STATE OF MICHIGAN

COURT OF APPEALS

RONALD DUMONT,

Plaintiff-Appellee,

-vs-

No. 87666

COASTAL TANK LINES,

Defendant-Appellant.

JAN 7 1987

BEFORE: Beasley, P.J.; R. B. Burns and G. D. Lostracco,* JJ.

PER CURIAM

This case concerns wage loss benefits under the No-Fault Act.[1] Defendant, Coastal Tank Lines, employed plaintiff, Ronald Dumont, as a truck driver and was self-insured so as to extend no-fault benefits to plaintiff. On August 1, 1983, in the course of his employment, plaintiff drove an empty tractor-trailer to a Ford Motor Company plant in Mt. Clemens. He dropped off the trailer and, according to his deposition, "proceeded to hook up to a loaded trailer of paint". Plaintiff attempted to raise the landing gears on the loaded tractor-trailer because, again according to his deposition, the truck could not be driven without the landing gears being in place. Plaintiff was injured while attempting to raise the landing gears, missing work for a considerable period of time. He received worker's compensation benefits and applied for no-fault benefits as well. Plaintiff's own insurance carrier took the position that, as the injury occurred in the course of plaintiff's employment, it was the responsibility of defendant to pay the no-fault benefits. Plaintiff's attorney so informed defendant on June 1, 1984. When defendant failed to pay the no-fault benefits, plaintiff filed this lawsuit on July 10, 1984.

After plaintiff's deposition had been taken, plaintiff moved for summary disposition in the circuit court, pursuant to

* Circuit Judge, sitting on Court of Appeals by assignment.

MCR 2.116(C)(9) and (10), on the grounds that there was no genuine issue of material fact. The circuit court granted the motion, entering an order to that effect on September 5, 1985 and stating that plaintiff was entitled to wage loss benefits. Plaintiff moved for entry of a proposed judgment which included 12% interest pursuant to MCL 500.3142(2); MSA 24.13142. Defendant filed objections to the proposed judgment on September 23, 1985 and a claim of appeal from the original order on September 24. A hearing on the motion was apparently scheduled for November 18, 1985, but the result of that hearing was adjourned indefinitely. Defendant's brief on appeal concerns only the order granting summary disposition.

The parties seem to disagree only on the question of whether plaintiff's raising of the landing gears constituted "loading" or "unloading" under MCL 500.3106(2); MSA 24.13106(2). They apparently agree that if plaintiff's actions did constitute "loading" or "unloading", then plaintiff was not entitled to no-fault benefits, whereas if he was not "loading" or "unloading", he was entitled to those benefits.

MCL 500.3106(2); MSA 24.13106(2) provides:

> "Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws, are available to an employee who sustains the injury in the course of his or her employment while loading, unloading, or doing mechanical work on a vehicle unless the injury arose from the use or operation of another vehicle."

The two principal cases interpreting the above quoted statute were both decided last year. In Bell v F.J. Boutell Co.[2] benefits were denied, whereas in Marshall v Roadway Express[3] they were granted. In Bell, the plaintiff truck driver had just driven a load of cars to a dealership and began lowering a portion of his tractor-trailer in preparation for unloading the cars he was delivering. He removed the chains securing a car to the trailer and was walking on the trailer to another location to remove the chains on the other axle of the car when he slipped and fell on hydraulic fluid leaking from the trailer and was

injured. A panel of this court held that the plaintiff was engaged in "unloading" under the statute. On the other hand, in Marshall, the plaintiff driver had driven his tractor-trailer to defendant's terminal and began unhitching the trailer. When he unhooked the brake lines, the tractor rolled forward, striking him and running over his left hand and chest. In that case, this court held that the plaintiff was not involved in "unloading" under the statute.

Both Bell and Marshall examined the legislative history of the statute. In Bell, the court focused on the fact that the injuries were work-related:

> "In support of the amendment, the Legislative Analysis Section asserted that injured truck-line industry workers who happened to be loading or unloading freight away from a vehicle could only collect workers' compensation, while similar employees suffering the same type of disabling injury while actually loading or unloading a vehicle could get double recovery. Thus, the former § 3106 unfairly provided an extra source of recovery for a work-related injury to a select few truck-industry workers.
> * * *
> "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."[4]

The court went on to say that the terms "loading" and "unloading" do not merely encompass the actual lifting onto or lowering of property. "Those terms also encompass activities that are preparatory to the actual lifting onto or lowering of property."[5]

On the other hand, the Marshall court focused on the fact that benefits had previously been available to non-drivers:

> "The current statute was primarily enacted because of complaints in the trucking industry that dock workers, warehouse workers and mechanics were collecting no-fault benefits even though they never drove in their employer's vehicles. As stated in the House Legislative Analysis Section's first analysis of this statute, then House Bill 4524 (February 5, 1982):
> "'Employers argue that the no-fault act was not put into law to compensate persons injured while working in and around parked vehicles as part of their employment, either loading or unloading vehicles or doing mechanical repair work.'
> "In the instant case, plaintiff was not acting as a dock worker or warehouse worker, but as a driver of the tractor-trailer rig."[6]

Of course, the plaintiff in Bell was a driver too, but the rationale of the Marshall court would probably be that the plaintiff in Bell was acting as a dock worker in taking the cars

off of his truck. It would seem, then, that Bell and Marshall employed two different tests. The Bell test is whether the activity was preparatory to the loading or unloading of property as opposed to the actual driving or operation of a vehicle, whereas the Marshall test is whether the plaintiff was acting as a dock or warehouse worker as opposed to as a driver. It is conceivable that these two tests would reach different results, requiring a court to choose between them.

The Marshall court, however, did not feel that its decision was in disharmony with Bell. It pointed out that the facts before it were so distinguishable from those of Bell that the Bell court would have agreed with the Marshall outcome. The Marshall court pointed out that the plaintiff in Bell was engaged in an activity, removing chains from cargo, which was plainly preparatory to the removal of that cargo. There was no evidence, on the other hand, that detaching the tractor from the trailer, as the Marshall plaintiff did, would in any way aid the unloading process.

Similarly, in the within case, plaintiff was raising the landing gears of a loaded trailer in preparation for driving it away. There is no indication that the raising of the landing gears aided the loading process, whereas defendant testified at deposition that the raising of the landing gears was necessary in order to drive the rig. Further, plaintiff took no part in the loading of paint onto the trailer. He merely unhitched from one trailer and hitched onto another. Consequently, we agree with the trial court that the actions undertaken by plaintiff do not constitute "loading" or "unloading" under either the Bell test or the Marshall test. Plaintiff was entitled to no-fault benefits.

Plaintiff has additionally requested, as part of his prayer for relief, that we award penalty interest of 12% under MCL 500.3142; MSA 24.13142. We note that such a request was originally part of plaintiff's complaint and that the proposed judgment plaintiff submitted contained a provision for interest. We also note that defendant challenged the interest provision at

the trial level. Apparently, the question of interest is one of the issues the trial court was going to decide at the hearing scheduled for November 18, 1985, but this hearing was, as indicated, indefinitely adjourned. The question of interest is not addressed in the argument section of plaintiff's brief, and defendant's brief does not mention it at all. Indeed, such information as we have about any trial level mentions of penalty interest were obtained only through combing the circuit court file.

The question of interest then is a disputed matter upon which the trial court never ruled. The only order appealed from is that which grants plaintiff's motion for summary judgment. The form of the judgment which will eventually be entered is still to be determined. The question is not within our jurisdiction under MCR 7.203(A) and, while we may have the power to order interest under MCR 7.216(A), we have heard no argument on this question and have found little evidence. This is a question for the trial court. We do not retain jurisdiction.

AFFIRMED.

/s/ William R. Beasley
/s/ Robert B. Burns
/s/ Gerald D. Lostracco

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1 MCL 500.3101, et seq.; MSA 24.13101, et seq.

2 141 Mich App 802; 369 NW2d 231 (1985).

3 146 Mich App 753; 381 NW2d 422 (1985).

4 Bell, supra, at pp 810-811.

5 Id. at p 813. Accord, Gray v Liberty Mutual Ins., 149 Mich App 446, 449-450; 386 NW2d 210 (1986). See also, Frohm v American Motorists Co., 148 Mich App 308, fn 1; 383 NW2d 604 (1985), lv den 425 Mich 857 (1986).

6 Marshall, supra, at p 756.