STATE OF MICHIGAN

COURT OF APPEALS

ROYAL INSURANCE COMPANY,

Plaintiff-Appellant,

v

MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
May 5, 1998

No. 194390
Wayne Circuit Court
LC No. 94-424199 CK

Before: Michael J. Kelly, P.J., and Cavanagh and N. J. Lambros*, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment entered in favor of defendant following a bench trial in this action for reimbursement, pursuant to MCL 500.3104(2); MSA 24.13104(2), of the no-fault benefits plaintiff paid in excess of $250,000 to the insured, Edmund Polakowski. We affirm in part and remand for further proceedings.

Defendant is an association of all licensed no-fault insurance carriers in the state created pursuant to MCL 500.3104(1); MSA 24.13104(1). Defendant is required by MCL 500.3104(2); MSA 24.13104(2) to reimburse its members for the amount of loss sustained under personal protection coverages in excess of $250,000. Defendant refused to reimburse plaintiff because it contended that Polakowski was entitled to worker's compensation benefits for his injury and that the amount of those benefits should have been subtracted from the no-fault benefits paid by plaintiff. Although Polakowski did not receive worker's compensation benefits, defendant relied on *Perez v State Farm Ins Co*, 418 Mich 634; 344 NW2d 773 (1984) for the proposition that the worker's compensation benefits should have been subtracted nonetheless.

The only issue actually litigated before the trial court was whether the circumstances under which Polakowski was injured were such that he would have been entitled to worker's compensation benefits. The court concluded that Polakowski's injuries arose out of and in the course of his employment, that Polakowski was entitled to worker's compensation benefits, and that plaintiff was not entitled to reimbursement from defendant.

* Circuit judge, sitting on the Court of Appeals by assignment.

We agree with the trial court's conclusion that at the time of his injury, Polakowski was in the course of his employment for the purposes of the Worker's Disability Compensation Act, MCL 418.101 *et seq.*; MSA 17.237(301) *et seq.* Plaintiff does not contest the factual findings of the trial court but rather contends that the court arrived at an erroneous legal conclusion. In the absence of a challenge to the court's findings of fact, the issues concern questions of law, *Zarka v Burger King*, 206 Mich App 409, 411; 522 NW2d 650 (1994), which we review de novo.

Polakowski's employer, General Motors (GM), supplied Polakowski with a new vehicle every month, paid for insurance, repairs, maintenance and gas pursuant to GM's Product Evaluation Program (PEP). Polakowski was required to participate in PEP, drive the vehicles for business and personal use and evaluate them as part of his employment. Polakowski was driving a PEP vehicle at the time of the accident, and had left the GM Tech Center headed for home or shopping. Although "as a general rule, an employee who is injured while going to or coming from work cannot recover worker's compensation," *Simkins v General Motors Corp (Aft Remand)*, 453 Mich 703, 712; 556 NW2d 839 (1996), we agree with the trial court that the circumstances of this case fit within the "dual purpose" exception to the general rule. *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444, 452, n 6; 320 NW2d 858 (1982). Polakowski was driving the PEP vehicle in furtherance of GM's business and as a circumstance of his employment. See *Thomas v Certified Refrigeration, Inc*, 392 Mich 623; 221 NW2d 378 (1974); *Botke v Chippewa County*, 210 Mich App 66; 533 NW2d 7 (1995).

Plaintiff also argues that Edmund Polakowski would not have been entitled to worker's compensation benefits because his injury occurred during an activity the major purpose of which was social or recreational, and therefore, benefits were precluded by MCL 418.301(3); MSA 17.237(301)(3)[1]. Although the trial court did not separately address the applicability of this statute, it found that Polakowski was headed either home or the mall to shop. Because the major purpose of returning home or shopping is not "social or recreational", MCL 418.301(3); MSA 17.237(301)(3) would not have precluded benefits in this case.

Finally, plaintiff contends that MCL 418.305; MSA 17.237[2], which prohibits compensation for injuries incurred by reason of an employee's intentional and wilful misconduct, would have precluded compensation because Polakowski was driving his car while intoxicated. We remand for the trial court to address this issue.

The question of intentional and wilful misconduct is a factual matter, *Lopucki v Ford Motor Co*, 109 Mich App 231, 242; 311 NW2d 338 (1981), citing *Day v Gold Star Dairy*, 307 Mich 383; 12 NW2d 5 (1943), to be determined by the trial court sitting as the finder of fact in this case. Here, the court did not make a finding whether Polakowski was "injured by reason of his intentional and wilful misconduct." MCL 418.305; MSA 17.237. In reference to the issue of misconduct, the court referred to *Allison v Pepsi-Cola Bottling Co*, 183 Mich App 101; 454 NW2d 162 (1990). However in that case, the Worker's Compensation Appeal Board's opinion, as quoted in this Court's opinion, indicates that the issue whether the employee's misconduct precluded benefits was not litigated. *Id.* at 107. Accordingly, *Allison* is not pertinent to the misconduct issue.

Because the court did not make a finding whether Polakowski was injured by reason of his intentional or wilful misconduct, we remand for the trial court to specifically address MCL 418.305; MSA 17.237(305) and to make the necessary findings of fact and conclusions of law.

Affirmed in part and remanded for further proceedings. We retain jurisdiction and direct the trial court to make its findings of fact and conclusions of law within fifty-six days of the release of this opinion. We further order that the trial court's written opinion or the transcript of a hearing in which the court makes its findings and conclusions be filed with the Court twenty-eight days thereafter.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros

[1] MCL 418.301(3); MSA 17.237(301)(3) states in pertinent part, "An employee going to or coming from his or her work, while on the premises where the employee's work is to be performed, and within a reasonable time before or after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act."

[2] MCL 418.305; MSA 17.237(305) states: "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act."