STATE OF MICHIGAN

COURT OF APPEALS

NORMAN E. CARSON,

Plaintiff-Appellant,

v

BANDIT INDUSTRIES INC and ACUITY MUTUAL INSURANCE CO,

Defendants-Appellees.

UNPUBLISHED
December 17, 2020

No. 350257
MCAC
LC No. 18-000012

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

Plaintiff, Norman Carson, appeals by partial leave granted the decision of the Michigan Compensation Appellate Commission (MCAC) reversing the magistrate's opinion and order denying defendant Bandit Industries' petition for recoupment of benefits overpaid to Carson.[1] For the reasons stated in this opinion, we affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS

In 2013, Bandit Industries hired Carson as a welder. Carson's job duties required him to kneel, bend, twist, and lift up to 100 pounds. On April 22, 2014, Carson was lifting a heavy part when he felt a pop in his back. Carson testified that he then felt pain and burning in his back and legs. The next day, when he reported the incident to his supervisor, he was referred to a physician. The physician who evaluated Carson two days later, recommended physical therapy and placed a 30-pound lifting restriction on Carson. Because Carson continued to experience pain, his primary care physician referred him to a spine specialist. That specialist eventually diagnosed Carson with

[1] *Carson v Bandit Industries, Inc*, unpublished order of the Court of Appeals, entered January 2, 2020 (Docket No. 350257). We denied Carson leave to appeal the MCAC's determination that the magistrate erred by finding that Carson had a work-related injury. *Id*. Thus, the only issue pertains to recoupment.

radiculopathy and recommended that Carson be off of work as of August 2014. Thereafter, Bandit Industries voluntarily began paying wage-loss benefits to Carson.

In October 2014, plaintiff was evaluated by another physician, who did a medical examination at the behest of Bandit Industries. That physician opined that there were degenerative changes in Carson's lumbar spine, and concluded that the April 2014 work incident may have aggravated Carson's degenerative disk injuries. In July 2015, Bandit Industries arranged for Carson to submit to a second medical examination, this time with a different physician selected by Bandit Industries. The new physician concluded that there was no neurological evidence of radiculopathy, that Carson had low back pain with no neurological involvement, and that Carson could return to work without restriction. Unsurprisingly, Bandit Industries opted to rely on the recommendation arising from the second medical examination. On September 2, 2015, Carson filed an application for mediation or hearing—Form A against Bandit Industries, alleging that he had sustained a work-related injury to his lower back on April 22, 2014. A response to the application was filed on October 2, 2015. Thereafter, on April 19, 2016, Bandit Industries' insurance carrier filed a petition to recoup benefits overpaid to Carson between August 5, 2014 and August 14, 2015.

A trial was held in December 2017. Carson was confronted by surveillance footage depicting him performing work for his brother's business, Carson Lawn Services. The surveillance footage depicted Carson performing the following activities: weed whacking, branch trimming, and mowing grass on a tractor. Carson admitted that almost immediately after he stopped working for Bandit Industries, he started helping his brother's business on a "limited" basis. He estimated that he did so for approximately 10 hours per week. He claimed that, primarily, his work for his brother consisted of training new employees. Carson also testified that he received no monetary compensation from his brother for his assistance with the business. Carson admitted that he did not tell any of his treating physicians of the lawn-care work he was performing for his brother's business.

As it related to the issue of recoupment, the magistrate found credible Carson's testimony that he did not receive payment for helping his brother's lawn care business, and that, as a result, "there is no basis for a recoupment." Bandit Industries appealed to the MCAC, arguing that for nearly four years Carson had concealed that he was both physically able to work and that he was, in fact, actually working for his brother's lawn care business. In its subsequent opinion and order, the MCAC held that Carson could not challenge Bandit Industries' petition for recoupment because Carson had failed to comply with MCL 418.222(3). The MCAC further held that, notwithstanding the magistrate's finding that Carson was credible when he testified that he did not receive any wages for work he performed for his brother's business, Bandit Industries had demonstrated that Carson obtained benefits as a result of fraudulent conduct. The MCAC found the matter of compensation was irrelevant and instead focused on the impact of the unrefuted testimony and documentary evidence showing that for almost four years Carson did not tell his doctors, therapists, or vocational experts that he had been working up to 10 hours per week doing landscaping, including mowing lawns, trimming overhead branches, and repeatedly bending and lifting without apparent difficulty.

This appeal follows.

