STATE OF MICHIGAN

COURT OF APPEALS

ROSIE LEWIS,

Plaintiff-Appellee

v

CHRYSLER CORPORATION,

Defendant-Appellant

UNPUBLISHED
July 15, 1997

No. 185770
WCAC
LC No. 93-001066

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,* JJ.

PER CURIAM.

Defendant appeals by leave granted from a 1995 order of the WCAC which affirmed the weekly rate of benefits as established by the hearing referee in 1989. Defendant also appeals the assessment of penalties against defendant for late payment of benefits to plaintiff. We affirm in part and reverse in part.

Plaintiff worked for defendant from the late 1960's until mid 1986. In 1986, plaintiff claimed a skin condition, caused by exposure to chemicals at her place of employment, which began in 1984 and, by July 1986, had worsened to the point of disability. At the time she filed her petition for disability in 1986, plaintiff listed six dependent children. At the 1989 hearing before the hearing referee, defendant stipulated that plaintiff's average weekly wage during the relevant time period was $450.66 and that the appropriate weekly benefit rate, "if applicable," should be $297.43. This figure was apparently calculated pursuant to the WCAB tables, under an assumption that plaintiff had six dependents.

On August 10, 1989, the hearing referee issued an opinion and order granting plaintiff an open award of benefits for partial disability. Although the hearing referee concluded that plaintiff had only 2 dependents for purposes of calculating the weekly benefit rate, he awarded plaintiff benefits at the rate of $297.43 (the figure apparently calculated based on six dependents). Both parties appealed this decision to the WCAB (the predecessor to the WCAC), but plaintiff's appeal was dismissed as untimely. The WCAB affirmed the open award of benefits to plaintiff, and this Court denied

---

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

defendant's application for appeal. Similarly, the Michigan Supreme Court denied leave to appeal, 441 Mich 854.

Throughout this appeal process, pursuant to MCL 418.862(1); MSA 17.237(862)(1), defendant was only obliged to pay plaintiff 70% of the weekly disability benefit awarded by the hearing referee. After defendant's appellate remedies were exhausted, defendant was obliged to pay plaintiff all of the remaining benefits owing, plus interest. Accordingly, defendant tendered a check to plaintiff in the amount of $63,502.74. However, in calculating this figure, defendant used a weekly benefit figure of $281.70 instead of the $297.43 figure calculated by the hearing referee in 1989 and affirmed by the WCAB. The amount paid by defendant was determined by figuring the rate for plaintiff with only 2 dependents. The rate was further reduced as of the 18th birthday of plaintiff's son David, with defendant, from that day forward, factoring in just one dependent.

Plaintiff objected to defendant's failure to use the full $297.43 weekly rate figure established by the hearing referee's 1989 order, and accordingly, plaintiff refused to endorse defendant's $63,532.54 payment check. Plaintiff filed an application for hearing with the worker's compensation board of magistrates based upon defendant's failure to pay the full weekly rate. Plaintiff also sought penalties against defendant. In August and September of 1993, proceedings before the Board of Magistrates were held in front of the original hearing referee. In an order dated December 1, 1993, the hearing referee found that, because defendant had exhausted his appellate options from the original 1989 order, it was no longer entitled to challenge the benefit rate which was established therein. Thus, the hearing referee ordered defendant to pay plaintiff compensation pursuant to the weekly rate of $297.43, as originally set forth by the hearing referee in 1989. In addition, the hearing referee assessed daily penalties against defendant up to the statutory maximum of $1,500.00, rejecting defendant's argument that penalties were inappropriate because there remained a legitimate ongoing dispute regarding the benefit rate.

Both sides appealed the hearing referee's decision to the WCAC, but plaintiff's appeal was dismissed for failure to timely file an appellate brief. On April 14, 1995, the WCAC affirmed the hearing referee's order requiring defendant to pay plaintiff the $297.43 weekly rate applicable for six dependents, but modified this requirement by allowing defendant to reduce the weekly rate by one dependent as of dependent David's 18th birthday.[1] The WCAC acknowledged that the hearing referee's award of benefits reflecting six dependents was factually unsupported by the record and was inconsistent with the hearing referee's finding of only two dependents. However, the WCAC concluded that defendant's failure to timely seek a correction of the benefit rate, either by stipulation or appeal, rendered the original award the "law of the case." The WCAC stated:

> Defendant can obtain some relief from §353(2). By operation of law, David's 18th birthday (November 13, 1989 [sic, see note 1]) ended his statutory dependency and plaintiff's benefits must be reduced accordingly. *Hackworth v Concord Manufacturing Co*, 1990 ACO #60. Mark, due to his disability, remains statutorily dependent. §353(2), however, only applies to dependents explicitly identified as such on the order. The four additional persons upon which the weekly benefit rate was apparently based do not appear on the order as dependents, so §353(2) cannot be

used to remove them from the rate calculation. Again, defendant failed to address this issue during the statutorily defined appeal period and forfeited the tools available to it for the correction of the magistrate's error.

The WCAC also affirmed the hearing referee's award of penalties for late payment of benefits, reasoning that since challenges to the magistrate's benefit rate determination were barred after exhaustion of defendant's appeal from the 1989 order, there was no legitimate ongoing dispute with regard to the number of dependents which should be used to calculate plaintiff's weekly benefit rate, at least with respect to the four "phantom" dependents. Defendant now appeals to this Court, arguing that the WCAC erred in refusing to reverse the $297.43 weekly rate award, which was based on "phantom" dependents. Defendant also contests the award of penalties against it. We affirm the weekly rate award, but reverse the imposition of penalties against defendant.

