STATE OF MICHIGAN

COURT OF APPEALS

JOHN R. SCHOONBECK, a/k/a JACK R. SCHOONBECK,

Plaintiff,

v No. 101369

NORTHERN ASSURANCE COMPANY OF AMERICA,

Defendant-Cross-Plaintiff Appellant,

and

AMERICAN CASUALTY COMPANY OF READING, PA,

Defendant-Cross-Defendant Appellee,

and

BLUE CROSS-BLUE SHIELD OF MICHIGAN,

Defendant.

BEFORE: J.B. Sullivan, P.J., MacKenzie and G. Schnelz*, JJ.

PER CURIAM

Cross-plaintiff-appellant Northern Assurance Company of America (Northern) appeals by right a circuit court order holding it as the primary carrier responsible for personal protection benefits to plaintiff John R. Schoonbeck, a/k/a Jack R. Schoonbeck.

The stipulated facts underlying this dispute are as follows. Plaintiff and his brother were each a 50% shareholder in a closely held corporation known as the Muskegon Window Cleaning Company, Inc. [hereinafter referred to as Muskegon Window or Company]. On October 1, 1984, the brothers sold the corporation. However, they agreed to remain with the company as consultants for two years to assist the new owners.

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*Circuit judge, sitting on the Court of Appeals by assignment.

Muskegon Window owned and operated four pickup trucks which were insured under a no-fault fleet insurance policy issued by American Casualty [American] from April 6, 1984, through April 6, 1985. Plaintiff was a listed driver under the policy.

On March 27, 1985, plaintiff was operating one of the trucks when he sustained bodily injury as a result of a collision with another vehicle.

Plaintiff resides with his wife, Doris, who has a motor vehicle titled in her name and insured under a no-fault automobile policy with Northern. Her vehicle was not involved in the accident.

Plaintiff claimed PIP benefits against Northern which made initial payments and then declined further payments claiming that American was responsible. Plaintiff then claimed PIP benefits against American as the no-fault insurer of the truck. American denied benefits claiming that because plaintiff was not an employee at the time of the accident, it was not responsible for payments under the no-fault policy. Plaintiff, in turn, filed an action against American and Northern for PIP benefits.[1]

Northern filed a cross-claim against American seeking to establish that it, American, was responsible because plaintiff was an employee of the corporation and was also listed as a driver under the policy.

Northern ultimately paid plaintiff's PIP benefits and filed a motion for summary disposition against American. In an order dated November 5, 1986, the trial court initially granted Northern's motion. However, on American's motion for reconsideration, the trial court reversed itself in an order dated December 9, 1986, ruling that Northern was the primary carrier responsible for payment of PIP benefits to plaintiff.

On June 4, 1987, the court entered another order, based on stipulated facts, that Northern's claim of equitable estoppel against American was inapplicable to the instant matter. The

court ruled further that plaintiff was not an employee of Muskegon Window under the no-fault act, but rather was an independent contractor to the company. Finally, the court found that plaintiff was a named insured under the fleet automobile policy issued to the company and relying on the case Madar v League General Ins Co, 152 Mich 734; 394 NW2d 90 (1986), concluded that Northern was first in priority for payment of PIP benefits to plaintiff.

As previously stated, the court concluded in its April 13, 1987 order, that plaintiff, as a listed driver, was a named insured on the fleet insurance policy.

The Court has used the term "named insured" interchangeably when referring to "the person named in the policy" under §3114. See Dairyland Ins v Auto-Owners, 123 Mich App 675, 686; 333 NW2d 322 (1983).

The trial court further found that plaintiff was not an employee of the company.

We review findings of fact under the clearly erroneous standard. MCR 2.613(C). A finding is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. Rozier v Michigan Dept of Public Health, 161 Mich App 591, 600; 411 NW2d 786 (1987) citing Tuttle v Dep't of State Highways, 397 Mich 44, 46; 243 NW2d 244 (1976). Under the facts of this case, we do not believe that a mistake has been made.

There is no definition of "employee" in the No-Fault Act. However, after reviewing the facts under Parham v Preferred Risk Mutual Ins Co, 124 Mich App 618; 335 NW2d 106 (1983), we cannot conclude that the court erred. The facts indicated that plaintiff had sold the business and agreed to serve as a consultant. He was not on salary for his services. Furthermore, there is no indication that the company had any control over plaintiff either in his duties or in possible disciplinary

action. In short, we do not believe that the court made a mistake in determining that plaintiff was not an employee of the company.

We now turn to the applicable provisions of the no-fault act for resolution of the priority issue.

MCL 500.3114; MSA 24.13114 provides that an insurer shall pay personal protection insurance benefits to "the person named in the policy, the person's spouse, and a relative of either domiciled in the same household . . ." Contrary to the parties' claims, §3114(1) does not establish priority coverage among multiple insurers, but rather creates rights of personal injury protection for three categories of people. Michigan Mutual Ins Co v Allstate Ins Co, 146 Mich App 475, 480; 382 NW2d 169 (1985) aff'd 426 Mich 346 (1986). As Justice Levin stated, the "no-fault act provides with considerable precision for priorities between insurers." 426 Mich at 348-349.

In this case subsections (2), (3) and (5) are applicable. However, subsection (4) provides:

"(4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

"(a) The insurer of the owner or registrant of the vehicle occupied. (Emphasis added)

"(b) The insurer of the operator of the vehicle occupied."

Here, American was the insurer of the owner or registrant of the vehicle occupied. As the Legislature carefully spelled out the order of priority, the trial court was bound to follow it and, accordingly, the court erred by finding Northern as the priority insurer.

Reversed.

/s/ Joseph B. Sullivan
/s/ Barbara B. MacKenzie
/s/ Gene Schnelz

[1] Plaintiff's claim against Blue Cross/Blue Shield is not relevant to this appeal.