

STATE OF MICHIGAN
COURT OF APPEALS

DELBERT SCHEUNEMAN,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED

January 8, 1999

No. 199831

WCAC

LC No. 92-000060

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

SAWYER, P.J. (dissenting).

I respectfully dissent.

Unlike the majority, I do not agree that defendant was prohibited by the res judicata doctrine from applying the coordinated benefits provisions of MCL 418.354(1)(d); MSA 17.237(354)(1)(d).

Plaintiff's argument that defendant cannot now raise the provisions of § 354 because it failed to do so at the time it challenged plaintiff's entitlement to benefits at all is without merit. In *Franks v White Pine Copper*, 422 Mich 636; 375 NW2d 715 (1985), the Supreme Court held that § 354 is self-executing. While plaintiff may disagree with that decision, the magistrate, the WCAC and this Court are bound to follow it. Indeed, in *Rotondi v Chrysler Corp*, 200 Mich App 368, 374; 504 NW2d 901 (1993), as noted by the WCAC, this Court noted that it was not necessary to hold a hearing in order to apply the provisions of § 354.

Plaintiff does correctly point out that the burden of justifying coordination lies with the employer. However, that burden arises only if the employee challenges the employer's application of § 354. That is to say, there is no burden for defendant to have raised the issue of the applicability of § 354. Rather, it could wait until plaintiff challenged the applicability of § 354, at which time defendant would have had to justify its right to apply § 354.

Would it have been more efficient had defendant, when it originally challenged plaintiff's right to benefits, raised as an alternative argument that the issue of plaintiff's right to benefits was moot because those benefits would be entirely offset by the mutual pension benefits? Yes. Would that approach have

saved time and money for all concerned? Yes. Was defendant legally obligated to do so? No—because there is no requirement that a hearing be held to determine the applicability of § 354 before the section is applied.

For these reasons, I would hold that the res judicata doctrine did not prohibit defendant from applying the coordination provisions of § 354. Furthermore, because I believe that the WCAC correctly held that defendant was entitled to apply the coordination provisions, I would affirm the decision of the WCAC.

/s/ David H. Sawyer