The WCAC, in affirming the weekly rate award by the hearing referee, essentially reasoned that any challenge to the implicit use of the four "phantom" dependents in the calculation of the award was barred by defendant's failure to raise such a challenge on direct appeal, and the issue was thus the settled "law of the case." Technically, the "law of the case" doctrine had no application here, because plaintiff's entitlement to payment for the "phantom" dependents had never been actually litigated by a panel of the WCAC or a hearing referee. However, the doctrine of res judicata not only applies when an issue is actually litigated, but also when the issue could have been litigated. *Hlady v Wolverine Bolt Co*, 393 Mich 368, 380; 224 NW2d 856 (1975). Because defendant failed to raise this issue on direct appeal, and its direct appeal has concluded, the doctrine of res judicata bars defendant from now contesting the hearing referee's award of weekly benefits to plaintiff at a rate of $297.43.

However, defendant also argues that it is entitled to relief pursuant to MCL 418.353(2); MSA 17.237(353)(2), which provides:

> (2) Weekly payments to an injured employee shall be reduced by the additional amount provided for any dependent child or spouse or other dependent when such child either reaches the age of 18 years or after becoming 16 ceases for a period of 6 months to receive more than ½ of his support from such injured employee, if at such time he is neither physically or mentally incapacitated from earning, or when such spouse shall be divorced by final decree from his injured spouse, or when such child, spouse or other dependent shall be deceased.

Defendant contends that, because the statute mandates the removal of all able-bodied dependents once they reach the age of majority, the "phantom" dependents should also be removed from the calculation of benefits. However, unlike a dependent who reaches the age of majority, the "phantom" dependents are not actual dependents, but merely a mistake or oversight by the magistrate. Because defendant failed to challenge this mistake at the proper time, on direct appeal, the doctrine of res judicata bars defendant from now challenging the calculation of benefits.[2] Similarly, given defendant's failure to timely pursue the available remedies of law, we deny defendant's claim for relief based on principles of equity.

Defendant next contends that penalties should not have been assessed against it pursuant to MCL 418.801(3); MSA 17.237(801)(3). Defendant correctly notes that penalties are not available for late payment of benefits so long as there is an "ongoing dispute" concerning the claimant's entitlement to the benefits in question. See *Couture v General Motors Corp*, 125 Mich App 174, 178; 335 NW2d 668 (1983). Normally, the time for disputing benefits ends once the hearing official's award is mailed and the remedy of direct appeal is exhausted. *Id*. However, in this case, it is clear and undisputed that plaintiff had just two dependents, and thus, the hearing referee's original calculation of benefits was incorrect. Thus, despite that the issue was barred by res judicata, the claim was clearly meritorious and in good faith. In general, MCL 418.801(3); MSA 17.237(801)(3) is to be construed in favor of the party being penalized. See *Ellison v Detroit*, 196 Mich App 722, 723; 493 NW2d 523 (1992). Accordingly, we find that a legitimate "ongoing dispute" existed, and we do not believe that defendant should be penalized for seeking to correct the wrong, though the proper time for doing so had passed. Thus, we reverse the penalty award against defendant.

Defendant's remaining issues on appeal lack merit and will be discussed only briefly. First, defendant contends that it is entitled to coordinate the sickness and accident benefits owed to plaintiff. However, defendant mentioned this issue only in the context of its argument that there was a legitimate, ongoing dispute, but failed to raise this issue on its own merits. In addition, it is well recognized that coordination may be self-implemented by employers unilaterally, and the WCAC indicated that defendant had "properly" adjusted the amount of plaintiff's accrued compensation to reflect plaintiff's receipt of sickness and accident benefits in 1986 and 1987. Accordingly, defendant's argument has not presented an issue for this Court to resolve.

Finally, defendant argues that an order by the Wayne County Circuit Court in February 1993, which denied plaintiff's petition for enforcement,[3] had binding, res judicata effect on the subsequent worker's compensation proceedings. We disagree. As correctly noted by the hearing referee and the WCAC, the disputed issues in this case regarding the enforceability of the hearing referee's 1989 benefit rate determination essentially require an interpretation of the 1989 order. This issue was not actually litigated, and indeed, probably could never be litigated, in the enforcement proceedings initiated by plaintiff in Wayne County Circuit Court. See *Bush v City of Detroit*, 129 Mich App 658, 662-663; 341 NW2d 859 (1983). Thus, the order of the circuit court had no res judicata effect on the worker's compensation proceedings.

Affirmed in part and reversed in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ Richard R. Lamb

[1] Dependent David turned 18 on November 13, 1987. In the WCAC opinion, his 18th birthday is erroneously stated as November 13, 1989. The other dependent, Mark, retained his dependent status based on his legal blindness.

[2] Our disposition of this issue does not affect defendant's right, pursuant to MCL 418.353(2); MSA 17.237(353)(2), to an adjustment of the weekly benefit rate following the 18th birthday of plaintiff's son David.

[3] This petition was filed by plaintiff in December 1992, at the same time she filed her application for hearing with the worker's compensation board of magistrates. Wayne County Circuit Court Judge John H. Hauser denied plaintiff's petition, but plaintiff's claims before the Board of Magistrates continued.