STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL T. DOBBYN,

Plaintiff-Appellee,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 18, 2008

No. 278661
Washtenaw Circuit Court
LC No. 04-001016-NF

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right a judgment in favor of plaintiff following a jury trial in this action for no-fault work-loss benefits. See MCL 500.3101 *et seq*. We affirm.

On September 20, 2003, plaintiff was involved in a motor vehicle accident and suffered back injuries that required surgical repair, including the placement of a rod and screws in his back. Defendant denied plaintiff's claim for work-loss benefits and this action was filed. Subsequently, defendant moved for summary dismissal and the trial court concluded that there was sufficient evidence for the jury to decide the matter. Following a four-day trial, the jury awarded those benefits. On appeal, defendant challenges the denial of its motion for summary dismissal of plaintiff's work-loss claim, the jury instructions related to the claim, and some of the evidentiary decisions made by the trial court during the trial. We conclude that none of these issues warrant appellate relief.

First defendant argues that it was entitled to summary dismissal of plaintiff's work-loss claim pursuant to MCR 2.116(C)(10) because, at the time of the accident, plaintiff was neither working nor "temporarily unemployed" under MCL 500.3107a. After de novo review of the trial court's denial of defendant's motion to determine whether a factual dispute existed, we disagree. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Defendant argued in its motion that plaintiff had been unemployed and was not actively seeking employment at the time of the accident. Plaintiff responded to this claim arguing that, on the date of the accident, he was temporarily unemployed but actively looking for work. In fact, just prior to being involved in this car accident he worked at Graham Construction. He was a laborer earning $11.00 per hour from May 12, 2003, until he was released on July 18, 2003. According to his deposition testimony, plaintiff then applied for a job at U.P. Special Delivery

Inc., located in Cheboygan, Michigan, as a dock worker, but he was not hired for the position. Plaintiff's attached affidavit also averred that during the time between his release from Graham and his car accident, he applied for jobs at Nicastri Construction, John Bryant Painting, PMP Personal Services, H & H Tube Manufacturing, and Northern, without success. In response to defendant's argument that plaintiff could not prove that he applied for these jobs, plaintiff argued that defendant did not seek such proof until it had been over two years since he had applied for those jobs and most potential employers do not retain such documentation.

At the hearing on the motion, plaintiff presented his tax records to illustrate that he had worked consistently since he was 16 years old. For example in 1998 and 2000, plaintiff earned $7,600. In 2001, he earned $26,000. In 2002, he earned $19,464. In 2003, the year of the accident, plaintiff had already earned $12,000. Plaintiff argued that he had only been unemployed for 44 days before this accident, following an admirable work history. Further, plaintiff provided a note written by someone at Nicastri Construction who remembered that plaintiff had applied for a job in the fall of 2003. The note indicated that plaintiff had not been hired because no position was available. The trial court agreed with plaintiff, holding that plaintiff established a genuine issue of material fact as to whether he was temporarily unemployed at the time of the accident and defendant's motion for dismissal of the work-loss claim was denied. On appeal, defendant claims that this decision was erroneous.

In *Popma v Auto Club Ins Ass'n*, 446 Mich 460; 521 NW2d 831 (1994), our Supreme Court explained the work-loss provisions of the no-fault act as follows:

> The provisions governing the award of work-loss benefits are contingent on the employment status of the claimant at the time of the accident. Section 3107(1)(b) applies when a claimant is working at the time of the accident, while § 3107a applies when a claimant is temporarily unemployed. [*Id*. at 466.]

Specifically, MCL 500.3107(1)(b) provides that personal protection insurance benefits are payable for "[w]ork loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." At issue here, because plaintiff was not employed at the time of the accident, is MCL 500.3107a which provides that "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." The phrase "temporarily unemployed" has been interpreted by our Supreme Court to refer to "the unavailability of employment, not the physical inability to perform work." *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 153; 350 NW2d 233 (1984). Also, with regard to § 3107a, the *Popma* Court held that "[t]he plain language of the statute leaves no doubt that once a person establishes unemployment, it is the characterization of that unemployment as temporary or permanent that is dispositive and not whether the person is receiving unemployment compensation." *Id*. at 470.

In this case, plaintiff presented evidence of a significant work history, including that his most recent gainful employment was about 44 days prior to the accident. Plaintiff testified in his deposition and averred in his affidavit that he had been actively seeking employment when the accident occurred. The insurance claim file included a list of the companies that plaintiff had contacted for employment. And one of those potential employers verified that plaintiff had sought such employment, but no positions were available.

In deciding a motion brought under subrule (C)(10), the trial court must consider the submitted documentary evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A trial court may not make findings of fact or weigh credibility in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The evidence submitted in this case, considered in a light most favorable to plaintiff, tended to establish that plaintiff was physically able to work at the time of the accident, that he was seeking employment but was not working because there was no work available, and that plaintiff's unemployed status was not permanent in nature. Thus, the trial court properly denied defendant's motion for summary dismissal of plaintiff's work-loss claim on the ground that there was a genuine issue of material fact as to whether plaintiff was temporarily unemployed.

