STATE OF MICHIGAN

COURT OF APPEALS

EDWARD POPMA, JR.,

Plaintiff-Appellee/
Cross-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant/
Cross-Appellee.

May 18, 1993
9:10 a.m.

FOR PUBLICATION

No. 136525

Before: MacKenzie, P.J., and Griffin and Connor, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting summary disposition in favor of plaintiff and ordering defendant to pay plaintiff $25,700.70 in work-loss benefits. Plaintiff cross-appeals that part of the order entitling defendant to a setoff for social security benefits received by plaintiff. We affirm in part and reverse in part.

The facts are substantially undisputed. Plaintiff suffered a fracture of the right femur in a one-car accident which occurred on September 23, 1988. He was disabled from working following the accident. Defendant is plaintiff's no-fault insurer. At issue is the amount of work-loss benefits to which plaintiff is entitled.

Plaintiff's work history is as follows. Plaintiff worked sporadically in Grand Rapids, Texas, and Gaylord after he left high school in his junior year. After being unemployed for two years, he went to Georgia, where he spent 2-1/2 years working in the construction industry. Upon his return to Michigan in January 1987, plaintiff went to Traverse City, where he worked eleven days in an oil field. Plaintiff hung drywall for a brief period, then in June 1987 returned to Grand Rapids where he worked for Manpower until March 1988. Plaintiff also worked at Norm's Restaurant from September 1987 until February 1988. He then obtained a job doing general maintenance, at which he worked from February until March 1988.

When he quit his Manpower and maintenance jobs, plaintiff entered an apprenticeship program working for Newkirk Electric, but was laid off after one week. Plaintiff next worked as an apprentice substation electrician for Hydaker-Wheatlake Company in Traverse City from April 18, 1988 until June 2, 1988. Plaintiff was paid $10.47 per hour at this job, but was terminated for inability to work above the ground. Plaintiff remained in Traverse City for a few weeks hanging drywall, then quit and returned to Grand Rapids. He received unemployment benefits and also returned to limited work. Beginning about August 18, 1988, and continuing until the date of his accident, plaintiff again worked for Manpower. He also worked at Norm's Restaurant about ten hours per week.

I

Defendant paid plaintiff work-loss benefits of $6,215, calculated at $55 per week -- the amount he was earning at the time of his accident -- for 113 weeks. Plaintiff claimed, and the trial court agreed, that his work-loss benefits should have been computed on the basis of his wages at his last full-time employment prior to the accident, the job at Hydaker-Wheatlake.

MCL 500.3107(1)(b); MSA 24.13107(1)(b) provides for the payment of personal protection insurance benefits for:

> Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured . . .

The trial court's award of benefits was based on MCL 500.3107a; MSA 24.13107(1), which provides:

> Subject to the provisions of [MCL 500.3107(1)(b); MSA 24.13107(1)(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. [Emphasis added.]

We agree with defendant that the trial court erred in awarding benefits to plaintiff on the basis of the latter statute, § 3107a. It is clear from a reading of the two statutes that the Legislature has seen fit to authorize work-loss benefits for persons whose work status falls within one of only two categories -- employed or temporarily unemployed. Irrespective of the nature of the work being performed, an underemployed person is, by definition, employed. Plaintiff, as an employee of both Manpower and Norm's Restaurant, was employed at the time of the accident. He was therefore entitled to benefits as set forth in § 3107(1)(b) and not § 3107a.

This conclusion is consistent with the purpose of § 3107a. In enacting § 3107a, the Legislature intended to protect persons whose regular employment has been temporarily suspended due to its seasonal nature or because of a temporary layoff. See MacDonald v State Farm Mutual Ins Co, 419 Mich 146; 350 NW2d 233 (1984). As his work history demonstrates, plaintiff simply does not fit that classification. Accordingly, we reverse the trial court's order awarding work-loss benefits under § 3107a.

