

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CHERYL ANN BAMBURY,

Plaintiff,

File No. 93-74235-NF

v

Hon. William E. Collette

CITIZENS INSURANCE COMPANY
OF AMERICA,

OPINION AND ORDER

Defendant.

INTRODUCTION

This matter was tried before the Court in a non-jury trial, where most of the facts were stipulated to as follows:

FACTS

Cheryl Ann Bambury was injured while riding as a passenger on the rear of a motorcycle on September 17, 1992. As a result of that accident, she received crippling injuries to her right leg that have to date required several surgeries and continued treatment. As of April 7, 1993, she was awarded social security disability benefits of \$626.00 per month which, by statute, are a set-off against any first-party no-fault wage benefits to which this Court finds her entitled.

Previous to September 17, 1992, Ms. Bambury was employed at Village Hardware in Haslett, Michigan. During the course of her employment, she received a neck injury that qualified her for worker's compensation benefits commencing November, 1991. Testimony indicates that Ms. Bambury had worked at gainful employment since graduation from high school at age

18. Prior to her injury on the job, Ms. Bambury had worked at Village Hardware for over six years. She had been an active member of the labor force for over ten years.

Subsequent to her November, 1991, job related injury, she was diagnosed as having a herniated disc at C5-C6 which qualified her for disability payments.

In April of 1992, Dr. Paul De Vries, conducted a medical examination of Ms. Bambury for her employer's insurance company and found her to be able to return to work without restrictions. Later, her own physician re-examined her and, on August 19, 1992, found her able to return to work with a 20-pound lifting restriction.

In June, even before being released for work by her doctor, Ms. Bambury began consulting with Susan Hieronymus, a rehabilitation specialist hired by her employer's insurance carrier to assist in getting her back to work. From August 19, 1992, until her injury on September 17, 1992, Ms. Bambury actively sought gainful employment at numerous locations in the Lansing area, including her former employer. There is no doubt that she was sincerely interested in becoming re-employed.

During all of this time, she continued to receive worker's compensation payments and was, in fact, receiving these payments on the date of the motorcycle accident in question. Compensation payments continued until April 13, 1993.

ISSUE

WAS THE PLAINTIFF "TEMPORILY
UNEMPLOYED" AS DEFINED IN MCLA §
500.3107(a) OF THE MICHIGAN NO-
FAULT INSURANCE ACT?

MCLA § 500.3107(a) was enacted to ensure that persons who were temporarily out of the work force would be eligible to seek first-party benefits even though technically unemployed at the time of their injury.

The Defendant in the present case wishes this Court to adopt a narrow interpretation of the term "temporarily unemployed." Under that interpretation, since Miss Bambury was receiving worker's compensation, she was not employable and not eligible for any benefits. They wish this Court to find that only laid off people and those seasonally unemployed are eligible under this statute for benefits.

In Williams v DAIE, 169 Mich App 301 (1988), the Court of Appeals addressed a case that, in many respects, is similar to our case. There, the plaintiff had been injured in a November 1980, work-related accident and had been receiving worker's compensation benefits at the time he was injured in an automobile accident in August, 1992. Later, he sued for first-party wage benefits on the basis of an alleged letter from his employer that they had found him a job, with restrictions, as of September, 1992. While the Court of Appeals affirmed the lower court ruling that plaintiff had provided no credible evidence to support his claim of an alleged job, the discussion clearly indicated that it is a factual question as to what work an employee would have

performed in each case.

Also, in O'Neil v Allstate Insurance Co, 176 Mich App 390, 394 (1989), the Court reaffirmed the principles of Szabo v DAIIE, 136 Mich App 9 (1983). There, quoting from Szabo, the Court said:

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 seasonable employment or in voluntary layoffs, from the class of individuals entitled to wage loss benefits.

Therefore, applying the factual test of Williams, supra, to Miss Bambury's situation, it would appear that she was a person that was unemployed because of the unavailability of work and not due to any disability that existed on September 17, 1992. The evidence indicated that she was a person that had been employed regularly since high school that was injured on the job. She had worked faithfully with an employment counsellor for some time before the motorcycle accident. She had sought employment through a number of sources and had been declared fit for work (with some limitations) by her doctor. There is no question in this Court's mind that she would have been employed at the time of the motorcycle accident if a job opening had been available.

The fact that her worker's compensation carrier chose, for whatever reason, to pay benefits through April, 1993, is of no consequence to this ruling. The Bureau of Worker's Compensation has its own rules and procedures, and various insurers make their own decisions based on those rules. It is

not for this Court to consider why her carrier chose to continue payments to an employable person when determining if, on the date of the motorcycle accident, Ms. Bambury was temporarily unemployed.

INTEREST

This Court finds that Ms. Bambury is entitled to interest under the No-fault Act for benefits not paid within 30 days.

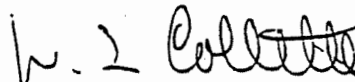
ATTORNEY FEES

This is an unusual case. Ms. Bambury's situation is, to say the least, unique. Here we have a person that was injured during the "window" of time where she had been declared available for work and was gainfully looking for work, and yet was still receiving disability payments. This Court believes that Defendant has in good faith presented a defense to a unique claim. Consequently, actual attorney fees are denied.

The parties stipulated to the amount of wages Ms. Bambury lost due to the accident. Consequently, the Court leaves the parties to do the addition. A judgment shall be filed under the appropriate rule by the Plaintiff.

Dated: _____

2/14/94



William E. Collette
Circuit Judge