STATE OF MICHIGAN

COURT OF APPEALS

ANNETTE F. BAK,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

June 7, 1993
9:05 a.m.

No. 132904

Before: Fitzgerald, P.J., and Holbrook, Jr. and Corrigan, JJ.

CORRIGAN, J.

Plaintiff, asserting the right to three full years of no-fault work loss benefits, MCL 500.3107(b); MSA 13107(b), sued defendant insurer for breach of contract. Shortly before trial, plaintiff moved in limine to bar defendant from proving her failure to mitigate damages, i.e., to seek other employment, as a defense. Plaintiff appeals by leave granted the circuit court's denial of her motion in limine to bar a mitigation of damages defense. We affirm the circuit court's ruling.

Plaintiff was injured in an automobile accident on January 8, 1987. A registered nurse, she was then employed as head operating room nurse at South Macomb Hospital. Her job involved administrative and nursing duties as well as lifting and moving patients and equipment. In April, 1987, a treating physician found her disabled, i.e., unable to perform that job or one similar to it. Her position as head nurse was subsequently filled.

Plaintiff has neither worked full-time nor sought employment since the accident. She has, however, worked part-time as an administrator at her fiance's medical clinic and returned to college. She satisfied all requirements for a B.S. degree in nursing in August, 1988.

Defendant no-fault insurer paid plaintiff's wage loss benefits pursuant to MCL 500.3107(b); MSA 24.13107(b) until May, 1988, when a medical examination at defendant's request found plaintiff no longer disabled. Section 3107(b) provides that a no-fault insurer must pay benefits for:

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

In a breach of contract action, the availability of a defense is a question of law. Sharp v Preferred Risk Mut Ins Co, 142 Mich App 499, 509-510; 370 NW2d 619 (1985); Jacobs v DAIIE, 107 Mich App 424, 432; 309 NW2d 627 (1981). A question of law is subject to de novo review. Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991).

Plaintiff contends that because she could not return to her former job, her right to work loss benefits for 3 years became irrevocable and she had no duty to seek other employment. We disagree. When a work-loss plaintiff has earned income from another job, no-fault benefits are correspondingly reduced. Snellenberger v Celina Mut Ins Co, 167 Mich App 83, 85; 421 NW2d 579 (1988). Further, a plaintiff cannot obtain work-loss benefits for a period in which he would be disabled from working, regardless of the accident. MacDonald v State Farm Ins Co, 419 Mich 146, 152; 350 NW2d 233 (1984). In addition, a claimant eligible for worker's compensation benefits must make reasonable efforts to obtain them if he also seeks no-fault payments. Perez v State Farm Mut Auto Ins Co, 418 Mich 634, 645-646; 344 NW2d 773 (1984). Our cases do not reveal an automatic right to work-loss benefits, without any regard for surrounding circumstances.

In both contract and tort actions, an injured party must make every reasonable effort to minimize damages. Williams v American Title Ins Co, 83 Mich App 686, 697; 269 NW2d 481 (1978). See also, e.g., Rasheed v Chrysler Motors Corp, 196 Mich App 196, 204; ___ NW2d ___ (1992) (employee who is wrongfully discharged has an obligation to mitigate damages by accepting employment of a "like nature"); May v William Beaumont Hosp, 180 Mich App 728, 756; 450 NW2d 43 (1989) (in determining loss of lifetime earning capacity, earnings should be offset by wages "which it may reasonably be anticipated the plaintiff will earn"). The general principle of mitigation should thus apply to no-fault work loss suits unless the legislature intended to abrogate the common law doctrine of mitigation.

The Michigan no-fault act is based upon the Uniform Motor Vehicle Accident Reparations Act (UMVARA). Nawrocki, supra at 143. See generally 14 ULA, Civil Procedural & Remedial Laws, pp 25-124. The Legislature agreed with the policies that underlie the model act's language. Miller v State Farm Mut Auto Ins Co, 410 Mich 538, 559; 302 NW2d 537 (1981) (expenses payable as survivor's loss). The UMVARA model act definition of "work loss" deviates in several respects from that adopted in § 3107(b). The model act provides:

> "Work loss" means loss of income from work the injured person would have performed if he had not been injured, and expenses reasonably incurred by him in obtaining services in lieu of those he would have performed for income, reduced by any income he would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake. 14 ULA, Civil Procedural & Remedial Laws, § 1(ii), p 43.

The model act definition is more generous than § 3107(b) in allowing compensation for expenses "reasonably incurred . . . in obtaining services in lieu of those [the injured person] would have performed for income" (compare Kerby v Auto-Owners Ins Co, 187 Mich App 552; 468 NW2d 276 (1991), holding that work-loss benefits do not include payment for substitute services in a profit-making enterprise). The same model definition is more restrictive because it expressly reduces benefits "by any income from substitute work actually performed . . . or by income [the insured] would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake." The latter is described in the drafters' comments to UMVARA § 1, as "the common law doctrine of avoidable consequences."

We do not share defendant's view that Michigan courts, by favorably citing the drafters' commentary, somehow impliedly have engrafted the avoidable consequences language on our statute. Conversely, given the mixed features of the model act definition of work loss, the legislature's failure to adopt in toto the model definition of work loss does not command the conclusion that the legislature has abrogated the common law duty to mitigate. To draw that conclusion would be an unnatural reading. Cf. Spencer v Hartford Co, 179 Mich App 389, 399; 445 NW2d 520 (1989) (failure to enact a comparable UMVARA provision creates a presumption that the legislature rejected the proposed language.)

