d 708 (1980). In this case, plaintiff received weekly workers' compensation benefits of $334.00 from February 9, 1984, to August 1, 1984, at which time these payments were reduced to $189.33 per week due to a pension plaintiff began receiving. Defendant was therefore entitled to a setoff of $334 from February 9, 1984, to August 1, 1984. From August 1 to the date of redemption, July 18, 1985, defendant was entitled to a setoff of $189.33. Pursuant to the decision in Gregory v Transamerica Ins Co, 425 Mich 625; 391 NW2d 312 (1986), defendant was not entitled to a setoff of the redemption amount of $40,000. Instead, defendant was entitled to offset the amount of workers' compensation benefits plaintiff

would have received if he had not entered into a redemption agreement which, in this instance, was $189.33 per week.

Although it appears that the trial court used the correct formula in calculating the setoff amount, it erred in the mathematical computation. We would thus amend the judgment to reflect the proper setoff that defendant was entitled. MCR 7.216(A)(1).

Unlike the previous issue, we find defendant's next argument to be without merit. The court ordered payment of monthly no-fault benefits to plaintiff from January 17, 1986 (the date of trial), for as long as plaintiff remains disabled from his work as a truck driver but not past February 8, 1987, the third anniversary date of plaintiff's injury. We find that these orders properly reflect that benefits are payable only as loss accrues. MCL 500.3142(1); MSA 24.13142(1).

Defendant's final argument is that the trial court erred in awarding plaintiff interest on all overdue payments of no-fault benefits. MCL 500.3142(3); MSA 24.13142(3). We agree.

Here, there was a legitimate question whether plaintiff was entitled to no-fault benefits in view of §3106(2) which precludes liability where the injured person sustained his injury during the course of his employment while loading or unloading the vehicle. Under these circumstances, we find that plaintiff did not submit reasonable proof of the fact of injury and the amount of loss sustained. Bradley v DAIIE, 130 Mich App 34, 50; 343 NW2d 506 (1983). We believe that this decision is consistent with the intent of the provision which is to penalize the recalcitrant insurer rather than compensate the claimant. Johnson v DAIIE, 124 Mich App 212, 215; 333 NW2d 517 (1983), lv den 400 Mich 1100.26 (1983).

We affirm in part and amend the judgment in accordance with this opinion.

/s/ Joseph B. Sullivan
/s/ Edward M. Thomas

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BEFORE: Sawyer, P.J., and J.B. Sullivan and E.M. Thomas*, JJ.

SAWYER, J. (dissenting).

I respectfully dissent.

I am unable to agree with the majority that the "loading and unloading" provisions of the no-fault act are inapplicable to the case at bar. In reaching this decision, I accept the trial court's factual conclusions that plaintiff was injured while determining whether a particular carton was in the trailer, that plaintiff did not move any freight immediately before the accident, and that plaintiff was injured while exiting the trailer. However, like the majority, I am not at all persuaded that I would have reached the same factual conclusions had I sat in the position of the trial court. In any event, I believe that plaintiff loses under either factual scenario.

No-fault benefits are not available where a person is injured while loading or unloading a vehicle in the course of his employment and worker's compensation benefits are available. MCL 500.3106(2); MSA 24.13106(2). The terms "loading" and "unloading" are to be given broad interpretation and encompass the entire operation of loading and unloading, including acts ancillary to and preparatory to loading or unloading. See Crawford v Allstate Ins Co, 160 Mich App 182; 407 NW2d 618 (1987) (injured after stopping in transit to adjust freight-restraint chains following a coffee break); MacDonald v Michigan Mutual Ins Co, 155 Mich App 650; 400 NW2d 305 (1986) (the plaintiff injured while pulling on a lever to allow a trailer box to be repositioned pri-

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or to loading or unloading); Gibbs v United Parcel Service, 155 Mich App 300; 400 NW2d 313 (1986) (loading dock worker injured while exiting a truck after loading packages); Gray v Liberty Mutual Ins Co, 149 Mich App 446; 386 NW2d 210 (1986) (the plaintiff injured while rearranging packages on truck for the next stop); Bell v F J Boutell Driveaway Co, 141 Mich App 802; 369 NW2d 231 (1985) (one plaintiff injured while removing restraints from freight prior to unloading and the other plaintiff injured while repositioning freight on a truck prior to unloading by a third person). See also Dowling v Auto Club Casualty Ins Co, 147 Mich App 482; 383 NW2d 233 (1985), and Marshall v Roadway Express, Inc, 146 Mich App 753; 381 NW2d 422 (1985).

Each of the above cases, with one exception, concluded that no-fault benefits were not available in light of the provisions of § 3106(2). The one exception, Marshall, supra, involved a situation where the plaintiff was injured after unhooking a trailer, which began to roll forward and struck and ran over the plaintiff. The Bell, supra, case established the principle of giving a broad interpretation to the terms "loading" and "unloading" and stated the reasons for a broad interpretation as follows:

> We conclude that the Legislature intended to eliminate duplication of benefits for work-related injuries except where the actual driving or operation of a motor vehicle is involved. Therefore, we find it appropriate to broadly interpret the terms "loading" and "unloading" in subsection (2) because by doing so the statute further eliminates duplication of benefits for work-related injuries that do not relate to the actual driving or operation of a motor vehicle.

As explained by the Bell Court, I believe the relevant inquiry in these types of cases is whether the injured person was performing the tasks of a driver of a motor vehicle or the tasks of a freight handler. In the former case, the loading exception does not apply and in the latter case it does apply. This distinction is, I believe, necessary to effectuate the legislative purpose behind the statute, namely of continuing to provide no-fault benefits to those individuals injured while operating a mo-

tor vehicle, yet leaving worker's compensation benefits as the sole remedy to those individuals who are performing non-driving tasks which may involved parked vehicles. This distinction becomes more difficult to discern when, as in the case at bar, the same employee performs both types of work.

However, simply put, I believe we must ask whether the person's activities at the time of the injury are more consistent with his operating of the vehicle or with his tending to the freight. In the instant case, I believe that plaintiff's action of going into the trailer to determine the presence of the package for his next delivery is more consistent with his duties as a freight handler than with his duties as a truck driver. His action of ensuring that the package was preparatory to his unloading of that package at his next stop, rather than involving his driving to the next stop.[1]

Finally, I believe that my position is consistent with this Court's conclusion in Dowling, supra. Dowling involved the "mechanical work" provision of § 3106(2) rather than the loading or unloading provision. Specifically, the plaintiff, a mechanic, was injured while walking from his work area to another area to get some parts. While in transit, he walked behind a vehicle being worked on by another worker. The vehicle then emitted a cloud of exhaust fumes, which the plaintiff inhaled, giving rise to his injuries. Relying on Bell, supra, this Court concluded that the plaintiff was performing mechanical work even though his specific activity was walking to obtain parts rather than actually working at a vehicle.

For the above reasons, I would reverse the decision of the circuit court and enter a judgment in favor of defendant.

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[1] Admittedly, had plaintiff discovered the package to be absent it would have truncated his trip to the next stop. However, I do not believe that that fact disturbs the conclusion that his conduct in inspecting the freight comes within the purview of loading or unloading.

/s/ David H. Sawyer