STATE OF MICHIGAN

COURT OF APPEALS

ELVIRA CHILLIK,

Plaintiff-Appellant,

v

AMERITECH, f/k/a MICHIGAN BELL TELEPHONE COMPANY,

Defendant-Appellee.

UNPUBLISHED
August 10, 1999

No. 209049
WCAC
LC No. 95-000514

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Plaintiff Elvira Chillik ("Chillik") appeals a May 16, 1996 order of the Worker's Compensation Appellate Commission (the "WCAC") that affirmed a magistrate's decision regarding Chillik's claim that defendant Ameritech, f/k/a Michigan Bell Telephone Company, ("Ameritech") improperly coordinated her benefits. We affirm.

I. Legislative And Judicial Framework

A. Coordination Of Benefits Under § 354

The crux of the dispute in this matter arises from the passage on December 30, 1980 of twelve amendments to the Worker's Disability Compensation Act (the "WDCA"), MCL 418.101, *et seq.*; MSA 17.237(101) *et seq*. These amendments were embodied in 1981 PA 192-203. Section 354, MCL 418.354; MSA 17.237(354), dealing with coordination of benefits, was added by 1981 PA 203 and become effective March 31, 1982. See *Franks v White Pine Copper Div*, 422 Mich 636, 649-650; 375 NW2d 715 (1985). As stated by the Michigan Supreme Court in *Franks:*

> Section 354(1) contains the fundamental instructional and definitional provisions which set forth the statutory preconditions for coordination, the specific other benefit sources or plans to which the provision applies and the permitted coordinations and reductions. [*Id.* at 650.]

At the time of its enactment, § 354(1) read as follows:

> Sec. 354(1) This section is applicable when either weekly or lump sum payments are made to an employee as a result of liability pursuant to section 351, 361, or 835 with respect to the same time period for which old-age insurance benefit payments under the social security act, 42 U.S.C. 301 to 1397f; payments under a self-insurance plan, a wage continuation plan, or a disability insurance policy provided by the employer; *or pension or retirement payments pursuant to a plan or program established or maintained by the employer*, are also received or being received by the employee. The employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts. [Emphasis supplied.]

In layperson's terms, then, if an employee was receiving weekly or lump sum payments under the WDCA, those payments were to be reduced under § 354(1) by the amount of payments which that employee received from a pension (among other categories) maintained by the employer.[1] As the Court put it in *Franks*, worker's compensation benefits are payable, not for the injury, but for the loss of wage-earning capacity. *Id.* at 653-654. The Court amplified on this concept in *Drouillard v Stroh Brewery Co*, 449 Mich 293, 299-300; 536 NW2d 530 (1995):

> Worker's compensation is one unit in a loosely connected system of wage-loss protection that also includes unemployment compensation, social security old-age, disability, and survivors benefits, aid to families with dependent children, and general assistance. [*Franks, supra* at 654]. Such wage-loss legislation is designed to restore to employees a portion of wages lost because of three major causes of wage loss: physical disability, unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. See, generally, 4 Larson, Workmen's Compensation, § 97, p 18-9 (1995 Supp, p 106).
>
> Because most social legislation in Michigan was implemented in unrelated fragments, failure to coordinate resulted in an accumulation of benefits. For example, before coordination, it was not unusual for an employee to collect both unemployment and worker's compensation benefits at the same time. However, if an employee undergoes a period of wage loss, it does not follow that he should receive multiple wage-loss benefits simultaneously. An employee can experience only one wage loss and, in any logical or coherent system, should receive only one wage-loss benefit at any one time. *Id.*
>
> As part of the 1981 amendments of the worker's compensation act, the Legislature added § 354, which provides for the coordination of wage-loss benefits. The purpose of this legislation was to prevent duplicate wage-loss payments while maintaining suitable wage-loss benefits.

B. WDCA Benefits Affected By § 354

(1) *Franks*

In *Franks*, a basic issue related to the proper application of §354 to various classes of workers as determined by the time that those workers' injuries occurred. As the Court described it:

> As of March 31, 1982, plaintiffs Chambers and Gomez[2] were receiving weekly payments "as a result of liability pursuant to" §§ 351 and 361(1), respectively, of the Worker's Disability Compensation Act. Mr. Chambers was also receiving old age insurance benefit payments under the Social Security Act, 42 USC 301-1397f, and both were receiving pension payments pursuant to a plan established, maintained, and fully funded by their employer. [*Franks*, *supra* at 659-660.]

