STATE OF MICHIGAN

COURT OF APPEALS

ROBERT D. ROBINSON, Plaintiff, v GENERAL MOTORS CORPORATION, Defendant-Appellant, and SECOND INJURY FUND, Defendant-Appellee.	UNPUBLISHED September 10, 2009 No. 285643 Workers Compensation Appellate Panel LC No. 06-000253

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendant, General Motors Corporation ("GM"), appeals by leave granted an order of the Workers' Compensation Appellate Commission ("WCAC") that affirmed a magistrate's dismissal of GM's petition for reimbursement from the Second Injury Fund ("SIF"). We affirm.

I. Factual and Procedural History

The relevant facts in this case are not in dispute. Plaintiff, certified as vocationally disabled under MCL 418.901(a), was injured while working for GM in April 1992. Plaintiff and GM entered into a voluntary pay agreement in 1993. Subsequently, GM sought reimbursement from SIF pursuant to MCL 418.921, which provides that, in the case of a vocationally disabled employee, the employer's liability is limited to benefits accruing during the period of 52 weeks after the date of the injury, and that, thereafter, "all compensation and the cost of all medical care and expenses of the employee's last sickness and burial shall be the liability of [SIF]." SIF rejected GM's reimbursement request.

Following this rejection, GM filed a petition with the workers' compensation bureau and sought to name SIF as a party. SIF moved for dismissal, claiming that it had no liability in this case because GM failed to provide SIF with proper notice, as required by MCL 418.925(1). The magistrate denied SIF's motion for dismissal. However, the WCAC reversed, finding that the

plain language of MCL 418.925(1) required notice to SIF within a defined timeframe, and the failure to provide timely notice precluded reimbursement.

On appeal, this Court affirmed the WCAC's decision, holding that MCL 418.925(1) established a mandatory notice requirement, and that although the statute was silent with regard to the consequences of a failure to comply with the notice requirement, "the WCAC properly construed the statute to find that dismissal of the fund as a party from this case was proper." *Robinson v Gen Motors Corp,* 242 Mich App, 331, 335; 619 NW2d 411 (2000).[1] The Michigan Supreme Court denied GM's application for leave to appeal. *Robinson v Gen Motors Corp,* 463 Mich 975; 623 NW2d 602 (2001).

On June 29, 2005, our Supreme Court released *Bailey v Oakwood Hosp and Medical Ctr,* 472 Mich 685; 698 NW2d 374 (2005), wherein this Court's decision in *Robinson* was specifically overruled. In *Bailey* the Court held that SIF has an obligation to reimburse a carrier after the fifty-second week following the injury of a vocationally disabled employee, regardless of the carrier's failure to provide SIF with timely notice of the injury as required by MCL 418.925(1).

Following the release of *Bailey*, GM filed the instant petition for reimbursement from SIF. The magistrate dismissed the petition on res judicata grounds. GM appealed to the WCAC, which affirmed the dismissal. The WCAC relied on this Court's decision in *Pieser v Sara Lee Bakery*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2008 (Docket Nos. 275608 and 277884), which held that *Bailey* only applied to pending cases when the reimbursement issue had been preserved. The WCAC concluded, "[t]he defendant has already litigated the identical issue and lost that issue on final order from the Michigan Supreme Court."

This Court granted GM's application for leave to appeal, "limited to the issues raised in the application and supporting brief." *Robinson v Gen Motors Corp,* unpublished order of the Court of Appeals, entered October 14, 2008 (Docket No. 285643). On appeal, GM claims that the retroactivity issue remains an open question because *Pieser* is an unpublished decision, and that *Bailey* should apply with full retroactivity. In contrast, SIF argues that res judicata bars the relitigation of the reimbursement issue in this case and that a law-changing decision such as *Bailey* only applies to pending cases wherein the legal question at issue has been preserved. As such, SIF contends that because this case was not pending when *Bailey* was released, the decision is inapplicable. In its reply brief, GM argues that res judicata is not an issue. GM first notes that in granting leave, this Court limited the appeal to the issues raised by GM, and res judicata is not such an issue. GM also contends that res judicata would not apply because there has been a change in the law and there is no longer a final adjudication since the Supreme Court specifically overruled the prior decision in this case.

II. Standard of Review

[1] Subsequently overruled in *Bailey v Oakwood Hosp and Medical Ctr,* 472 Mich 685; 698 NW2d 374 (2005).

"[Q]uestions concerning the retroactivity of earlier judicial decisions are for this Court to decide de novo as matters of law." *Lincoln v Gen Motors Corp,* 461 Mich 483, 490; 607 NW2d 73 (2000); see also MCL 418.861a(14).

III. Analysis

The sole issue presented by GM is whether *Bailey* is fully retroactive, and thereby applicable to the case at bar. As in this case, there are two relevant statutory provisions discussed by the Court in *Bailey*, MCL 418.921 and MCL 418.925(1). Specifically, MCL 418.921, addresses liability for injuries to employees certified as vocationally disabled and states as follows:

> *A person certified as vocationally disabled who receives a personal injury arising out of and in the course of his employment and resulting in death or disability, shall be paid compensation in the manner and to the extent provided in this act,* or in case of his death resulting from such injury, the compensation shall be paid to his dependents. *The liability of the employer* for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act *shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation and the cost of all medical care and expenses of the employee's last sickness and burial shall be the liability of the fund.* The fund shall be liable, from the date of injury, for those vocational rehabilitation benefits provided in section 319. [Emphasis added.]

The notification provision of MCL 418.925, provides:

> (1) When a vocationally disabled person receives a personal injury, the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein. *Not 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 fund, thereafter, may review, at reasonable times, such information as the carrier has regarding the accident, and the nature and extent of the injury and disability.* [Emphasis added.]

In *Bailey,* our Supreme Court specifically overruled the prior decisions of this Court in *Valencic v TPM, Inc,* 248 Mich App 601; 639 NW2d 846 (2001) and *Robinson v Gen Motors Corp,* 242 Mich App 331; 619 NW2d 411 (2000), interpreting these cases as "fail[ing] to give effect to the Legislature's intent" when interpreting or applying the relevant statutory provisions. *Bailey, supra* at 702. Accordingly, the *Bailey* Court ruled, in relevant part:

> We find unconvincing the argument that it is a violation of the terms of the fund's trust to disburse benefits when the mandatory notice provision has not been satisfied. To the contrary, the trust by its terms is required to reimburse carriers for benefits paid to disabled employees after fifty-two weeks following an injury. MCL 418.925(3). Notification by a carrier is not a condition precedent to the

> fund's obligation. The trustee is not absolved of its responsibility by a settlor's failure to notify the trustee of a possible obligation. [*Id.* at 703.]

In general, judicial decisions apply retroactively, while prospective applications of decisions is typically reserved only for "exigent circumstances." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 400; 738 NW2d 664 (2007). However, a more flexible approach is deemed to be necessary when "injustice might result from full retroactivity." *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003). When evaluating whether a decision should be accorded full retroactive effect, the threshold question is whether the decision "clearly establishes a new principle of law," *Trentadue, supra* at 400-401; *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 220; 731 NW2d 41 (2007), or whether the decision serves merely to clarify, extend, or interpret existing law, *Bolt v Lansing*, 238 Mich App 37, 44-45; 604 NW2d 745 (1999). In contrast, prospective application is deemed to be appropriate when the decision overrules "clear and uncontradicted case law," *Rowland, supra* at 221, quoting *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 487; 702 NW2d 539 (2005) (internal quotation marks omitted), or "decides an issue of first impression whose resolution was not clearly foreshadowed," *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 713; 620 NW2d 319 (2000). If this is the case, this Court must consider "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Trentadue, supra* at 400-401 (internal quotation marks and citation omitted).

In light of this precedent, *Bailey* would be entitled to retroactive application. As discussed in *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180; 596 NW2d 142 (1999):

> It can hardly by considered "unexpected" or "indefensible" that this Court would reverse a Court of Appeals decision that was contrary to the clear and unambiguous language of the statute . . . . [*Id.* at 195; see also *Zanni v Medaphis Physician Services Corp*, 240 Mich App 472, 478; 612 NW2d 845 (2000).]

While *Bailey* serves to effectuate the intent of the Legislature and is, therefore, subject to retroactive application, from a practical perspective we must also recognize that courts and other litigants have relied on prior case law involving the erroneous interpretation of these statutes. Consequently, while it is appropriate to give retroactive application to *Bailey*, such application must be subject to limitations in order to minimize the "the effect of this decision on the administration of justice." *Gladych, supra* at 606.

To resolve this issue, we must address SIF's argument regarding the effect of res judicata. SIF contends that retroactive application of *Bailey* would result in a violation of the doctrine of res judicata. Clearly, *Bailey* has determined that the prior decision by this Court in *Robinson* was in error based on the misinterpretation of the relevant statutory language. GM argues that our Supreme Court has previously determined limitations on the application of the doctrine of res judicata, finding the doctrine does not serve to bar a redetermination of an employee's workers compensation benefits "because the amount of an employee's award is never final." *Pike v City of Wyoming*, 431 Mich 589, 601-602; 433 NW2d 768 (1988). In addition, in *Riley v Northland Geriatric Ctr*, 431 Mich 632, 642; 433 NW2d 787 (1988) (citation omitted), the Court noted the unfairness of adopting a position contrary to the law based on res judicata, stating, in relevant part:

> Were this Court to give preclusive effect to a prior adjudication . . . it would perpetuate, in the name of a judicial doctrine, a judicial error in construing a statute that thwarts legislative intent.

In these decisions, the determination that the applicability of res judicata is limited relies on the inherent modifiability of workers compensation decisions premised on the potential for future changes in a claimant's condition.

In contrast, as discussed in *Askew v Ann Arbor Pub Schools*, 431 Mich 714, 728-729; 433 NW2d 800 (1988), citing MCL 418.863, "the Workers' Disability Compensation Act specifies that a claim of appeal may be taken from either the decision of the hearing referee or the appeal board. At the expiration of an appeal period, the decision is final and may be enforced in circuit court." (Footnotes and internal citations omitted). This is consistent with the recognized purpose of res judicata to obtain finality in litigation. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 33; 620 NW2d 657 (2000) (citation omitted). As recognized by the United States Supreme Court in *Federated Dep't Stores, Inc v Moitie*, 452 US 394, 398; 101 S Ct 2474; 69 L Ed 2d 103 (1981):

> "Nor are the res judicata consequences of a final . . . judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." [Citations omitted.]

To permit GM to prevail in this appeal premised solely on the fortuitous fact that our Supreme Court has issued a determination contrary to the original ruling of this Court pertaining to the liability of SIF based on the failure to comply with the notice provision of MCL 418.925(1), would serve to eviscerate the doctrine of res judicata and open up the potential for unlimited re-litigation of cases which have been concluded.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens