STATE OF MICHIGAN

COURT OF APPEALS

LUIGI CHIRCO,

Plaintiff-Appellant,

v

FRANKENMUTH MUTUAL INSURANCE COMPANY, a Michigan Corporation,

Defendant-Appellee.

UNPUBLISHED
May 23, 1997

No. 181345
Wayne Circuit Court
LC No. 93-305733-NF

Before: Taylor, P.J., and Markey and N. O. Holowka,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's decision granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) with respect to plaintiff's claim for no-fault work-loss benefits under MCL 500.3107(1)(b); MSA 24.13107(1)(b). We affirm.

Plaintiff argues that summary disposition was erroneously granted because genuine issues of material fact existed. We disagree.

We review de novo an order granting summary disposition pursuant to MCR 2.116(C)(10), examining the entire record, including pleadings, affidavits, depositions, admissions and other documentary evidence, and construing all reasonable inferences arising from the evidence in a light most favorable to the nonmoving party. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Fitch v State Farm Fire & Casualty Co*, 211 Mich App 468, 470-471; 536 NW2d 273 (1995). Once the moving party has shown that no genuine issues of material fact exist, the opposing party has the burden of establishing through evidentiary materials that a genuine issue of disputed fact does exist. *Skinner, supra* at 160. We will uphold the grant of summary disposition if we are satisfied that the claim or defense cannot be proven at trial. *Fitch, supra* at 471.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff filed a lawsuit against defendant seeking to recover work-loss benefits pursuant to MCL 500.3107(1)(b); MSA 13107(1)(b), which states in pertinent part:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> * * *
>
> (b) Work 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. . . . [T]he benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed [the statutory maximum], which maximum shall apply pro rata to any lesser period of work loss.

"The legislative purpose in providing work-loss benefits to an injured person . . . is to compensate him (and his dependents) by providing protection from economic hardship caused by the loss of the wage earner's income as a result of an automobile accident." *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994), citing *Perez v State Farm Mutual Automobile Ins Co*, 418 Mich 634, 640; 344 NW2d 773 (1984). Indeed, work-loss benefits paid pursuant to MCL 500.3107(1)(b); MSA 24.13107(1)(b) only compensate the injured person for income that he or she would have received but for the accident. *Marquis, supra* at 645. Thus, in order to be compensable, the lost income must be a direct consequence of the injury that the plaintiff sustained. *Id.* at 646; *Nawrocki v Hawkeye Security Ins Co*, 83 Mich App 135, 144; 268 NW2d 317 (1979).

In February 1992, the maximum monthly amount for work-loss benefits was set at $3,077, pursuant to MCL 500.3107(1)(b); MSA 24.13107(1)(b) and Insurance Bureau Bulletin 93-95. Plaintiff paid a higher premium, however, to contract for an additional $1,000 of work-loss benefits, so plaintiff was potentially entitled to $4,077 in work-loss benefits a month under § 3107(1)(b). This Court has consistently interpreted the language of § 3107(1)(b) as requiring that " 'income earned by an injured person' [is] to be deducted from the statutory maximum payable as no-fault work-loss benefits during a single thirty-day period." *Snellenberger v Celina Mutual Ins Co*, 167 Mich App 83, 87; 421 NW2d 579 (1998); see also *Bak v Citizens Ins Co of America*, 199 Mich App 730, 733; 503 NW2d 94 (1993) (Corrigan, J.). Only income that plaintiff earns for work performed will be discounted against plaintiff's work-loss benefits under § 3107(1)(b). However, any income a plaintiff receives as a gratuity that is passive, or pursuant to a formal wage continuation policy is not discounted or set-off against the benefits cap; rather, such income constitutes a collateral source payment that is not attributed to the injured party for purposes of §3107(1)(b). *Spencer v Hartford Accident & Indemnity Co*, 179 Mich App 389, 392-393; 445 NW2d 520 (1989); *Brashear v DAIIE*, 144 Mich App 667, 671-672; 375 NW2d 785 (1985).