Since both Chambers and Gomez were injured *before* March 31, 1982, they took the position that § 354's coordination of benefits provisions did not apply to them. The Court disagreed and held that § 354 applied. The net result of this decision was the termination of the employer's obligation to pay basic weekly compensation benefits, as the sum of those portions of the employer-funded benefits subject to coordination under § 354 exceeded the amounts of the employer's basic weekly compensation obligations to Chambers and Gomez. *Id* at 660.

(2) *1987 PA 28*

The Court's decision in *Franks* was, to put it mildly, not well received by the Michigan Legislature. Effective May 14, 1987, the Legislature effectively overruled *Franks* through the passage of 1987 PA 28 and determined that benefits could not be coordinated where the injury date was before March 31, 1982, the effective date of 1981 PA 203. See 1987 PA 28, MCL 418.354(17); MSA 17.237(354)(17).[3] Further, the Legislature determined that payments for an injury date prior to March 31, 1982 that were coordinated prior to May 14, 1987 were to be considered underpayments and that the amounts withheld based on coordination were to be "reimbursed" with interest by the employer or worker's disability carrier. See MCL 418.354(19); MSA 17.237(354)(19).[4]

Of course, litigation ensued, but in *Romein v General Motors*, 436 Mich 515, 520-521; 462 NW2d 555 (1990), the Michigan Supreme Court held that the amendments to § 354 contained in 1987 PA 28 were "constitutional exercises of legislative power retroactively modifying benefit levels for a legitimate purpose furthered by rational means." The Court reasoned that remedial statutes which act retroactively do not violate due process so long as they do not impair vested rights. *Id.* at 531. Citing *Lahti v Fosterling*, 357 Mich 578, 589, 592; 99 NW2d 490 (1959),[5] the Court held that the "retroactive liability imposed by 1987 PA 28 does not abrogate a vested or contractual right of the employers since workers' compensation benefits and liabilities are statutory in origin and may be revoked or modified at the will of the Legislature."[6] *Id.* at 532. The United States Supreme Court granted certiorari, *General Motors Corp v Romein*, 500 US 915; 111 S Ct 2008; 114 L Ed 2d 97

(1991), but ultimately affirmed the decision of the Michigan Supreme Court, *General Motors Corp v Romein*, 503 US 181; 112 S Ct 1105; 117 L Ed 2 328 (1992), holding:

> In sum, petitioners knew they were taking a risk in reducing benefits to their workers but they took their chances with their interpretation of the 1981 law. Having now lost the battle in the Michigan Legislature, petitioners wished to continue the war in court. Losing a political skirmish, however, in itself creates no ground for constitutional relief.

(3) *Conclusion*

To the extent that anything is ever settled in this well-litigated area, it is reasonably certain that the law with respect to coordination of benefits under § 354 is now settled: For any injury that occurred before March 31, 1982, the effective date of 1981 PA 203, coordination of benefits is not available; for any injury that occurred after March 31, 1982, coordination of benefits is available. Here, as noted below, Chillik suffered a psychiatric injury with ensuing total disability on August 27, 1980. Quite obviously, Chillik's injury occurred before March 31, 1982. Thus, pursuant to 1987 PA 28, *Romein v General Motors*, and *General Motors Corp v Romein*, Ameritech was not allowed to coordinate any pension benefits that Chillik might receive with her weekly compensation benefits and any amounts withheld pursuant to coordination were required to be reimbursed with interest. If it were this simple, therefore, this case would be over.

C. The § 357(1) Age Sixty-Five Reduction Provisions

The issues in this case are complicated, however, by the provisions of what is now § 357(1) of the WDCA, MCL 418.357(1); MSA 17.237 (357)(1). The substance of this section was initially contained in 1965 PA 44, effective September 1, 1965, which, among other things, reduced benefits for an injured worker after that worker reached the age of sixty-five. This provision states that:

> When an employee *who is receiving weekly payments or is entitled to weekly payments reaches or has reached or passed the age of 65*, the weekly payments for each year following his or her sixty-fifth birthday shall be reduced by 5% of the weekly payment paid or payable at age 65, but not to less than 50% of the weekly benefit paid or payable at age 65, so that on his or her seventy-fifth birthday the weekly payments shall have been reduced by 50%; after which there shall not be further reduction for the duration of the employee's life. Weekly payments shall not be reduced below the minimum weekly benefit as provided in this act. [Emphasis supplied.][7]

Here, as noted below, Chillik reached the age of sixty-five on January 4, 1983 and was receiving weekly payments under the WDCA. Clearly, then, the age sixty-five reductions contained in § 357(1) applied to her. Again, if it were this simple, this case would be over.

II. Statement Of The Issues

Of course, it is not that simple. The issues in this case revolve around the *interplay* between the § 354 coordination provisions and the § 357(1) age sixty-five reduction provisions during a specific time period. The ruling in *Franks* covered the period from March 31, 1982 (the effective date of 1981 PA 203) through May 13, 1987 (the day before the effective date of 1987 PA 28) and for purposes of clarity, we will refer to this time period as the "*Franks* case time period." With this in mind, we regard the first issue as being: can an employer who elected to coordinate benefits, pursuant to the § 354 coordination provisions as understood prior to 1987 PA 28, *Romein v General Motors*, and *General Motors Corp v Romein*, due to an employee during the *Franks* case time period thereafter elect to utilize the § 357(1) age sixty-five reduction provisions as to that employee?

We regard the second issue as being: can an employer who refunds, pursuant to § 354(19), any amounts withheld during the *Franks* case time period, pursuant to the § 354 coordination provisions as understood prior to 1987 PA 28, *Romein v General Motors*, and *General Motors Corp v Romein*, deduct from that refund any amounts attributable to the § 357(1) age sixty-five reduction provisions that the employer could have used during the *Franks* case time period to reduce the employee's weekly benefits?

III. Basic Facts And Procedural History

The parties argued, and the magistrate and the WCAC decided, this case in accordance with stipulated facts. For all but those steeped in the lore of the WDCA, these stipulated facts function somewhat like streetlights on a foggy road: they may illuminate the road somewhat but they do not cause the fog to lift. We therefore attempt to recast these stipulated facts in a way as to make them somewhat generally intelligible.[8]

Chillik suffered a psychiatric injury with ensuing total disability on August 27, 1980. On September 21, 1982, Chillik was granted an open award of weekly benefits at the rate of $171.00 per week. Ameritech filed a claim with the Worker's Compensation Appeal Board (the predecessor to the WCAC) and on or about October 18, 1982, Ameritech began paying Chillik "70% benefits"[9] at the rate of $119.70. The Michigan Supreme Court decided *Franks* on October 7, 1985, and effective March 23, 1986, Ameritech began coordinating Chillik's pension benefits against the weekly benefits of $119.70; the effect of this coordination was to reduce Chillik's weekly benefits to zero.

As noted above, the Legislature overruled *Franks* through the passage of 1987 PA 28, effective May 14, 1987. On or about June 23, 1987, therefore, Ameritech resumed paying Chillik weekly benefits of $119.70.[10] However, in January of 1989, Ameritech began paying Chillik weekly benefits of $111.15. This was the full rate of $171.00 per week[11] less the accumulated effect of the § 357(1) age sixty-five reduction; Chillik had turned sixty-five on January 4, 1983.

As noted above, on September 28, 1990, the Michigan Supreme Court in *Romein v General Motors, supra,* held that the Legislature had properly "overruled" *Franks* and on March 9, 1992, the United States Supreme Court upheld this decision in *General Motors Corp v Romein, supra.* The effect of these two decisions was that employers were required to reimburse, with interest, any benefits that they had coordinated during the *Franks* case time period, for injuries occurring before March 31, 1982. Therefore, in June, 1992, Ameritech paid Chillik the sum of $44,241.50 representing monies withheld due to coordination during the *Franks* case time period.[12] However, this sum is net of the application by Ameritech of the accumulated effect of the § 357(1) age sixty-five reduction from the year of Chillik's sixty-fifth birthday (January 4, 1983) through May 13, 1987.

In September 1982, Chillik filed an application for mediation or hearing. In an opinion and order mailed May 25, 1995, the magistrate concluded that Ameritech had properly reduced plaintiff's benefits pursuant to § 357, even though this Court held in *Krueger v Simplicity Pattern Co,* 196 Mich App 212; 492 NW2d 790 (1992), vacated 442 Mich 912 (1993) and *Saraski v Dexter Davison Kosher Meat & Poultry,* 206 Mich App 347, 353-354; 520 NW2d 383 (1994) that an employer may not serially switch between the coordination provisions § 354 and the age sixty-five reductions authorized under § 357. The magistrate found the instant case distinguishable because events outside of Ameritech's control made its initial election to coordinate benefits under § 354 void *ab initio*. Because he concluded that in this case Ameritech made no valid election to use § 354, the magistrate reasoned that Ameritech was free to reduce benefits pursuant to § 357. Chillik appealed to the WCAC and in an opinion and order dated May 16, 1996, the WCAC affirmed for the reasons given by the magistrate. The WCAC also, in essence, found that Ameritech could deduct from its refund amounts attributable to the § 357(1) age sixty-five reduction that Ameritech could have used during the *Franks* case time period to reduce Chillik's weekly benefits. This Court denied Chillik's application for leave to appeal for lack of merit in the grounds presented. Chillik then applied to the Michigan Supreme Court for leave to appeal. In lieu of granting leave, the Supreme Court remanded to this Court for consideration as on leave granted. 456 Mich 921 (1998).

