STATE OF MICHIGAN

COURT OF APPEALS

MARY BAILEY,

Plaintiff-Appellant/Cross-Appellee,

v

OAKWOOD HOSPITAL AND MEDICAL CENTER,

Defendant-Appellee/Cross-Appellant,

and

SECOND INJURY FUND,

Defendant-Appellee/Cross-Appellee,

and

DIRECTOR OF THE BUREAU OF WORKERS' AND UNEMPLOYMENT COMPENSATION,

Intervening Appellant.

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Before: Whitbeck, C.J., and Jansen and Markey, JJ.

WHITBECK, C.J. (*concurring*).

I concur in the majority opinion. I write separately to highlight the reasoning by which I reach the same result as the majority regarding the question of the liability of an employer who fails to give the notice required by subsection 925(1)[1] of the Worker's Disability Compensation Act. I do so because this reasoning is somewhat at variance with the language of the majority opinion.

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[1] MCL 418.925(1).

I. The Language Of The Statute

As the majority opinion states, defendant Oakwood Hospital and Medical Center hired plaintiff Mary Bailey as a medical transcriptionist. At the time of her hire, Bailey was certified as vocationally handicapped because of a prior back injury. Bailey's prior disability triggers the provisions of § 921 of the act. This section provides:

> A person certified as vocationally disabled who receives a personal injury arising out of and in the course of his employment . . . shall be paid compensation in the manner and to the extent provided in this act . . . . The liability of the employer for the payment of compensation . . . shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation . . . shall be the liability of the [Second Injury F]und . . . .[2]

Subsection 925(1) of the act requires that "[n]ot 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."[3]

Worker's compensation for a person who is certified as vocationally disabled and who is thereafter injured in the course of employment is provided for in the general sections of the act. Subsection 301(1) states that "[a]n employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act."[4] Subsections 351(1) and 361(1) state that "[c]ompensation shall be paid for the duration of the disability."[5]

Thus, the statutory scheme for paying worker's compensation to a person who is certified as vocationally disabled and who is thereafter injured in the course of employment is a reasonably straightforward one. The employer of such a person, or that employer's worker's compensation carrier, pays worker's compensation to that person for fifty-two weeks from the date of the injury. Thereafter, the Second Injury Fund pays worker's compensation to that person. The payments are made as provided in the act and for the duration of the disability.

II. Statement Of The Issues

This case presents two separate and distinct issues. The first issue relates to the to the consequences to the Second Injury Fund of a failure by an employer, in this case Oakwood, to comply with the requirements of subsection 925(1) by providing notice to the Second Injury

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[2] MCL 418.921.

[3] MCL 418.925(1).

[4] MCL 418.301(1).

[5] MCL 418.351(1), 418.361(1).

Fund that compensation may be payable beyond a period of fifty-two weeks after the date of an injury to a person, here Bailey, who has been certified as vocationally disabled. This Court has addressed this issue in two prior, precedentially binding decisions: *Valencic v TPM, Inc*,[6] and *Robinson v Gen Motors Corp.*[7] In both of these cases, this Court held that the consequence to the Second Injury Fund of an employer's failure to provide the required subsection 925(1) notice to the Fund was that such a failure precluded the imposition of liability on the Fund.[8]

The second issue flows from the first and relates to the consequences to the employer, Oakwood, of its failure to comply with the requirements of subsection 925(1) by providing notice to the Second Injury Fund. To my knowledge, there are no precedentially binding cases dealing with this issue. The majority here first holds that, since Oakwood failed to give timely notice to the Second Injury Fund, it cannot pass its liability for Bailey's continued benefits to the Second Injury Fund under § 921 of the act. The majority next holds that "[n]or should defendant [Oakwood] be given the benefit of the fifty-two-week limitation" set forth in § 921 "where it has not effectively brought the Fund into the action."

III. The Consequences To The Second Injury Fund

I must admit that I am not overly enamored of the reasoning in *Robinson* and in *Valencic*. The *Robinson* panel noted, accurately, that subsection 925(1) is "silent regarding the consequences of an employer's failure to give notice to the fund during the period prescribed by the statute."[9] Despite this lack of any statutory language spelling out the consequences to the Second Injury Fund of an employer's failure to give notice, the *Robinson* panel concluded that there should be *some* consequences because, were there not, "employers would be free to ignore the statutory requirements without fear of adverse consequences."[10] In my view, the *Robinson* panel thereby took upon itself the role of a superlegislature, stepping into a breach created by the silence of the statute itself in order to avoid a hypothetically undesirable result. I do not view this as the proper function of an appellate court; we do not, or ought not, function as black-robed nannies who tidy up the language of the law in the name of "fairness." Similarly, when the *Valencic* panel used the *Robinson* holding to cut off the liability of the Second Injury Fund, it was quite simply inventing a remedy nowhere provided for in the statute itself.

