STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

* * * * *

GENE R. WORKMAN, JR.,

Plaintiff,

vs. File No. 85-20635-CK

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant.

* * * * *

OPINION

Plaintiff files suit against defendant for wage loss benefits pursuant to MCL 500.3107 (a), MSA 24.13107 (1), which provides:

> "Subject to the provisions of section 3107 (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."

Plaintiff also claims replacement service expenses pursuant to MCL 500.3107 (b), MSA 24.13107 (b). The parties have submitted a stipulation of facts and depositions for utilization by the Court in the adjudication of this case. Those facts establish that plaintiff worked at Howmet in Terrell, Texas after his graduation from high school in 1981. He quit his job and returned to Muskegon in the fall of 1984, and after a month's job search, he worked full-time at D & H Manufacturing at $4.00 per hour. He quit this job to take a higher paying job with Shot Point Service on April 24, 1985. While working at Shot Point Service, plaintiff applied for a higher-paying, more permanent job at Kaydon Corporation, and he periodi-

cally checked with Kaydon about the possibility of employment during his employment with Shot Point. On May 22, 1985, plaintiff voluntarily quit his job because he heard crew members saying that the job was completed and that the Michigan workers were going to be laid off. On June 9, 1985, plaintiff was injured in the automobile accident. Kaydon hired him for full-time employment on October 7, 1985.

In McDonald v. State Farm Ins. Co., 419 Mich 146, 153 (1984), the Court stated: "The phrase 'temporarily unemployed' [as used in Section 3107a], it is evident to us, refers to the unavailability of employment, not the physical inability to perform work." Defendant argues that the rationale enunciated in the McDonald case requires that the trial court construe a "voluntary quit" as being an independent cause for the loss of wages equivalent to a physical inability to perform work. However, in Smith v. League Gen. Ins. Co., 143 Mich App 112, 114 (1985), the Court narrowly construed the McDonald holding and refused to equate "physical inability to work" with incarceration. Such a ruling suggests to this trial court that McDonald stands only for the proposition that a physical inability to perform work because of a subsequent injury or illness does not constitute "temporary unemployment" within the meaning of the statute. Thus, the Court does not equate a "voluntary quit" with a "physical inability to work", and McDonald, supra, does not mandate the result urged by defendant. When the Court stated at pages 153-154. "In short, those who are temporarily unemployed in the colloquial sense by a disability (emphasis added) unrelated to an automobile accident are not 'temporarily unemployed' in the statutory sense because they have no income from work or its equivalent to lose", the Court was referring to "disabilities", not voluntary resignations from jobs.

Defendant also relies upon the following language in Szabo v. DAIEE, 136 Mich App 9, 14 (1983):

> "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 seasonal employment or involuntary layoffs, from the class of individuals entitled to wage loss benefits."

Defendant apparently argues that this language somehow implies that a person who voluntarily leaves a job excludes himself from that class of unemployed persons eligible for wage loss benefits. This Court respectfully disagrees. The aforementioned language only notes that if the legislature had wanted to limit eligibility for wage loss benefits to those who were seasonably unemployed or involuntarily layed off, it could have done so by specifically excluding from eligibility all other clases of unemployed workers. The appellate court is observing that because the legislature did not specifically exclude other classes of unemployed workers, eligibility for work loss benefits is not limited to those who are unemployed because of seasonal employment or involuntary layoffs. Indeed, the Szabo court held that a worker who was fired was eligible for wage loss benefits as a temporarily unemployed worker, and being "fired" is not equivalent to seasonal unemployment or a "layoff", voluntary or involuntary. Finally, the Court notes that in Kennedy v. Auto-Owners, 87 Mich App 93, 96-97 (1978), the Court of Appeals permitted a college student who voluntarily quit his job to return to college to receive work loss benefits as a temporarily unemployed worker under Section 3107 (b).

Because plaintiff was actively seeking employment prior to the accident while he was working at Shot Point Service, he demonstrates more than just a subjective intent to work somewhere else after leaving Shot Point. Thus, the Court holds that plaintiff

is entitled to benefits under MCL 500.3107 (a), MSA 24.13107 (1) in the amount of $5,585.68 as a temporarily unemployed worker.

As to plaintiff's claim for replacement services, defendant has not briefed the issue, and the Court finding that work loss and replacement services are two distinct and separate benefits payable, each with its own limit, Pries v. Travelers Ins. Co., 86 Mich App 221, 224-225 (1978), the Court, relying upon the stipulation of facts, awards plaintiff $576.00 for replacement services. Plaintiff is also entitled to 12% interest in addition to ordinary judgment interest pursuant to MCL 500.3142, MSA 24.13142.

Plaintiff also claims a reasonable attorney fee pursuant to MCL 500.3148 (1), MSA 24.13148 (1). In Joiner v. Mich. Mut. Ins. Co., 137 Mich App 464, 479 (1984), the Court held that a delay in paying benefits is not unreasonable where it is "a product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty." The Court finds that the claim for replacement services was overdue and unreasonably delayed by the insurer. There is nothing in the statute which suggests that replacement services are payable only if the claimant first qualifies for work loss benefits. This observation is especially true in light of the holdings in Pries, supra. The Court also finds that the claim for work loss benefits was overdue and unreasonably delayed by the insurer. While the statutory language itself may have an inherent ambiguity, no ambiguity relevant to the facts of the instant case existed in light of the holdings in Szabo, supra, and Kennedy, supra. At page 96 of Kennedy, supra, the Court stated: "Defendant argues that plaintiff is not a temporarily unemployed person within the meaning of Section 3107 (a) because he voluntarily left his job to return to college" (emphasis added). In holding that plaintiff was entitled to work loss benefits, the Court specif-

ically rejected the argument now being urged upon this Court by defendant in the instant case. Nothing in McDonald, supra, either expressly or impliedly negates the holdings in Szabo or Kennedy. Thus, there is no legitimate issue of statutory construction, and plaintiff is entitled to a reasonable attorney fee.

Dated this 11 day of June, 1986.

James M. Graves, Jr.

James M. Graves, Jr., Circuit Judge

cc: Robert J. Van Leuven
Attorney for Plaintiff

William J. Hipkiss
Attorney for Defendant