IV. The Interplay Between § 354 And § 357 With Respect To Elections

In *Krueger, supra,* the defendant employer initially decided to coordinate pension benefits against the plaintiff's worker's compensation benefits. In granting an award of benefits, the magistrate held that in light of the employer's election, it could not apply the age sixty-five reduction of § 357. *Id.* at 213-214 On appeal the WCAC affirmed, holding that an employer is free to elect either coordination under § 354 or age-sixty-five reductions under § 357, but once having chosen coordination it may not then apply age sixty-five reductions either simultaneously or serially. *Id.* at 214. This Court granted the employer's application for leave to appeal and affirmed. However, this Court's decision in *Krueger* was vacated by the Supreme Court because the parties stipulated to dismiss the appeal when plaintiff died. 442 Mich 912 (1993).

The issue arose again in *Saraski, supra*. In that case the plaintiff received worker's compensation general disability benefits which were reduced pursuant to the age sixty-five provision in §357. *Id.* at 349. However, following the Supreme Court decision in *Franks,* the defendant employer ceased making age sixty-five reductions and instead began coordinating 50% of plaintiff's social security

benefits pursuant to § 354. *Id.* at 349-350. The plaintiff then sought and was granted an open award of total and permanent disability benefits, a different class of disability which is exempt from coordination under § 354. The employer then began reducing plaintiff's benefits pursuant to the age sixty-five provision. *Id.* at 350. The plaintiff filed an application for hearing, claiming that his employer could not use the § 357 reduction because it had in the past elected to coordinate under § 354. The hearing referee agreed, but the WCAC reversed, holding that an employer is not prohibited from serially selecting between reductions under §§ 354 or 357 at its discretion. *Id.* at 350-351.

On appeal, the majority of the panel in this Court adopted the general rule announced in *Krueger*. *Saraski, supra* at 352. Applying that rule the majority upheld the pertinent part of the WCAC's result, but not its reasoning, because the employer was in effect merely attempting to return to its original election of the age sixty-five reduction under § 357. *Id.* at 352-353. In addition, the majority held that the plaintiff's attempt to alter his disability status from regular disability to total and permanent disability constituted a new event that may terminate prior elections by the employer and permit the employer to make a new election. *Id.* at 353.

Chillik argues that the WCAC was bound to follow this Court's decisions in *Krueger* and *Saraski*, and that the instant case is not in any meaningful way distinguishable from those cases. We disagree. Although Ameritech did initially elect to coordinate under § 354, that election was then essentially wiped out as a result of legislative action. This is not a case in which Ameritech is seeking to switch between § 354 and § 357(1) in order to maximize the amount it may deduct from its worker's compensation liability. Rather it is analogous to the alternative holding in *Saraski*, in which a new event (the legislative overruling of *Franks*) terminated the defendant's prior election.

In summary, employers, such as Ameritech, lost a political skirmish when the Legislature effectively overruled *Franks* through the passage of 1987 PA 28, and they therefore lost the ability to coordinate the benefits of employees, such as Chillik, who were injured prior to March 31, 1982. Simply put, employers lost the ability to make an election between, on the one hand, coordinating benefits and, on the other hand, not coordinating benefits. This, however, did not mean that such employers also lost the ability to apply the § 357(1) age sixty-five reduction. Section 357(1) was the product of earlier political skirmishes in the Legislature. While Ameritech's § 354 election was terminated through the passage of 1987 PA 28, its pre-existing and on-going right to apply the § 357(1) age sixty-five reduction was unaffected. Ameritech, although it could not elect to coordinate benefits under § 354, could elect to apply the § 357(1) age sixty-five reduction.