The enactment of the no-fault act did not extinguish common law doctrines predating that legislation. Adams v ACIA, 154 Mich App 186, 194-195; 397 NW2d 262 (1986) (the common law rule permitting recoupment of payments not abolished by the no-fault act.) See also Struble v DAIIE, 86 Mich App 245, 250; 272 NW2d 617 (1978) (common law tort rule "should not be considered as abrogated unless there is a clear intent to do so," citing 73 Am Jur 2d, Statutes, § 181, p 384); Rusinek v Schultz, Snyder & Steele Lumber Co, 411 Mich 502, 508; 309 NW2d 163 (1981) (no-fault act did not abolish common law actions for loss of consortium). The statute must not be construed to abrogate established common law principles by implication. Id. at 507-508. Because the no-fault act did not specifically abrogate the common law principle of mitigation, the defense remains available.

The question is how to interpret the statute's provision that work-loss benefits are payable "for work the injured person would have performed." MCL 500.3107(b); MSA 24.13107(b) (emphasis supplied). The Teachers' Tenure Act, MCL 38.71 et seq.; MSA 15.1971 et seq., provides a similar problem of interpretation. Under that statute, if a suspended teacher is reinstated after an appeal to the tenure commission, "[T]he teacher shall be entitled to all salary lost as a result of such suspension." MCL 38.103; MSA 15.2003 (emphasis supplied). In Shiffer v Gibralter School Dist, 393 Mich 190; 224 NW2d 255 (1974), the Supreme Court held that "all salary lost" refers only to the difference between a teacher's prior salary and income received from any alternate employment during the appeal, rather than the full salary he would have received.

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FITZGERALD, J. (dissenting.)

We are asked to determine whether plaintiff, who is not disabled in the sense of being unable to perform any work, is entitled to wage loss benefits because she was initially unable to return to her job on account of her injuries and her job has since been filled. Specifically, the inquiry is whether a plaintiff has a duty to mitigate damages by seeking alternative employment that the disability does not prohibit. I do not believe that MCL 500.3107(b); MSA 24.13107(b) imposes such a duty and, therefore, I would reverse the trial court's denial of plaintiff's motion in limine to bar a mitigation of damages defense.

Section 3107(b) provides that a no-fault insurer must pay benefits for

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

In Ouellette v Kenealy, 424 Mich 83, 86; 378 NW2d 470 (1985), the Court stated that Michigan's No-Fault Act is patterned after the Uniform Motor Vehicle Accident Reparations Act (UMVARA) and that the drafter's comments and provisions of the UMVARA may be looked to for guidance when construing provisions of our No-Fault Act. In Spencer v Hartford Co, 179 Mich App 389, 399; 445 NW2d 520 (1989), this Court stated that in cases where the Legislature failed to enact a comparable portion of the UMVARA, a presumption exists that the Legislature considered but rejected the proposed language.

Section 1(a)(5)(ii) of the UMVARA[1] provides:

> "Work loss" means loss of income from work the injured person would have performed if he had not been injured . . . reduced by any income from substitute work actually performed by him or by income he would have earned in available appropriate substitute work he was capable of performing but reasonably failed to undertake.

The drafter's comments to this subsection provide in part:

> Finally, the definition contains an explicit reference to the doctrine of avoidable consequences -- work loss is computed by subtracting not only income from work which the injured person undertook in lieu of that which his injury prevented him from performing but also income which he might have earned in available appropriate substitute work. As under the common law doctrine of avoidable consequences, the issue is whether claimed work loss is justly attributable to the injury. Subtraction of potential income from alternate work which the injured person declines is proper only where, under all the circumstances, the alternate work is "appropriate" and the injured person's refusal to undertake the work is "unreasonable." [14 ULA, p 46.]

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HOLBROOK, JR., J. (concurring.)

I concur with Judge Corrigan's opinion, but write separately to explicate my position on the issue presented in light of my concurring vote in Marquis v Hartford Accident & Indemnity (On Remand), 195 Mich App 286; 489 NW2d 207 (1992).

In Marquis, the plaintiff was disabled from her employment due to an automobile injury. When she was medically able to return to work, she could not return to her employer because a permanent replacement had filled her position. Defendant no-fault insurer initially paid her work-loss benefits. Plaintiff then began working for a new employer. Her new job paid less than her preinjury position, and she voluntary resigned within two months. The issue presented to this Court in Marquis was whether the plaintiff was entitled to eighty-five percent of the difference in the compensation levels of her two jobs. This Court held that the defendant was responsible for eighty-five percent of the wage differential for the time after the plaintiff returned to work and after she quit her subsequent employment. Id.

Primarily for two reasons, I concurred with Judge Kelly's opinion in Marquis that the plaintiff was entitled to eighty-five percent of the difference in the compensation levels of her two jobs even for the time after she quit her second job. First, the plaintiff had made a good faith effort in finding another job. Second, the plaintiff in Marquis did not ask to be rewarded for quitting by seeking the difference between her preinjury wage and zero. Judge Kelly's opinion stated that the plaintiff should not have the same work-loss benefits after she voluntarily quit her new job. However, the issue of mitigation of damages was not presented to this Court in Marquis. I believe that § 3107(b) requires the no-fault insurer to compensate the employee not for work she would have performed in the absence of insurance benefits (as Judge Corrigan postulates in the present case), but for loss of income due to the accident. Accordingly, compensating the plaintiff in Marquis with eighty-five percent of the difference in the compensation levels was consistent with "loss of income from work an injured person would have performed" but for the accident. MCL 500.3107(b); MSA 24.13107(b).

In the present case, I concur with Judge Corrigan's opinion because I believe that employees when losing a job under these circumstances have the duty to mitigate by seeking other employment. Although I agree with Judge Corrigan that reasonableness of mitigation is a question of fact, I would welcome standards (preferably from the Legislature) that might quell the onslaught of litigation regarding the "reasonableness" of mitigation our holding is bound to initiate.

/s/ Donald E. Holbrook, Jr.