STATE OF MICHIGAN

COURT OF APPEALS

RICHARD L. PIESER,

Plaintiff-Appellee,

v

SARA LEE BAKERY and TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY OF AMERICA,

Defendants-Appellants,

and

SECOND INJURY FUND (VOCATIONALLY HANDICAPPED PROVISION),

Defendant-Appellee.

UNPUBLISHED
March 20, 2008

No. 275608
WCAC
LC No. 05-000354

RICHARD L. PIESER,

Plaintiff-Appellee,

v

SARA LEE BAKERY and TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY OF AMERICA,

Defendants-Appellees,

and

SECOND INJURY FUND (VOCATIONALLY HANDICAPPED PROVISION),

Defendant-Appellant.

No. 277884
WCAC
LC No. 05-000354

Before: White, P.J., and Hoekstra and Schuette, JJ.

WHITE, P.J. (*dissenting*).

I respectfully dissent. I would affirm the WCAC.

The majority concludes that under the "usual" rule of limited retroactivity, *Bailey v Oakwood Hospital & Medical Ctr*, 472 Mich 685; 698 NW2d 374 (2005), should not be applied to the instant case because it was not pending when *Bailey* was decided. So concluding, the majority does not reach the res judicata issue. I disagree. I would follow *Gusler v Fairview Tubular Products*, 412 Mich 270; 315 NW2d 388 (1981), *Riley v Northland Geriatric Ctr (After Remand)*, 431 Mich 632; 433 NW2d 787 (1988), and *Pike v City of Wyoming*, 431 Mich 589; 433 NW2d 768 (1988), and hold that *Bailey* "applies to all benefits due or paid after [the date *Bailey* was decided], including benefits paid pursuant to awards entered prior to that date," *Riley* at 636, and that res judicata does not bar the relief granted by the WCAC.

Riley is closely analogous to the instant case. *Riley* addressed the change of law effected by *Gusler, supra*, which held that the adjustment provisions of MCL 418.355 of the WDCA applied only to the maximum weekly rates established in MCL 418.351(1). *Gusler* overruled *Jolliff v American Advertising Distributors, Inc*, 49 Mich App 1; 211 NW2d 260 (1973), decided eight years earlier, which had held that the minimum weekly rates established in MCL 418.351(1) were adjustable under MCL 418.355. The *Gusler* Court had held that its holding should not

> affect any disability compensation payments already made. Consequently, no recipient will be obligated to repay sums already received by reason of the erroneous computation formula we have nullified today. However, any benefits due and not yet paid or to be awarded after the date of this opinion shall be in accord with this ruling. [*Gusler*, 412 Mich At 298.]

The issue in *Riley* was "whether the directed correction of *Jolliff*'s error with respect to 'benefits due and not yet paid' after *Gusler* is precluded by the doctrine of res judicata." The *Riley* Court held that res judicata was not a bar, and that "*Gusler* applies to all benefits due or paid after December 30, 1981, the date of our opinion in that case, including benefits paid pursuant to awards entered prior to that date." 431 Mich at 636. Thus, *Gusler* decided the retroactivity question, and *Riley* both interpreted the *Gusler* Court's retroactivity decision and decided the res jucicata issue.

Pike, like *Riley*, involved decisional law, and also supports both that *Bailey* should apply to the instant case, and, more directly, that res judicata is not a bar. In *Pike*, a majority of the Court held that res judicata did not preclude a redetermination of a wife's dependency status after an intervening change in the law. *Pike*, 431 Mich at 592. A wife of an employee who had

lost the use of his legs had been awarded benefits based on the statutory provision that the wife of an injured employee, who lives with him, is conclusively presumed to be a dependent. The employer and Second Injury Fund (SIF) did not appeal. The Supreme Court subsequently struck down as unconstitutional a similar conclusive presumption in a parallel provision of the WDCA,[1] under which a widow of a deceased employee was conclusively presumed dependent. *Day v W A Foote Memorial Hosp*, 412 Mich 698; 316 NW2d 712 (1982). The employer and the SIF in *Pike* then sought a determination that the widow was not, in fact, a dependent, and that her benefits should be reduced accordingly. The widow sought dismissal based on res judicata, and the magistrate and WCAC agreed. The Supreme Court reversed, holding that "the gender based presumption in § 353(1)(a)(1) [MCL 418.353(1)(a)(i)] is also unconstitutional, [] that res judicata does not preclude a redetermination of the wife's dependency," and that its holding would "not affect dependency payments already made." *Pike,* 431 Mich at 592.

Although *Riley* and *Pike* addressed the res judicata issue and did not directly decide the retroactivity issue, in both cases the need to reach the res judicata issue was premised on the application of intervening decisional law to cases that were *not* pending when the intervening decision was rendered. In *Riley*, the retroactivity issue had already been decided in *Gusler*, and in *Pike*, the *Day* decision was applied without discussion. As the *Riley* Court stated, the reason for the application of the decisional law to payments made pursuant to awards that had already become final is that

> [i]n a wide variety of circumstances, an employee's *future* rate of workers' compensation benefits is subject to change. Events in the future may operate to increase or decrease the amount of benefits to which he is entitled. For example, as a consequence of 1980 PA 357, certain employees injured between September 1, 1965, and December 31, 1979, became entitled after January 1, 1982, to receive a supplemental benefit under § 32 to offset increases in the cost of living. Furthermore, if a disabled worker recovers, or later works at a less lucrative job, the amount of his compensation is subject to adjustment, and res judicata is not a bar.
>
> Recently, in *Pike v City of Wyoming,* 431 Mich 589; 433 NW2d 768 (1988), this Court faced a question similar in important respects to the issue presented in the cases now before us. . . . We held that res judicata did not preclude an adjustment in the amount of the employee's benefit:
>
> > Because the amount of an employee's award is never final, res judicata principles do not apply to a change in the amount of benefits the claimant receives. This is consistent with the flexible nature of the workers' compensation system which permits redetermination of the amount of a claimant's benefits. [*Pike*, p 602.]

---

[1] MCL 418.331.

> As in *Pike*, a new determination in these cases made on the basis of *Gusler* would affect only the amount of plaintiffs' benefits and not their eligibility for workers' compensation. As in *Pike*, we conclude that res judciata does not bar a redetermination of the amount of benefits to which plaintiffs are entitled. [*Riley*, 431 Mich at 640-641.]

Here, the only determination at issue is whether defendants' failure to give timely notice to the SIF relieved the SIF of its statutory liability for benefits beyond the first 52 weeks. No determinations regarding the employee's injury or eligibility for benefits are involved. In this context, the redetermination of defendants' eligibility for reimbursement-- the redetermination of who must pay after 52 weeks--is akin to the redetermination of the amount of benefits that must be paid. Application of *Bailey* to future benefits is appropriate, and the WCAC did not err.

Lastly, I do not agree with the parties' positions at argument that the WCAC erred in failing to take an "all or nothing" approach. The WCAC did not err in declining to order reimbursement retroactive to a date 52 weeks after the injury.[2] The order in the first workers compensation proceeding was not reversed in a direct appeal. That order was not challenged until the instant proceeding was filed. While res judicata did not bar the redetermination of the reimbursement issue, the redetermination should only be effective as of the date of *Bailey*. This is consistent with *Gusler*, *Pike* and *Riley*.

I would affirm.

/s/ Helene N. White

[2] Justice Brickley's discussion in *Pike, supra*, is particularly enlightening on this issue.