II

After his accident, plaintiff hired an attorney to secure social security disability benefits for him. These benefits were paid, and the attorney fee was sent directly to plaintiff's lawyer by the Social Security Administration.

After ruling on the amount of no-fault work-loss benefits payable to plaintiff, the trial court held that defendant was entitled to a setoff equal to the entire amount of social security disability benefits paid to plaintiff, including the amount paid to plaintiff's attorney as compensation for securing the social security benefits. In his cross-appeal, plaintiff contends that this was error. We disagree.

Neither the fact that plaintiff's attorney received his fee directly from the Social Security Administration nor the fact that this money never actually passed through plaintiff's hands precludes a setoff for the entire amount of social security disability benefits to which plaintiff was entitled. See Thompson v DAIIE, 418 Mich 610, 617-619; 344 NW2d 764 (1984); Perez v State Farm Mutual Automobile Ins Co, 418 Mich 634, 645-646; 344 NW2d 733 (1984); Gregory v Transamerica Ins Co, 425 Mich 625, 635-636; 391 NW2d 312 (1986); Deppmeier v Associated Truck Lines, Inc, 143 Mich App 244, 248; 372 NW2d 521 (1984).

Plaintiff contends that he should not be forced to accept less than a full recovery of no-fault benefits. However, on several occasions our Supreme Court and this Court have allowed a plaintiff to accept less than a full recovery, in varying circumstances. See Thompson, supra; Perez, supra; Gregory, supra; Deppmeier, supra. We also reject plaintiff's contention that the trial court's decision to allow a setoff is contrary to the policies underlying the no-fault insurance act, MCL 500.3101 et seq.; MSA 24.13101 et seq. The setoff of benefits provided by the federal government is expressly authorized by MCL 500.3109(1); MSA 24.13109(1). As this Court has recognized, "[t]he purpose of § 3109(1) is to reduce the basic cost of insurance by requiring a setoff of those government benefits that duplicate no-fault benefits and coordinating those benefits a victim may receive." Allstate Ins Co v Sentry Ins Co of Michigan, 175 Mich App 153, 159; 437 NW2d 341 (1989). The trial court's decision comports with this purpose.

Affirmed in part and reversed in part.

/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin

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CONNOR, J. (concurring).

I agree with my colleagues that defendant was entitled to a setoff equal to the entire amount of social security benefits paid to plaintiff, including the amount paid to plaintiff's attorney.

I also agree that "underemployed" is clearly not the same as "temporarily unemployed". The trial court's order granting plaintiff summary disposition and awarding work-loss benefits under § 3107a must be reversed. However, the majority opinion fails to address the trial court's misapprehension that plaintiff's benefits would be unfairly diminished if they were to be determined under § 3107(1)(b) merely because he was underemployed at the time of his accident.

Defendant, applying § 3107(1)(b), calculated plaintiff's work-loss benefits based on $55 per week, the amount he was earning at the time of his accident. The trial court ordered that plaintiff's benefits be redetermined pursuant to § 3107a (based upon his last full-time employment) because the court determined that plaintiff should not be penalized for accepting part-time employment, the only available work at the time of his accident.

The appropriate amount of no-fault work-loss benefits payable to an underemployed person is set forth in § 3107(1)(b) which provides in part:

> Personal protection insurance benefits are payable for the following:
>
> * * *
>
> Work loss consisting of loss of income from work an 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).]

The amount of money an underemployed person would earn in the 3 years after the date of the accident is a question of fact. Nothing in the provision states that the income must be calculated based on the person's earnings at the time the injury occurred. Kirksey v Manitoba Pubs Ins Corp, 191 Mich App 12, 16 (1991). An underemployed person is entitled to increased work loss benefits if the underemployed person can demonstrate convincingly that he or she would have earned a higher income during the 3 years after the date of the accident but for the injury.

After remand, plaintiff should be permitted to present his proofs regarding his anticipated loss of income from work he would have performed during the first three years after the date of the accident if he had not been injured.

/s/ Michael J. Connor