Plaintiff asserts that his income dropped from $273,000 in 1991 to $114,000 in 1992 as the direct result of the accident and his subsequent inability to perform his job duties at his land development and residential construction company. His duties included making repairs, such as fixing mortar, carpentry and plumbing problems. As a result of his inability to work, plaintiff increased the job responsibilities and pay of other contractors. Additionally, plaintiff claims his inability to be at work and push productivity at the construction sites or to inspect subcontractors' work also resulted in a loss of income. In contrast, defendant's expert certified public accountant, who reviewed plaintiff's books and tax returns, testified that plaintiff's lower income in 1992 resulted from decreased home sales and increased land costs, interest expenses, property taxes, and other expenses. He did not attribute the diminished income to plaintiff's injuries or construction inefficiencies stemming from his absence from job sites. Defendant's expert also noted that plaintiff's payments to replacement workers actually decreased in 1992. Given this testimony, a genuine issue of fact existed regarding whether plaintiff's income loss was attributable to his injury, because "where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at a trial by the trier of fact and a motion for summary judgment cannot be granted." *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

However, rather than determining whether plaintiff's lost income was attributable to the injuries he sustained in the February 1992 automobile accident, the trial court granted summary disposition on the basis that plaintiff's net income exceeded the statutory cap under § 3107(1)(b), so that plaintiff was not entitled to wage-loss benefits from defendant.[1]

From February 27, 1992, through the end of April 1992, plaintiff contends that he was "totally unable to attend to any business responsibilities." Defendant alleges, however, that excerpts from plaintiff's deposition[2] establish that he was working at approximately fifty percent of his capacity within one month of his accident. Notwithstanding this dispute, there is no genuine issue of material fact that the monies plaintiff received during this period constituted earned income that was in excess of the applicable benefit cap. The monies plaintiff received during this short period was earned income, although a smaller amount, the same as the monies he received before the car accident. The monies received during this time was not a gratuitous collateral payment or passive income. Accordingly, with respect to this brief window of time, the trial court did not err in granting summary disposition.

Considering the period following April, 1992, it was the case that plaintiff's average monthly income was $9,500. This was based on an annual income of $114,000. This exceeded the maximum work-loss benefits that can be paid to an individual. Indeed, § 3107(1)(b) clearly states that "the benefits payable for work loss sustained in a single 30-day period and the *income earned* by an injured person for work during the same period *together* shall not exceed," in this case, $4,077 (emphasis added). After plaintiff returned to work in May 1992, even though his injuries precluded him from performing all of his regular duties, he still received *earned* income for work that he performed. But because his monthly income earned as profit attributable to plaintiff's personal efforts and self-employment exceeded $4,077, plaintiff was not entitled to work-loss benefits under § 3107(1)(b) for lost income after April 1992.

We also find no merit in plaintiff's assertion that his income is not subject to being set off against the work-loss maximum benefit because self-employed individuals will always have gross revenues providing the business owner with net profits exceeding the statutory cap, even though the earnings are derived in spite of the owner's disability, not as a result of the owner's efforts. Nothing in MCL 500.3107(1)(b); MSA 24.13107(1)(b) suggests that the cap is inapplicable to the self-employed, and plaintiff provides no authority supporting his interpretation of §3107(1)(b). Indeed, it is counter-intuitive for plaintiff to argue that his business is a one-man operation but that income generated by ongoing construction projects started before the accident and generating income after the accident are not the result of his individual efforts.

Affirmed. Defendant, being the prevailing part, may tax costs pursuant to MCR 7.219.

/s/ Clifford W. Taylor
/s/ Nick O. Holowka

[1] Although the court did not state specifically the amount of income it attributed to plaintiff, it appears that the court accepted plaintiff's assertion that he earned only $114,000 in 1992, a $159,000 reduction from his 1991 income.

[2] An entire copy of plaintiff's deposition was not filed with the trial court. This Court may only review the record developed in the trial court and cannot consider portions of the deposition not filed with the trial court. MCR 7.210(A)(1); *Isagholian v Transamerica Ins Co*, 208 Mich App 9, 18; 527 NW2d 13 (1994).