STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY WARD, Plaintiff-Appellant/Cross-Appellee,	FOR PUBLICATION March 16, 2010
v	No. 284994 Kent Circuit Court
TITAN INSURANCE COMPANY, Defendant-Appellee/Cross-Appellant.	LC No. 04-006032-NF Advance Sheets Version

Before: SERVITTO, P.J., and BANDSTRA and MARKEY, JJ.

MARKEY, J., (*dissenting*).

I believe that the trial court properly denied plaintiff's request for work-loss benefits, penalty interest, and attorney fees; therefore, I dissent in respect to the majority's decision to reverse on that issue.

MCL 500.3158(1) provides:

> An employer, when a request is made by a personal protection insurer against whom a claim has been made, *shall* furnish forthwith, in a form approved by the commissioner of insurance, a sworn statement of the earnings since the time of the accidental bodily injury and for a reasonable period before the injury, of the person upon whose injury the claim is based. [Emphasis added.]

The language of § 3158(1) is unequivocal and unambiguous. The word "shall" signals that the requirement of § 3158(1) is mandatory. There is absolutely nothing about the wording of § 3158(1) that provides for any method of proving a claim for work-loss benefits when an insurer has requested verification from an employer other than that set forth in § 3158(1). Nor is there any caselaw that creates an alternate means. The majority's decision creates, although perhaps inadvertently, an exception to § 3158(1) or an alternative method of proving the amounts claimed for work-loss benefits. Under the facts of this case, I find the majority's crafting a loophole for an employer and his complicit employee who cannot or will not provide the requisite documentation because they are flouting federal and state tax laws contrary to the plain language, intent, and spirit of the no-fault act. The majority is legislating from the bench and creating public policy while that function resides with the Legislature. Moreover, under the facts of this case, I can find no injustice to plaintiff. Indeed, both the law and the equities of this fact situation to me lie with Titan Insurance Company, the personal protection benefits insurer.

Here, there is simply no question whatsoever that plaintiff's employer, although requested by Titan Insurance, failed to provide any documentation whatsoever of wages paid to plaintiff, much less provided documentation in accord with § 3158(1). There is no dispute about this, nor is there any dispute about the fact that plaintiff's employer provided no documentation because the employer maintained no records. Plaintiff worked "under the table." It is, however, incumbent upon claimants to prove how much they would have earned had they not been injured in the automobile accident. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 472; 521 NW2d 831 (1994). Plaintiff and his employer patently decided *together* that plaintiff would work "under the table." This was a joint decision obviously made to avoid either of them having to pay taxes. But the side effect of that decision is that it renders the employer and the employee unable—or unwilling—to comply with § 3158(1), and in this case, it patently leaves plaintiff unable to prove how much he would have earned had he not been injured in the automobile accident. MCL 500.3158(1) does not provide for any alternative method of proving a claim for work-loss benefits. Nor under this particular situation, should we allow for affidavits, testimony, or any other means of proving a claim for wage-loss benefits. Had the Legislature intended for there to be another way of proving such a claim under these circumstances, surely by now it would have done so, and if it sees the need to, the Legislature may still, of course, modify the existing statutory requirement.[1]

What makes this decision, I believe, particularly easy is that plaintiff and his employer were provided numerous opportunities to furnish the requisite sworn statement of plaintiff's earnings. The case languished for years; subpoenas were issued for such records and documentation, and depositions were scheduled. Yet the information was never provided. This is not a situation where an injured employee is being punished because of a recalcitrant employer stubbornly or neglectfully failing to provide proof of income.

When one chooses to accept employment for which he or she will be paid "under the table," surely there may be some negative repercussions, and people who make such decisions should expect some. Because of his own and his employer's actions, I believe plaintiff forfeited his ability to claim work-loss benefits under MCL 500.3158(1). It is improper for this Court to write in exceptions to the requirement of § 3158(1), and I believe the plain language of the statute absolutely forbids us from doing anything other than affirming the trial court in this respect.

Additionally, there is no authority, nor has the majority cited any, for the creation of an exception to § 3158(1). The other employees of plaintiff's employer, also paid under the table, have indeed submitted affidavits and other evidence, but it is all conflicting. Moreover, without plaintiff's satisfying the requirements of § 3158(1), the issue should be examined no further. The courts cannot create "a genuine issue of material fact" as the majority concludes there is where the initial statutory requirement has not and cannot be met. The simple fact of this case is that plaintiff cannot provide documentation as required under the statute to make a claim for

[1] I can envision factual situations where this Court might consider such evidence to prove a work-loss claim.

wage-loss benefits. It is profoundly unfair to allow a judicially created means to collaterally attack the requirement that such documentation be provided because it puts the no-fault insurance carrier in an untenable position. It has no way whatsoever to dispute or prove—when it is not its burden of proof—the amount the plaintiff was earning at the time of the accident. It creates a situation rife with the potential for fraud, frankly, what seems to be precisely the case here. Moreover, we must look at the no-fault statute in its entirety to interpret it harmoniously. When one reads MCL 500.3107(1)(b), that portion of the statute that sets forth in detail the computation of work loss for an injured party, it is again patent that the calculations must stem from the documentation received from the employer as to how much the injured claimant was earning.

Additionally, I do not believe that my analysis requires us to address or be concerned with whether plaintiff or his employer filed federal or state income tax returns. I agree that plaintiff apparently is entitled to other forms of first-party, no-fault benefits, for example the attendant care and housing expenses that are also claimed in this case. I would not deny, nor do I believe that the trial court denied, his claim for work-loss benefits on the basis of the fact that he or his employer failed to comply with tax laws. In short, I see no applicability under the facts of this case and in view of the statutory language previously discussed for any resort to MCL 500.3l13.

In conclusion, the unfortunate ramification for plaintiff in this case who chose to work "under the table" is that he cannot meet the statutory requirements for documenting his wages. Nor can his employer supply the requisite proof by any other means. Without documentation of the amount he was allegedly earning, I do not believe he can prove a claim for work-loss benefits under MCL 500.3107(1)(b). Summary disposition is proper under MCR 2.116(C)(10) where the evidence fails to establish a genuine issue regarding any material of fact, and the moving party is entitled to judgment as a matter of law. Here, there is no genuine issue of the material fact that plaintiff cannot and did not provide the requisite statutory documentation in respect to his earnings at the time of the accident. The statute requires that he provide such documentation when the insurer, here, Titan, so requests. Because there is no genuine issue regarding that fact, defendant was entitled to summary disposition as a matter of law, and the trial court was correct in doing so.

I would affirm the trial court on this issue.

/s/ Jane E. Markey