STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL J. VALENCIC,

Plaintiff,

v

TPM, INC., ACCIDENT FUND COMPANY, and CONTINENTAL CASUALTY COMPANY,

Defendants-Appellees,

and

SECOND INJURY FUND,

Defendant-Appellant.

FOR PUBLICATION
December 7, 2001
9:10 a.m.

No. 232051
WCAC
LC No. 00-000231

Updated Copy
February 15, 2002

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Appellant, the Second Injury Fund (SIF), appeals by leave granted the reversal by the Worker's Compensation Appellate Commission of a magistrate's dismissal of the SIF from the proceedings below. We reverse and remand.

Plaintiff was a certified vocationally disabled employee hired by TPM, Inc., in 1991 as a maintenance worker. TPM was the management company running a housing project known as West Highland Limited Housing Association. In 1992, plaintiff was diagnosed with and underwent surgery for carpal tunnel syndrome. While plaintiff was off work, TPM, through its carrier, Continental Casualty Company, voluntarily paid worker's compensation benefits to plaintiff.

Plaintiff returned to work in January 1993, but suffered recurrent carpal tunnel syndrome complications. As a result, in June 1994, plaintiff was no longer able to work. TPM, through Continental Casualty, continued to voluntarily pay benefits to plaintiff.

In 1998, plaintiff filed the instant petition seeking an upward adjustment in the amount of benefits he was receiving. Plaintiff alleged two injury dates, June 1992 and June 1994. During

the course of the proceedings below, it was determined that another insurance company, Accident Fund Company, not Continental Casualty, was TPM's carrier after September 15, 1992. As a result, Continental Casualty sought reimbursement from Accident Fund for benefits it paid plaintiff after that date. Continental Casualty also sought to join the SIF in the matter. Pursuant to MCL 418.921, an employer who employs a certified vocationally disabled employee is liable for benefits accruing during the first fifty-two weeks after the injury, and, as long as specified certification and notice requirements are met, the SIF is liable for benefits after the first fifty-two weeks.

The magistrate found an injury date of June 7, 1994. Accident Fund was ordered to pay wage-loss benefits to plaintiff and to reimburse Continental Casualty for the benefits it paid to plaintiff after September 15, 1992. In addition, the magistrate dismissed the SIF from the action because the certification sent to the SIF upon plaintiff's hire listed West Highland, not TPM, as plaintiff's employer and because the SIF was not timely notified of plaintiff's injury and the SIF's potential liability.

The magistrate's decision was appealed to the WCAC. The WCAC affirmed the injury date and award of benefits, but reversed the magistrate's decision regarding the SIF's liability. According to the WCAC, the error on the certification form sent to the SIF upon plaintiff's hire was inadvertent and did not prejudice the SIF, and the failure to timely notify the SIF of its potential liability was not fatal to a claim for reimbursement. As a result, the WCAC ordered the SIF to reimburse Continental Casualty and Accident Fund for benefits paid after the first fifty-two weeks. The SIF sought leave to appeal the WCAC's decision. We granted leave.

First, the SIF claims that the WCAC's decision is incorrect because TPM failed to comply with the certification requirement of MCL 418.911. We disagree.

As mentioned, pursuant to MCL 418.921, an employer who employs a certified vocationally disabled employee is liable for benefits accruing during the fifty-two weeks after the date of a personal injury suffered by such an employee where that injury arises out of, and in the course of, the employment. After the first fifty-two weeks, the SIF is liable. However, under MCL 418.911, if the employer does not file certification forms with the SIF upon the commencement of employment of a certified vocationally disabled employee or before an injury occurs, the employer is precluded from the protection of MCL 418.921.

In the case at bar, there is no dispute that plaintiff is a certified vocationally disabled employee. The issue is whether plaintiff's employer complied with the requirement of filing the certification forms.

Upon hiring plaintiff, a certification form was submitted. However, the employer on the form was listed as West Highland, not TPM. The magistrate concluded that this fact precluded the SIF from liability. However, the WCAC reversed this finding. According to the WCAC:

> In this case the failure to list the correct employer was an inadvertent error, with neither any intent to deceive or prejudice the fund nor with any resulting actual prejudice. First, the employer representative Ms. Anzalone, testified that the names were used interchangeably. Second, communication

> directed to Ms. Anzalone at West Highland was received and processed. Third, there is no claim nor any evidence in support of the notion that plaintiff would not have been certified had the proper employer been listed. Fourth, the fund became a participant in the proceedings and was fully able to protect its interests on the questions of work-related injury and disability. Thus, we reverse the determination of the magistrate that the fund was not liable for reimbursement of benefits pursuant to section 921.

