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STATE OF MICHIGAN

COURT OF APPEALS

DAVID O'NEAL,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

April 4, 1989

FOR PUBLICATION

No. 105644

Before: Holbrook, Jr., P.J., and Murphy and C.O. Grathwohl,* JJ.

PER CURIAM.

Plaintiff appeals as of right the granting of summary disposition in favor of defendant. Plaintiff sustained a hand injury in a single car accident that prevented him from continuing his employment. Defendant paid plaintiff wage loss benefits under plaintiff's no-fault insurance policy. Defendant stopped paying wage-loss benefits to plaintiff and alleged that such payments should not be paid to plaintiff because plaintiff's employer closed the factory at which plaintiff had worked.

On May 13, 1985, plaintiff was driving to work in the morning when he had a flat tire. Plaintiff injured his left ring finger while attempting to change the flat tire. Plaintiff was then unable to perform his job as an iron pourer at the CWC Foundry in Muskegon, Michigan. Defendant, pursuant to plaintiff's no-fault policy, commenced paying plaintiff wage-loss benefits.

On June 29, 1986, defendant discontinued paying plaintiff wage-loss benefits as defendant determined that plaintiff had enough seniority within his union to have bumping rights, rights which would have enabled plaintiff to obtain favored work consistent with his medical restrictions. Plaintiff filed the instant suit against defendant, to force defendant to continue the wage-loss benefits.

As the instant suit progressed, defendant deposed Stephen P. Ives, manager of industrial relations at CWC. Ives stated that plaintiff worked at Plant No. 3, and that CWC closed Plant 3 on September 19, 1986. Thus, Ives concluded, plaintiff would not have a job available to him, with or without medical restrictions, after the first quarter of 1987.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendant claimed there was no issue of material fact and that plaintiff failed to state a claim for wage-loss benefits accruing after December 31, 1986. The trial court granted defendant's motion without stating if it was pursuant to (C)(8) or (C)(10). The trial court did note that defendant's motion was granted from April 1, 1987.

A motion for summary disposition under MCR 2.116(C)(8) tests only the legal sufficiency of the pleadings. The court must accept as true all well-pled factual allegations as well as any conclusions which can reasonably be drawn therefrom. The court may grant the motion only when the claim, on the pleadings alone, is so clearly unenforceable as a matter of law that no factual development could possibly justify the right to recovery. Scameheourn v Bucks, 167 Mich App 302, 306; 421 NW2d 918 (1988).

In contrast, a summary disposition motion pursuant to MCR 2.116(C)(10) based on the lack of a genuine issue of material fact tests whether there is factual support for the claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. Giving the benefit of any reasonable doubt to the nonmoving party, the court must determine whether the type of record

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

which might be developed would raise an issue upon which reasonable minds might differ. Scameheourn, supra.

By statute in Michigan a person injured in an automobile accident can receive from their insurer wages lost due to the injury. MCL 500.3107; MSA 24.13107. This is true even if the injured person was temporarily unemployed at the time of the accident. MCL 500.3107a; MSA 24.13107(1). MCL 500.3107a, states:

> "Subject to the provisions of section 3107(b), work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident."

Our Supreme Court interpreted MCL 500.3107a and stated:

> "The phrase "temporarily unemployed", it is evident to us, refers to the unavailability of employment, not the physical inability to perform work. The legislative analysis of HB 4221 [HB 4221 became MCL 500.3107a] reveals a legislative concern with those who but for their disability could have received unemployment compensation as a substitute income."
> MacDonald v State Farm Ins Co, 419 Mich 146, 153; 350 NW2d 233 (1984).

This Court has stated:

> "We conclude that had the Legislature intended to circumscribe the class of unemployed persons eligible for wage loss benefits, it would have specifically excluded unemployed persons, other than those who are unemployed as a result of seasonal employment or involuntary layoffs, from the class of individuals entitled to wage loss benefits." Szabo v DAIIE, 136 Mich App 9, 14; 355 NW2d 619 (1984).

In the instant case, plaintiff should receive wage loss benefits as long as he is disabled for the statutory three-year period. The statute treats plaintiff the same as an employee who is injured during a lay off. Plaintiff's claim is not unenforceable as a matter of law and there exists an issue of material fact as to the degree of plaintiff's disability. It was error to grant summary disposition in favor of defendant pursuant to either MCR 2.116(C)(8) or (C)(10).

Defendant argues that the instant case is controlled by Lubdera v Farm Bureau Ins, 163 Mich App 457; 415 NW2d 245 (1987), and Smith v League General Ins Co, 424 Mich 893; 382 NW2d 168 (1986). However, the plaintiffs in Smith and Lubdera suffered work loss due to incarceration in prison, and the cases can be distinguished from the case at bar.

Reversed and remanded.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Casper O. Grathwohl