Nevertheless, these decisions are on the books and are precedentially binding. Under the law as it now stands, therefore, the consequence to the Second Injury Fund of an employer's

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[6] *Valencic v TPM, Inc*, 248 Mich App 601; 639 NW2d 846 (2001).

[7] *Robinson v Gen Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000).

[8] See *Valencic, supra* at 608, citing *Robinson, supra* at 334-335 (failure to comply with the mandatory notice requirement in MCL 418.925[1] precludes the liability of the Second Injury Fund).

[9] *Robinson, supra* at 335.

[10] *Id.*

failure to provide the required subsection 925(1) notice is quite clear: there can be no imposition of liability on the Second Injury Fund.

IV. The Consequences To The Employer

A. Inability To Pass Liability To the Second Injury Fund

The majority here first holds Oakwood cannot pass its liability for Bailey's continued benefits to the Second Injury Fund under section 921 of the Worker's Disability Compensation Act. This holding accords with the formal logic of a syllogism:

> Major Premise: The Second Injury Fund is not liable if it has not received the required Section 921 notice.
>
> Minor Premise: Oakwood did not give the required Section 921 notice to the Second Injury Fund.
>
> Conclusion: Therefore, the Second Injury Fund is not liable.

Under the rules of logic, generally, if the major premise and the minor premise are both true, then the conclusion must also be true if the premises imply such a conclusion. While I disagree with the reasoning that the *Robinson* and *Valencic* panels used to construct the major premise, we are constrained to adopt it by the rules of precedent.[11] It is only a semantic half-step, and a perfectly logical one, to say that if the Second Injury Fund itself cannot be liable, then Oakwood cannot pass its liability to the Fund. Therefore, I agree with the majority's conclusion that the first consequence to Oakwood for its failure to give the required § 921 notice is that it cannot pass its liability to the Second Injury Fund under the second sentence of that section of the act.

B. Inability To Utilize The Fifty-Two-Week Limitation

The majority here next holds that Oakwood should not be given the benefit of the fifty-two-week limitation set forth in § 921 where it did not effectively bring the Second Injury Fund into the action. This is certainly more than semantics. It does not necessarily follow that if the Second Injury Fund *cannot be* liable, then Oakwood *must be* liable. While I concede that § 921 provides that when a vocationally disabled person is injured on the job, that person "*shall* be paid compensation in the manner and to the extent" provided in the act,[12] nowhere in the language of the statute is there a provision that expressly states that an employer, if it fails to provide the required § 921 notice, loses the benefit of the fifty-two-week limitation.

Certainly, fairness would appear to dictate such a result. Again, however—and as harsh as it may sound—appellate courts are not, when construing a statute, primarily concerned with

[11] See MCR 7.215(J)(1).

[12] Emphasis supplied.

fairness. Rather, we are—or ought to be—concerned with ascertaining the plain meaning of the words that the Legislature used.

The fact remains, however, that in *Robinson* and in *Valencic* this Court saw fit to create a consequence for the Second Injury Fund if an employer failed to give the Fund the required § 921 notice. That consequence was a positive one for the Fund: it could not be held liable for the payment of worker's compensation if it had not received the required notice. Here, the majority creates a consequence for the employer who fails to give the notice. That consequence is a negative one for the employer: it will be held liable beyond the fifty-two-week limitation.

Although I view it as a close question, I am ultimately persuaded that the creation of such a consequence for the employer flows inevitably from *Robinson* and *Valencic*. We are precedentially bound by those decisions to shield the Second Injury Fund from liability when it did not *receive* the required § 921 notice, even in the face of the absolute silence of the third sentence in § 921 regarding such a shield. If this is so, then we cannot avoid imposing liability on Oakwood when it failed to *give* the required § 921 notice, even in the face of the absolute silence in the second sentence of § 921 regarding such an imposition.

While I am not persuaded by the obvious fairness of such a result, I am convinced that consistency is an important value in the application of the law. It would be utterly inconsistent to hold, as *Robinson* and *Valencic* require us to do, that the Second Injury Fund has a shield from liability because it did not *receive* the required § 921 notice and then accord the same shield from liability to Oakwood because it did not *give* such notice. Simply put, if we are to interpret the third sentence of § 921, then we must also interpret the second sentence and we must do so in a consistent manner. Thus, I agree with the majority's conclusion that the second consequence to Oakwood for its failure to give the required § 921 notice is that it cannot obtain the benefit of the fifty-two-week limitation contained in the second sentence of that section of the act.

I therefore concur.

/s/ William C. Whitbeck