The WCAC's finding that the names West Highland and TPM were used interchangeably was one of fact and is supported by the record. As a result, that finding is conclusive. See *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000).

The question then becomes whether, even assuming the names are used interchangeably, the mistake renders the filing of the certification form ineffective as a matter of law and precludes the SIF from becoming liable for the payment of plaintiff's benefits. We answer that question in the negative.

The SIF cites *Robinson v General Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), in support of its claim. However, *Robinson* is of little value in this regard because it deals with notice under MCL 418.925(1), not MCL 418.911.

The SIF cites the case, by analogy, for the proposition that the certification forms are mandatory. We agree that the certification forms are mandatory. However, the precise issue presented here is whether the certification form that was submitted in the instant case was sufficient to satisfy that mandatory requirement. *Robinson* offers no assistance in the resolution of this issue. In our opinion, in light of the fact that the names West Highland and TPM are used interchangeably, and in the absence of any authority that renders the WCAC's decision an error of law, we are simply not persuaded that the SIF is entitled to any relief on this issue.

Next, the SIF claims that TPM failed to comply with MCL 418.925(1), which states, in part:

> 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.

In the case at bar, the magistrate concluded that TPM failed to comply with the above notice provision. The WCAC reversed the magistrate's decision, stating:

> [D]efendants were not paying benefits nor did plaintiff even seek benefits from them until more than four years after the new date of injury. As a result, appellants [TPM and Accident Fund] were neither paying benefits nor were they even aware of a claim against them. Section 925(1) presumes not only an awareness of a claim but also actual payment of benefits.

MCL 418.925(1) specifically places the burden of notifying the SIF on the "carrier." In this case, the "carrier" for a June 1994 injury was Accident Fund, and Accident Fund was unaware of the injury until 1998, well outside the notice period set forth in MCL 418.925(1). The question then becomes whether the WCAC committed an error of law in concluding that, in light of the fact that Accident Fund was unaware of plaintiff's claim for benefits until after the notice period set forth in MCL 418.925(1) expired, the failure to comply with the notice provision did not preclude the SIF's liability. In support of its claim that the WCAC did err, the SIF again cites *Robinson, supra*.

We do find *Robinson* instructive on this issue. In *Robinson, supra* at 334-335, this Court held that MCL 418.925(1) imposes a "mandatory notice requirement" and that failure to comply with that requirement precludes the SIF's liability. Therefore, compliance with the notice provisions of 418.925(1) is "mandatory," and in the case at bar, it is undisputed that notice was not given within the period set forth in that subsection. In light of *Robinson* and the WCAC's failure to cite any authority for its conclusion that this "mandatory" notice requirement can be waived, we conclude that the WCAC's decision amounted to an error of law.

The WCAC also appeared to support its decision by relying on MCL 418.931(1), which states:

> If an employee was employed under the provisions of this chapter and a dispute or controversy arises as to payment of compensation or the liability therefor, the employee shall give notice to, and make claim upon, the employer as provided in chapters 3 and 4 and apply for a hearing. On motion made in writing by the employer, the director, or the worker's compensation magistrate to whom the case is assigned, [sic] shall join the fund as a party defendant.

According to the WCAC, MCL 418.931 specifically covers situations, such as the instant case, where there is a dispute or controversy regarding the payment of compensation, whereas MCL 418.925(1) applies to voluntary payment cases. While it did not clearly say so, the WCAC seemed to indicate that MCL 418.931, not MCL 418.925(1), applied to the instant case.

To the extent the WCAC did arrive at such a conclusion, we disagree. MCL 418.925(1) states that when a vocationally disabled person receives an injury, "the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein." We find nothing in the rest of MCL 418.925(1) that specifically limits the notice requirement therein to situations where the benefits are voluntarily paid, nor anything in MCL 418.931 that specifically limits its application to situations where there is a dispute concerning the payment of benefits. Therefore, to the extent the WCAC concluded that MCL 418.925(1) was inapplicable to the instant case, it committed an error of law.

We reverse and remand to the WCAC for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey