

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

MARY BAILEY,

Plaintiff-Appellant/Cross-Appellee,

v

OAKWOOD HOSPITAL AND MEDICAL  
CENTER,

Defendant-Appellee/Cross-  
Appellant,

and

SECOND INJURY FUND,

Defendant-Appellee/Cross-  
Appellee,

and

DIRECTOR OF THE BUREAU OF WORKERS'  
AND UNEMPLOYMENT COMPENSATION,

Intervening Appellant.

FOR PUBLICATION  
November 6, 2003  
9:00 a.m.

No. 243132  
WCAC  
LC No. 01-000076

Updated Copy  
January 16, 2004

---

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the Worker's Compensation Appellate Commission (WCAC) terminating an open award of benefits in favor of plaintiff because the defendant's workers' compensation insurance carrier failed to notify the Second Injury Fund of the Fund's potential liability; consequently, neither the carrier nor the Fund was liable. Defendant Oakwood Hospital and Medical Center (hereinafter defendant) cross-appeals, challenging the magistrate's decision awarding benefits. The director of the Bureau of Worker's and Unemployment Compensation joins plaintiff in this appeal as an intervening appellant. We

reverse the WCAC's order terminating benefits and remand the matter to the commission to address defendant's challenge to the magistrate's finding of fact.

Plaintiff started working for defendant as a medical transcriptionist in 1989. When defendant hired plaintiff she was certified as vocationally handicapped because of a prior back injury. In late 1993, plaintiff began suffering pain in her hands and arms from bilateral carpal tunnel syndrome. She underwent surgery in December 1993 and January 1994, and returned to work in February 1994. Despite the surgery and physical therapy, plaintiff's symptoms returned. She left work in September 1994.

Defendant paid worker's compensation benefits to plaintiff until March of 1998. It stopped payments on the basis of plaintiff's alleged work avoidance. Plaintiff filed her first application for a hearing in May 1998, claiming a bilateral upper extremity and neck disability. The parties stipulated injury dates of October 6, 1993, and September 21, 1994.

At some point during the proceedings, defendant discovered plaintiff's vocationally handicapped worker's certificate. In November 1998 defendant filed a claim against the Second Injury Fund seeking reimbursement for benefits it paid plaintiff past the one-year period set by MCL 418.921. The Fund moved to dismiss defendant's petition for failure to comply with the notice provisions set by MCL 418.925. The magistrate found that defendant had failed to timely notify the Fund of plaintiff's claims as required by subsections 925(1) and 931(1) of the worker's compensation act and granted the Fund's motion to dismiss defendant's petition.

Defendant appealed the magistrate's dismissal of its claim against the Fund to the WCAC, which reversed the magistrate and remanded the matter with an instruction that the magistrate make the Fund a party. In his opinion after remand, the magistrate addressed defendant's argument that plaintiff's benefits should be terminated on the basis of work avoidance and reconsidered whether the Fund could be added as a party in light of this Court's recent decision in *Robinson v Gen Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000). The magistrate found that defendant had not met its burden of proving that plaintiff avoided work. The magistrate noted that it was not contested that defendant did not properly notify the Fund as required by the act. Citing *Robinson*, the magistrate found that dismissal of defendant's claim against the Fund was the appropriate sanction for failing to provide notice. The magistrate dismissed defendant's claim against the Fund and granted plaintiff an open award of benefits.

Defendant appealed the magistrate's decision to the WCAC, challenging the magistrate's dismissal of the Fund and his finding that plaintiff had not avoided work. The commission's final opinion addresses only the Fund's dismissal. The WCAC noted that under subsection 921(1), the employer's liability for compensation is limited to benefits accruing during the fifty-two weeks after the plaintiff's injury. After that fifty-two-week period, the Fund is liable for the benefits. On the basis of subsection 921(1) and *Robinson*, the WCAC concluded that dismissing defendant's claim against the Fund effectively precluded plaintiff from receiving any benefits after the fifty-two-week period following her injury. The commission reasoned:

While we disagree with the rationale [from] *Robinson*, we must follow that decision. That decision requires dismissal of the Second Injury Fund because

defendant failed to notify the Fund of potential liability within the time parameters of section 925.

However, *Robinson* does not address an employer's liability. Section 921 defines the liability of the employer. As we have previously stated, the liability of the employer extends through the first year post injury and no further. Under section 921, defendant's liability expires 52 weeks after the date of injury. In this case plaintiff's last date of injury was September 21, 1994. Thus, defendant's liability expired on September 21, 1995.