II. RETROACTIVE APPLICATION OF *FISHER*[2]

While this case was pending, this Court issued its opinion *Fisher v Kalamazoo Regional Psych Hosp*, 329 Mich App 555; 942 NW2d 706 (2019). The question in *Fisher* was whether the MCAC's opinion in *Whirley v JC Penney Co, Inc*, 1997 Mich ACO 247, imposed an employee-fraud requirement on the recoupment of overpaid benefits in violation of separation-of-power principles. *Id*. at 557, 561. This Court held that it did, reasoning:

> Under the WDCA, the right of an employer or carrier to seek reimbursement from an employee for an overpayment of benefits has long been recognized by courts. See, e.g., *McAvoy v HB Sherman Co*, 401 Mich 419, 449-450 n 11; 258 NW2d 414 (1977) (explaining that MCL 418.833(2) "originally was designed and passed . . . to provide for the recoupment of benefits overpaid"); *Ackerman v General Motors Corp*, 201 Mich App 658, 660-661; 506 NW2d 622 (1993) (same). This is consistent with the oft-repeated principle that the WDCA does not authorize double compensation to an injured employee, *Reidenbach v Kalamazoo*, 327 Mich App 174, 183; 933 NW2d 335 (2019), because double recovery by an employee "is repugnant to the very principles of workers' compensation," *Hiltz v Phil's Quality Market*, 417 Mich 335, 350; 337 NW2d 237 (1983).
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> And yet, as previously recognized, seeking reimbursement for overpayment could result in some hardship to the employee. One way that the Legislature has alleviated this hardship is with a one-year statute of limitations. Under MCL 418.833(2), "When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than 1 year prior to the date of taking such action." Thus, while an employee who, through no fault of her own, may have to reimburse her employer for an overpayment of benefits, the financial impact to the employee is limited to a one-year period. See *Ross* [*v Modern Mirror & Glass Co*], 268 Mich App [558] 562[, 710 NW2d 59 (2005)] (recognizing that the one-year limit was a statute of limitations that applied to overpayment of benefits).
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> To provide additional relief to employees, the commission has further qualified the right of reimbursement by strictly limiting it to cases where the employee engaged in fraud to obtain the overpayment. Yet, nowhere in the act is there a requirement that an employer or carrier show that the employee engaged in fraud before seeking reimbursement for an overpayment. Nor was the rule adopted by formal rulemaking under delegated authority pursuant to the Administrative Procedures Act, MCL 24.201 *et seq*.
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> Instead of relying on statutory authority, the commission created the fraud requirement out of whole cloth in *Whirley v JC Penney Co, Inc*, 1997 Mich ACO 247. In this decision, the commission opined, "[I]t seems to us that voluntarily made payments, in the absence of any fraudulent behavior, should remain

[2] *Fisher v Kalamazoo Regional Psych Hosp*, 329 Mich App 555; 942 NW2d 706 (2019).

> undisturbed." *Whirley*, 1997 Mich ACO 247, p 6. The commission made this pronouncement without further explanation or citation to authority, and subsequent decisions of the Commission have simply relied on *Whirley* as support.
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> In crafting and applying this employee-fraud requirement, the commission exceeded its statutory authority. As explained by our Supreme Court on several occasions, " 'The power and authority to be exercised by boards or commissions must be conferred by clear and unmistakable language, since a doubtful power does not exist.' " *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 155-156; 596 NW2d 126 (1999), quoting *Mason County Civic Research Council v Mason County*, 343 Mich 313, 326-327; 72 NW2d 292 (1955). Neither the act nor any promulgated rule entrusted the commission with crafting an employee-fraud requirement to a recoupment action. Whether the requirement might be sound public policy is neither for the commission nor this Court to decide, but instead is left solely to the Legislature. Const. 1963, art. 4, § 1; see also *People v Babcock*, 343 Mich 671, 679-680; 73 NW2d 521 (1955); *D'Agostini*, 322 Mich App at 560. [*Fisher*, 329 Mich App at 559-561.]

Thus, the *Fisher* Court rejected the employee-fraud requirement that was invented out of "whole cloth" by the MCAC. *Id*. at 561.