Unlike *Krueger*, therefore, this was not a case where the employer simply – and absent other factors – switched between § 357 and § 354 to reduce a disabled employee's benefits. Rather, as in *Saraski*, there were intervening events – here the passage of 1987 PA 28 and the decision in *Romein v General Motors* and *General Motors Corp v Romein* – that terminated Ameritech's initial election to coordinate Chillik's benefits under § 354. Indeed, perhaps the best evidence that Ameritech's initial election to coordinate Chillik's weekly benefits was terminated by legislative action is that the Legislature included a refund with interest provision in 1987 PA 28. Clearly, the Legislature acted to put persons in Chillik's situation in exactly the same position they would have been absent their employers' decision to coordinate benefits pursuant to *Franks*. In essence, the Legislature returned

persons in Chillik's situation to the *status quo ante* the *Franks* decision. That being the case, there is no reason to conclude that the Legislature intended, simultaneously, to deprive employers of the right such employers would otherwise have to apply the § 357(1) age sixty-five age reduction provisions.

V. Age Sixty-Five Deductions From The Refund

We also hold that the WCAC reached the correct result regarding Chillik's reimbursement claim, and our reasoning parallels that set forth above. The Legislature clearly intended § 354(19) to require reimbursement, with interest, of amounts previously coordinated under § 354 as a result of *Franks*. There is no reason whatever to conclude that the Legislature also meant to require reimbursement of amounts that could have been – and subsequently were – properly deducted from worker's compensation benefits pursuant to § 357(1) or any other portion of the WDCA.

VI. Conclusion

We hold that an employer, such as Ameritech, who elected to coordinate benefits, pursuant to the § 354 coordination provisions as understood prior to 1987 PA 28, *Romein v General Motors* and *General Motors Corp v Romein*, due to an employee, such as Chillik, during the *Franks* case time period, may thereafter elect to utilize the § 357(1) age sixty-five reduction provisions as to that employee. We further hold that an employer, such as Ameritech, who refunds, pursuant to § 354(19), any amounts withheld during the *Franks* case time period, pursuant to the § 354 coordination provisions as understood prior to 1987 PA 28, *Romein v General Motors* and *General Motors Corp v Romein*, may deduct from that refund any amounts attributable to the § 357(1) age sixty-five reduction provisions that the employer could have used during the *Franks* case time period to reduce the weekly benefits of an employee, such as Chillik.

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck

I concur with the result in this case, but do not wish to join in the opinion.

/s/ Martin M. Doctoroff

[1] According to the Michigan Supreme Court, "The resources saved as a result of this coördination were re-allocated by the statute to increase benefit levels generally, from two-thirds of the average weekly wage to eighty percent of after-tax wages, effective for injuries occurring after January 1, 1982." *Romein v General Motors*, 436 Mich 515, 521; 462 NW2d 555 (1990), aff'd on other grounds 503 US 181; 112 S Ct 1105; 117 L Ed 2d 328 (1992).

[2] The cases brought by Chambers and Gomez were consolidated with the case brought by Franks. *Franks, supra* at 643-644.

[3] Subsection 17 provides:

> The decision of the Michigan Supreme Court in *Franks v White Pine Copper Division*, 422 Mich. 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose.

[4] Subsection 19 provides:

> Notwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before the effective date of this subsection shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, within 60 days of the effective date of this subsection, to the employee by the employer or carrier.

[5] *Lahti*, in turn, cited *Hogan v Lawlor & Cavanaugh Co*, 286 AD 600; 146 NYS2d 119 (1955).

[6] The Court also held that 1987 PA 28 did not violate the Contract Clause of the federal constitution or the Separation of Powers Clause of the Michigan constitution. See *Romein, supra* at 540.

[7] Through the enactment of 1968 PA 227, effective July 1, 1968, the Legislature amended the above-emphasized portion of § 357(1) to cover employees who had reached or passed the age of sixty-five.

[8] We do not mean to imply, through our attempt at gentle humor with respect to the parties' stipulated facts, that such stipulations are not appropriate or useful; indeed, we commend the parties for this approach and encourage the use of stipulated facts whenever possible when appropriate.

[9] The phrase "70% benefits" refers to a procedure under MCL 418.862(1); MSA 17.237(862)(1) whereby a claim for review does not operate as a stay of payment to the claimant of 70% of the weekly benefit required by the terms of the hearing referee's award. Here, Ameritech withheld 30% of $171.00, or $51.30, from Chillik's weekly benefits and paid 70%, or $119.70, pursuant to MCL 418.862(1); MSA 17.237(862)(1). Although this withholding complicates the arithmetic in this case, it is not significant with respect to the issues and the parties do not contest its propriety.

[10] Ameritech also made a lump sum payment of weekly benefits, calculated at $119.70 per week, retroactive to May 14, 1987.

[11] That is, the original rate without the 30% withholding under the 70% benefits rule pursuant to MCL 418.862(1); MSA 17.237(862)(1).

[12] Of this amount, $24,432.48 was principal and $19,809.02 was interest.