Again, we must state that we rejected the *Robinson* rationale for precisely this reason. More specifically, Section 921 limits a defendant's liability, and since section 925 expressly does not impose any additional liability, *Robinson* unfairly punishes plaintiffs for defendant's actions. As we previously explained, the Fund is the only entity liable beginning 52 weeks after the injury according to the statute. In fact, we may not have jurisdiction to order an employer to pay benefits beyond the first year post injury. If the Fund escapes liability, the injured employee has no recourse. The court addressed only the limits of the Fund's liability and did not explain the extension of an employer's liability. While we avoided this absurd result by interpreting sections 921, 925, and 931 collectively, *Robinson* did not follow our interpretation. Instead, the court mandates the dismissal of the Fund.

The WCAC noted that its disposition "renders defendant's argument concerning work avoidance moot." The commission's order modified the magistrate's decision by stating that defendant's "liability for wage loss and medical benefits ends on September 21, 1995."

On appeal plaintiff argues that the WCAC misinterpreted the Worker's Disability Compensation Act and left her with no remedy for an adjudicated work-related disability. The director and the Second Injury Fund also argue that the commission erroneously limited defendant Oakwood's liability for worker's compensation benefits. Defendant raises four arguments on cross-appeal: (1) that the magistrate's decision to follow *Robinson* rather than simply following the commission's instruction to add the Fund as a party violated the law of the case doctrine; (2) that the magistrate's failure to find that plaintiff was avoiding work was not supported by the evidence; (3) that the Worker's Disability Compensation Act required that the commission limit defendant's liability to the first fifty-two weeks of worker's compensation benefits; and (4) that the bureau and the Fund have advocated irreconcilable positions that require either holding the Fund liable or simply affirming the commission's order terminating plaintiff's benefits. The Fund argues that the commission properly affirmed the magistrate's order dismissing it from the case.

## I

We agree with plaintiff's position on appeal and reject the third and fourth arguments from defendant's cross-appeal. The WCAC committed an error of law by concluding that defendant is entitled to the protection of § 921 when it did not comply with the notice provision of § 925.

The Commission relied on MCL 418.921, which provides:

A person certified as vocationally disabled who receives a personal injury arising out of and in the course of his employment . . . shall be paid compensation in the manner and to the extent provided in this act . . . . The liability of the employer for payment of compensation . . . shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation . . . shall be the liability of the fund.

Subsection 925(1) of the act, MCL 418.925(1), requires that "[n]ot less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury." The notice requirement of subsection 925(1) is mandatory, so an employer's or carrier's failure to notify the Second Injury Fund obviates the Fund's liability under § 921. *Valencic v TPM, Inc*, 248 Mich App 601, 608; 639 NW2d 846 (2001); *Robinson, supra* at 334-335.

It is undisputed that defendant did not notify the Fund within the time required by § 925. Because defendant failed to timely notify the Second Injury Fund as required by subsection 925(1), it cannot pass its liability for plaintiff's continued benefits on to the Fund under § 921. Nor should defendant be given the benefit of the fifty-two-week limitation set forth in § 921 where it has not effectively brought the Fund into the action. Section 921 expressly provides that a vocationally disabled person who is injured on the job "shall be paid compensation in the manner and to the extent provided in this act." Other parts of the act require that employees disabled by a work-related injury receive benefits "for the duration of the disability." MCL 418.351(1) and 418.361(1). While § 921 provides that after fifty-two weeks of disability, the Second Injury Fund will pay benefits for disabled persons previously certified as vocationally handicapped, that section only applies if the Fund has been properly notified of the claim and made a party to any proceeding for benefits. Invoking the payment schedule set by § 921 when the Fund was never properly brought into the case is illogical, inconsistent with the language and purpose of the act, and unjustly punishes plaintiff for defendant's lack of diligence.

## II

Defendant argues that the magistrate erred by following this Court's decision in *Robinson, supra*, instead of following the commission's order to add the Fund as a party. The commission did not address this issue. This Court reviews the WCAC's decision, not the magistrate's decision. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 723, 732; 614 NW2d 607 (2000). Furthermore, the law of the case doctrine does not preclude reconsideration of a question if there has been an intervening change of law after the initial decision on appeal. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). This Court's decision in *Robinson* was issued after the WCAC's order remanding the case to the magistrate and changed the law on the issue. The magistrate was obliged to follow the law established in *Robinson*.

## III

Defendant also argues that the magistrate erred by failing to find that plaintiff was avoiding work. The WCAC, not the courts, reviews the magistrate's findings of fact. *Mudel*,

*supra* at 706, 732. Because the commission erroneously concluded that this argument was moot, we remand this case to the WCAC to address this issue.

The Worker's Compensation Appellate Commission's order concluding that defendant's liability for wage loss and medical benefits ended after fifty-two weeks is reversed, and the case is remanded to the commission to address defendant's challenge to the magistrate's finding that it had not shown that plaintiff was avoiding work.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Jane E. Markey