If *Fisher* is applied to this case, then Bandit Industries may recoup the benefits it overpaid to Carson. Further, in the absence of an employee-fraud requirement, any review of whether Carson committed fraud in order to obtain benefits would be moot. See *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000) ("An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief.").[3] Accordingly, we *sua sponte* ordered supplemental briefing, directing the parties to address whether the *Fisher* opinion "applies retroactively to this case so that appellees are entitled to recoupment of overpaid benefits in this case regardless of whether appellant committed fraud in his application."[4]

In its supplemental brief, Bandit Industries argued that *Fisher* should be applied retroactively and contended that, as a result, without regard to whether Carson committed fraud, it was entitled to recoup the benefits it overpaid to Carson. Carson, however, ignored our directive to address whether *Fisher* should be applied retroactively and instead argued that *Fisher* was inapplicable because of the MCAC's reference to MCL 418.222(6) in its opinion and order reversing the magistrate. Yet, the MCAC's opinion also plainly relied upon a determination that Carson engaged in fraud when, for almost four years, he concealed the fact that he was physically capable of working, and actually did work, up to 10 hours per week at his brother's lawn care

[3] This is because, even if we were to reverse the MCAC's determination that Carson engaged in fraud in order to obtain the benefits, Bandit Industries would nevertheless be entitled to recoupment because employee-fraud is not a barrier to recovery in a recoupment action.

[4] *Carson v Bandit Industries, Inc*, unpublished order of the Court of Appeals, entered November 5, 2020 (Docket No. 350257).

business. The MCAC, in fact, directly cited to the employee-fraud requirement in *Whirley*. Thus, it is clear that *Fisher*'s rejection of *Whirley* is applicable to the facts. The only question is whether *Fisher* should be applied retroactively.

In *Clay v Doe*, 311 Mich App 359, 362-363; 876 NW2d 248 (2015), this Court discussed the principles regarding the retroactive application of caselaw:

> "Generally, judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved." *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620, 722 NW2d 922 (2006). "A court may limit the retroactive effect of a judicial decision . . . if 'injustice might result from full retroactivity.' " *People v Quinn*, 305 Mich App 484, 489, 853 NW2d 383 (2014), quoting *Pohutski v City of Allen Park*, 465 Mich 675, 696, 641 NW2d 219 (2002). In making a decision whether to apply caselaw retroactively, a court looks to: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Quinn*, 305 Mich App at 489 (citation and quotation marks omitted). In a civil suit, the court also looks to "whether the decision [to be applied retroactively] clearly established a new principle of law." *Pohutski*, 465 Mich at 696.

Having reviewed *Fisher*, we conclude that *Fisher* did not create a "new principle of law" or overrule binding caselaw. Instead, it examined the WDCA, and recognized that the only legislatively-imposed restriction on a recoupment action was set forth in MCL 418.833(2). *Fisher*, 329 Mich App at 560. There have been no changes to the statutory language between when *Whirley* was issued and when this Court recognized that *Whirley*'s employee-fraud requirement was fabricated out of thin air. See 1969 PA 317. Therefore, Carson could not reasonably rely on an "old rule" that imposed an employee-fraud requirement on an employer or carrier's recoupment action because no such "old rule" existed. Accordingly, we must follow the general principle that gives "judicial decisions . . . full retroactive effect," and apply *Fisher*'s holding to this case. See *Clay*, 311 Mich App at 364.

Applying *Fisher*, we conclude that Bandit Industries is entitled to proceed with its recoupment action against Carson. Given our resolution, we decline to address the now moot issues of whether the recoupment action was barred by the lack of employee fraud, and whether the word "employment" as used in MCL 418.222(3) only refers to paid employment. See *City of Jackson*, 239 Mich App at 493. We affirm the MCAC's reversal of the magistrate's opinion and order denying Bandit Industries' claim for recovery of benefits overpaid to Carson. However, we remand for calculation of the amount Bandit Industries may recoup from Carson. In its brief on appeal, Bandit Industries explains that it is seeking recoupment based upon a miscalculation of Carson's average weekly wage between August 5, 2014 until August 14, 2015. However, the record reflects that it filed its petition for recoupment on April 19, 2016. Thus, under MCL 418.833(2), Bandit Industries may only recoup benefits paid in the one-year period before it filed its recoupment petition. On remand, the MCAC shall determine the proper amount of overpaid benefits that Bandit Industries may recover from Carson, taking care to apply the one-year restriction in MCL 418.833(2). The parties may also raise other issues relevant to the calculation of the amount Bandit Industries may recover in its recoupment action.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction. No taxable costs are awarded. MCR 7.219(A).

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford