STATE OF MICHIGAN

COURT OF APPEALS

RICHARD GUENTHER,

Plaintiff-Appellee,

v

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,

Defendant-Appellant.

November 20, 1991

No. 105181

Before: Shepherd, P.J., and Holbrook, Jr., and Connor, JJ.

PER CURIAM.

Plaintiff sued his no-fault insurer, defendant, in order to recover for no-fault benefits not paid by defendant, including work-loss and medical expense benefits. A jury trial was held in September 1987, with the jury asked to resolve specific questions regarding plaintiff's right to recover for injuries under the no-fault policy. After the jury had decided that plaintiff was disabled from an automobile accident, rather than from a previous work-related injury, the trial court resolved issues over the computation for work-loss and medical expense benefits, and determined whether defendant was entitled to any setoff for payments made by the workers' compensation insurer. The trial court held that plaintiff was entitled to work-loss benefits in the amount of $33,826.57 and medical expenses in the amount of $17,218.73 by a final judgment entered on November 16, 1987. From the final judgment, defendant appeals by right. We affirm the judgment in part, and remand this matter to the trial court for a redetermination of work-loss benefits.

Plaintiff was injured on June 29, 1979, while working as a truck driver for Beckwith Evans Company. While still on a medical leave from work for that injury, plaintiff was injured in an automobile accident on July 16, 1979. As a result of his injuries, plaintiff was unable to return to work.

Plaintiff's insurance policy for no-fault coverage included provisions for coordination of benefits for both work-loss and medical expense benefits. Defendant refused to pay full work-loss benefits to plaintiff under the no-fault policy because plaintiff was receiving workers' compensation insurance benefits to cover the loss of work and defendant could not determine which injury caused plaintiff's disability since both injuries involved the lower back area.

The jury was charged with determining the cause of plaintiff's disability and if plaintiff would have returned to work if not for the automobile accident. The jury found that plaintiff's disability was a combination of both the work injury and the automobile accident; but, if not for the automobile accident, plaintiff would have returned to work on July 30, 1979. Based upon the jury's findings, the trial court awarded plaintiff work-loss benefits and medical expenses, but denied any setoff for defendant for duplicative benefits paid by the workers' compensation insurer.

I.

Defendant first claims that the trial court erred in denying its motion for summary disposition for no genuine issue of material fact, MCR 2.116(C)(10). It was defendant's argument that plaintiff could not establish he would have returned to work if not for the automobile accident and that plaintiff's receipt of workers' compensation benefits established as a matter of law that plaintiff did not consider himself disabled due to the automobile accident.

We believe the trial court correctly held that there was a genuine issue of material fact on plaintiff's claim for work-loss benefits. Plaintiff produced medical evidence on his condition, before the automobile accident but after his work injury, that indicated plaintiff's condition was temporary and that he was expected to return to work. This was sufficient to create a genuine issue of material fact. Maccabees Mutual Life Ins Co v Dep't of Treasury, 122 Mich App 660, 663; 332 NW2d 561 (1983), lv den 417 Mich 1100.15 (1983).

The case at bar is distinguishable from Williams v Detroit Automobile Inter-Ins Exchange, 169 Mich App 301, 305; 425 NW2d 534 (1988), because in that case, the plaintiff's own doctor attributed the plaintiff's continuing neck pain to a previous work-related injury. Accordingly, the plaintiff in Williams, supra, 304-305, was unable to establish a genuine issue of material fact that but for a subsequent automobile injury, the plaintiff could have returned to work.

The fact that plaintiff accepted workers' compensation benefits did not establish as a matter of law that plaintiff considered himself disabled due to the first accident. There was other evidence presented by plaintiff that he intended to return to work. The mere receipt of workers' compensation benefits in place of other income sources, is insufficient to establish the cause of plaintiff's disability as a matter of law.

II.

Defendant also argues that the trial court's cautionary instructions to the jury on plaintiff's receipt of workers' compensation benefits were erroneous because plaintiff's receipt of those benefits was relevant to the issue of the cause of plaintiff's disability. Defendant also contends that the cautionary instructions were inconsistent with other instructions read to the jury. We disagree.

The trial court allowed defendant to present evidence on plaintiff's acceptance of workers' compensation benefits for the limited purpose of allowing defendant to explain why some no-fault benefits were not paid to plaintiff. The trial court however, was concerned that the jury would misapply the evidence to decide defendant's liability for no-fault benefits. Accordingly, the trial court read a cautionary instruction to the jury that it should not consider the voluntary payment of benefits by the workers' compensation insurer to decide defendant's liability for no-fault benefits.

Under the facts and theories of this case, we believe the trial court did not abuse its discretion by giving the cautionary instruction. Wengel v Herfert, 189 Mich App 427, 431; ___ NW2d ___ (1991), lv pending. Plaintiff's receipt of workers' compensation benefits was essentially irrelevant to a determination of defendant's liability. The cautionary instruction was necessary to avoid unfair prejudice to plaintiff since there had been no prior determination that plaintiff had a previous work-related disability. Nor did the jury have any need to consider whether there was any entitlement to a setoff for the previously paid workers' compensation benefits since the trial court was to decide that issue as a matter of law after the jury resolved the factual issues surrounding plaintiff's disability.

III.

In its third issue, defendant argues that the trial court erred in holding that defendant was not entitled to a setoff for benefits paid by the workers' compensation insurer under MCL 500.3109; MSA 24.13109, and MCL 50.3109a; MSA 24.13109(1). We believe the trial court reached the correct result on this issue.

MCL 500.3109; MSA 24.13109 ("§ 3109") provides for the mandatory coordination of benefits "provided or required to be provided under the laws of any state or the federal government" with personal protection insurance benefits. The underlying intent behind § 3109 is to mandate the setoff of benefits that duplicate no-fault benefits. Morgan v Citizens Ins Co of America, 432 Mich 640, 648; 442 NW2d 626 (1989), reh den 433 Mich 1201 (1989). Benefits are not subject to a setoff if they bear no relationship to the reason no-fault benefits are paid. Jarosz v Detroit Automobile Inter-Ins Exchange, 418 Mich 565, 573; 345 NW2d 563 (1984). Benefits which are "duplicative" serve the same purpose as no-fault benefits and are provided or required to be provided as a result of the same accident. Jarosz, supra, 577, 579-580.

MCL 500.3109a; MSA 24.13109(1)(1) ("§ 3109a") also provides a discretionary provision for the coordination of benefits for other health and accident insurance, and once again the intent is to avoid duplicative coverage. LeBlanc v State Farm Mutual Automobile Ins Co, 410 Mich 173, 193; 301 NW2d 775 (1981), reh den 411 Mich 1119 (1981).

Under the meaning of "duplicative" benefits, Jarosz, supra, we do not believe the payment of workers' compensation benefits in this case served the same purpose as the no-fault benefits or were provided as a result of the same accident. The workers' compensation carrier began paying benefits for the first accident; in contrast, plaintiff did not become liable for benefits until the second accident. The workers' compensation carrier voluntarily continued to pay benefits due to confusion over the cause of plaintiff's disability, but the jury resolved this issue by deciding plaintiff was disabled as a result of the automobile accident. The two types of benefits cannot be said to be "duplicative" under the two-part test established in Jarosz, supra.

IV.

In deciding the rate for work-loss benefits, the trial court relied on plaintiff's earnings for his last full month of employment before the first injury, under the authority of MCL 500.3107a; MSA 24.13107(1) ("§3107a"), rather than actual earnings over the disability period. On appeal, defendant contends this decision was erroneous. We agree.

Generally, work loss consists of the loss of income from work the "injured person would have performed during the first 3 years after the date of the accident if he had not been injured..." MCL 500.3107(b); MSA 24.13107(b) ["§ 3107(b)"]. The language in § 3107(b) involves actual work available to the injured person during the three-year period, including increased wages. Kirksey v The Manitoba Public Ins Corp, ___ Mich App ___; ___ NW2d ___ (Docket No. 117428; rel'd 8/20/91), slip op at 2, lv pending; Lewis v Detroit Automobile Inter-Ins Exchange, 90 Mich App 251, 255-256; 282 NW2d 794 (1979).

Section 3107a provides for the computation of benefits "for an injured person who is temporarily unemployed at the time of the accident or during the period of disability." Based upon the Legislature's intent, § 3107a has been interpreted as providing work-loss benefits only in the place of unemployment compensation. MacDonald v State Farm Mutual Ins Co, 419 Mich 146, 152-154; 350 NW2d 233 (1984), reh den 419 Mich 1213 (1984). Under this interpretation, the trial court erred by awarding benefits to plaintiff under § 3107a when plaintiff had employment and intended to return to work after his medical leave ended.

We believe the trial court erred in the computation of work-loss benefits by using only the rate for the last full month of employment under § 3107a. We therefore remand this matter to the trial court to recompute plaintiff's work-loss benefits for work he would have performed if not for his disability, under § 3107(b). This amount should include all adjustments to income plaintiff would have had on the job over the three years, if not injured. Kirksey, supra.

V.

For its fifth issue on appeal, defendant cites error in the trial court's instructions (modifying SJI2d 50.10 and 50.11) which informed the jury that defendant would be liable, even if plaintiff had a preexisting condition making him susceptible to injury, if the automobile accident either aggravated that condition or combined with the preexisting condition to cause plaintiff's disability. We believe the trial court did not abuse its discretion in giving the jury these special instructions under the facts of this case. Wengel v Herfert, 189 Mich App at 431. Aggravation of a preexisting condition does not bar an action under the no-fault act if the aggravation can be attributed to an event within the scope of no-fault coverage. Mollitor v Associated Truck Lines, 140 Mich App 431, 438; 364 NW2d 344 (1985). The instructions were appropriate since the jury had to assess what physical damages were caused by each accident or could not be apportioned. The fact that the modified instructions were based on tort concepts does not demonstrate error because no-fault benefits are intended to provide benefits for injuries caused by automobile accidents that would otherwise be recoverable in a tort action, Williams v Detroit Automobile Inter-Ins Exchange, 169 Mich App at 304.

VI.

Defendant's final issue on appeal challenges the trial court's decision to not instruct the jury that it had to decide how long plaintiff would have remained in his former position if the jury decided that plaintiff would have returned to work, but for the automobile accident. The trial court refused to instruct the jury as requested because defendant had never challenged plaintiff's disability from work. The issue was not raised until the jury was about to receive the case to decide, and the opening statements and evidence had not addressed the issue. Based on the facts and theories of this case, the trial court did not abuse its discretion in declining to instruct on this point when it was never placed in issue during the trial. Wengel v Herfert, 189 Mich App at 431.

Affirmed in part, reversed in part, and remanded for additional proceedings. We do not retain jurisdiction.

/s/ John H. Shepherd
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Connor