Next, defendant argues that the trial court erroneously instructed the jury as to the law regarding the meaning of "temporarily unemployed" because it failed to give defendant's supplemental instruction. We disagree.

Claims of instructional error are generally reviewed de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). When the standard jury instructions do not adequately cover an issue, the trial court is obligated to give additional instructions when requested if the supplemental instructions properly inform the jury on the applicable law and are supported by the evidence. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001). A supplemental instruction need not be given if it would neither add to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly, and impartially. *Novi v Woodson*, 251 Mich App 614, 630-631; 651 NW2d 448 (2002), quoting *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591 NW2d 422 (1998). Whether a supplemental instruction is accurate and applicable is within the court's discretion. *Jones v Porretta*, 428 Mich 132, 146; 405 NW2d 863 (1987). The trial court's decision regarding supplemental instructions is reviewed for an abuse of discretion. *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 590; 657 NW2d 804 (2002). An instructional error warrants reversal only where failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

Defendant had requested that the trial court instruct the jury as follows: "[t]he bare assertion of an intent to secure employment without any corroboration of such intent or actions taken to obtain employment during the period of unemployment is insufficient to render an injured party temporarily unemployed and thus entitled to wage loss benefits under the no-fault insurance act." Defendant cited the case of *Frazier v Allstate Ins Co*, 231 Mich App 172; 585 NW2d 365 (1998) in support of its request. In *Frazier*, the insured plaintiff was seeking work-loss benefits but was last gainfully employed four years before the accident, and had last sought employment eight months before the accident. *Id*. at 177. The plaintiff indicated that he had intended to begin a new career at the time of the accident. *Id*. The *Frazier* Court held that "a bare assertion of intent to secure employment without any corroboration of such intent or actions taken to obtain employment during the period of unemployment is insufficient to render an injured party 'temporarily unemployed.'" *Id*. at 176.

In denying defendant's request for the supplemental jury instruction, the trial court held that the circumstances in the present case were unlike those presented in the *Frazier* case; thus,

the supplemental instruction would be misleading and confusing to the jury. This decision does not constitute an abuse of discretion. See *Chastain, supra*. Unlike the circumstances presented in the *Frazier* case, here, plaintiff had only been unemployed for about 44 days before this accident, he had a significant and consistent work history, and he submitted evidence in support of his claim that he had been actively seeking employment at the time of his accident. The jury instruction actually given by the trial court included that "A person is temporarily unemployed if he was, at the time of the accident, actively seeking employment and but for the accident would have been actively seeking employment and there is evidence that the unemployed status would not have been permanent if the injury had not occurred." The jury instruction given by the trial court properly informed the jury on the applicable law and was supported by the evidence. See *Bouverette, supra*. No error warranting relief occurred.

Next, defendant argues that the trial court erroneously refused to instruct the jury that, if plaintiff was terminated from employment for just cause following the accident, the termination was a superseding event that extinguished his right to work-loss benefits. We disagree.

In *MacDonald, supra*, our Supreme Court held that MCL 500.3107(1)(b) relieves an insurer from liability for work-loss benefits if a subsequent, independent event would have prevented the insured from working even if the motor vehicle accident had not occurred. *Id*. at 152, 157. The *MacDonald* Court held:

> [W]ork-loss benefits are available to compensate only for that amount that the injured person would have received had his automobile accident not occurred. Stated otherwise, work-loss benefits compensate the injured person for income he would have received but for the accident. [*Id*. at 152.]

In *MacDonald*, the subsequent, independent event that severed the "but for" chain of causation was a heart attack. *Id*. The Court held that after the plaintiff's heart attack, he would not have earned a wage even if the accident not occurred. *Id*. In *Luberda v Farm Bureau Gen Ins Co*, 163 Mich App 457; 415 NW2d 245 (1987), this Court, relying on *MacDonald*, similarly held that the plaintiff's work-loss benefits could be suspended during his incarceration because his incarceration, and not the injuries sustained in a motor vehicle accident, is what prevented his gainful employment. *Id*. at 460.

In this case, plaintiff was physically unable to work for about six months after the accident. On or about March 10, 2004, he became employed as a machinist at Moeller Manufacturing Company. He had worked as a machinist in the past, but the machines were different. Plaintiff testified that he had great difficulty performing the work because of his back pain. The job required that he stand for about ten hours a day, twist over machines, and lift various sizes of metal parts, some weighing 40 pounds. At the end of a shift, he felt like he had been hit by a truck. But plaintiff continued working at Moeller until he was told, on day 89, that he did not have the background that they needed. According to plaintiff, the plant manager gave him the option of moving to a different department, doing machine work that he had previously performed at another Moeller plant, but plaintiff declined. Plaintiff testified that the work would have been more difficult and he would not have been physically able to perform the job. His employment ended that day—June 3, 2004, because of "performance issues [and] lack of work." The plant manager, Paul Dery, testified that plaintiff was let go because he did not have the skills to perform the job and work was slow anyway. Because it was a UAW facility, the decision had

to be made before plaintiff got his 90 days in at the plant. Dery denied that he offered plaintiff the option of moving to a different department.

Defendant claimed in the trial court, as it does here, that plaintiff's termination from employment at Moeller constituted a supervening, independent event that severed the "but for" chain of causation between plaintiff's work-loss damages and the injuries he sustained in the car accident. Defendant's request for a jury instruction to that effect was denied by the trial court on the ground that the termination "doesn't amount to the kind of termination that would be an intervening cause." We agree with this determination. Plaintiff's termination from employment for "performance issues [and] lack of work" is not similar to suffering a disabling heart attack or incarceration.

Defendant claims that the situation presented here is similar to the factual situation presented in *McGee v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued July 30, 2002 (Docket Nos. 225819 and 225824). We disagree. In that case, the plaintiff suffered injuries that prevented him from returning to his employment as a bus driver. After the plaintiff returned to work on a different job, he tested positive for controlled substances and was terminated. Here, the evidence tended to establish that plaintiff was terminated because he could not perform the assigned tasks and there was no work for him to perform, not because some other event occurred that would have prohibited him from working even if the motor vehicle accident had not occurred. Thus, the trial court's refusal to give the requested supplemental instruction did not constitute an abuse of discretion. See *Chastain, supra*.

Defendant next argues that the jury verdict awarding plaintiff work-loss benefits based on the argument that plaintiff was temporarily unemployed was against the great weight of the evidence. Again, and for the reasons already discussed above, we disagree. Contrary to defendant's arguments, the evidence did not preponderate heavily against the verdict which necessarily included the finding that plaintiff was temporarily unemployed at the time of his motor vehicle accident. See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003).

Defendant also argues that the trial court abused its discretion when defendant was prohibited from introducing evidence that plaintiff had been incarcerated for domestic violence against his girlfriend. Defendant claims that plaintiff introduced evidence of his good character so it should have been allowed to introduce this evidence of his "bad" character. After review of this discretionary decision for an abuse of discretion, we disagree. See *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005).

Generally, relevant evidence is admissible and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more or less probable than it would be without the evidence. MRE 401. Here, defendant's theme throughout this case was that plaintiff did not work because he did not want to work. Defendant promoted the theories that plaintiff did not work because he was lazy and, when he did work, he was a poor worker. To rebut those claims, plaintiff elicited testimony directly related to plaintiff's work ethics and habits, including whether plaintiff had issues with alcohol or drugs that might lead to him not working or being a poor worker. Defendant claims that this line of questioning "opened the door" regarding plaintiff's domestic abuse. It did not. As the trial court held, the line of questioning pursued by plaintiff's counsel simply related to

"the issue of whether he was willing to work and nothing else." Whether plaintiff had any involvement in a domestic violence dispute is not relevant to whether he was entitled to work-loss benefits. Accordingly, the trial court did not abuse its discretion when it prohibited the proffered evidence.

Next, defendant argues that the trial court abused its discretion when it allowed plaintiff to repeatedly present hearsay evidence. After review of these discretionary decisions for an abuse of discretion, we disagree. See *Elezovic, supra*.

Generally, out-of-court statements offered for their truth are considered inadmissible hearsay. MRE 801(c); MRE 802. Here, defendant argues that various statements were admitted into evidence that pertained to plaintiff's employment status before and after his accident. First, defendant claims that hearsay testimony was admitted from plaintiff's girlfriend. Plaintiff's counsel asked her if she recalled what plaintiff had told her after losing his job at Graham Construction before the accident and what plaintiff had told her after losing his job at Moeller Manufacturing after his accident and she testified that she did not recall what he said. Thus, contrary to defendant's claim, no hearsay testimony was admitted.

Second, defendant argues that hearsay testimony was elicited from plaintiff's mother when she was asked about plaintiff's efforts to secure employment after the accident. Plaintiff's mother testified that plaintiff had been looking for a job but the only jobs advertised in the newspaper were jobs that his doctors were telling him he was physically incapable of performing. When defendant objected, the trial court ruled that the testimony was not hearsay because it was not offered for the truth of whether the doctors told plaintiff that he could not perform certain jobs. The testimony was offered to explain plaintiff's post-accident employment situation. Further, the court also instructed the jury that they were to consider the testimony just as something she heard from her son, and not to decide whether the statement allegedly made by the doctors were true. No abuse of discretion occurred.

Third, defendant argues that hearsay testimony was elicited from plaintiff regarding statements allegedly made to him by physicians. Examples of the purported inadmissible hearsay illustrate that the testimony pertained to the physical restrictions placed on plaintiff by various physicians with respect to his ability to be employed in positions involving manual labor. The testimony was elicited for the purpose of explaining why plaintiff was not employed in the same types of positions he had held in the past, including construction and machining positions. Plaintiff had a duty to mitigate his damages. See *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652; 513 NW2d 799 (1994). The trial court did not abuse its discretion in admitting this testimony.

Finally, defendant argues that the cumulative effect of errors warrants a new trial. In light of our conclusions on the claimed errors, this issue is without merit. See *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 471; 624 NW2d 427 (2000).

Affirmed. Costs to plaintiff. MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly