STATE OF MICHIGAN

COURT OF APPEALS

DAVID RANCILIO,

Plaintiff-Appellee,

and

OHIO CASUALTY INSURANCE COMPANY,

Intervening Plaintiff-Appellant,

v

RICHARD SHAFER BUILDER, RICHARD SHAFER and RAYMOND SHAFER,

Defendants-Appellees.

UNPUBLISHED
February 21, 1997

No. 183934
LC No. 93-002125

Before: Saad, P.J., and Corrigan and R.A. Benson,* JJ.

PER CURIAM.

Intervening plaintiff, Ohio Casualty Insurance Company ("Ohio Casualty"), appeals from the trial court's order, which held that: (1) plaintiff was entitled to no-fault benefits, and (2) Ohio Casualty was entitled to reimbursement for worker's compensation benefits it had paid to plaintiff, to the extent that its payments exceeded the amount of no-fault benefits to which plaintiff was entitled. Although the trial court correctly concluded that Ohio Casualty's reimbursement of benefits paid to plaintiff must be reduced by the amount of no-fault benefits to which plaintiff was entitled, the court erroneously found that plaintiff was entitled to no-fault benefits because he was not injured by the use of a motor vehicle. We reverse and remand.

Plaintiff brought a negligence action against defendants to recover damages for an injury he sustained in the course of his employment when the bucket of a backhoe fell on his foot, amputating his right big toe. Plaintiff received a settlement of $70,000 from defendants. As the worker's

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

compensation carrier for plaintiff's employer, Ohio Casualty paid plaintiff $22,251.36 in worker's compensation benefits, for which it sought reimbursement from plaintiff's tort recovery. The trial court granted reimbursement to Ohio Casualty of its payment of worker's compensation benefits to plaintiff and future credit against the settlement to the extent that the payment of benefits exceeded the no-fault benefits to which plaintiff would otherwise have been entitled.

I.

Ohio Casualty first contends that the amount of its reimbursement for worker's compensation benefits paid to plaintiff should be reduced only if plaintiff *actually received* no-fault benefits. Since plaintiff did not receive no-fault benefits, Ohio Casualty claims it is entitled to reimbursement of the entire amount it paid to plaintiff. We disagree.

An employer may obtain reimbursement for payments made to an employee under the Worker's Disability Compensation Act pursuant to MCL 418.827(5); MSA 17.237(827)(5). However, worker's compensation benefits received by an employee injured in a motor vehicle accident in the course of his employment substitute for no-fault benefits to the extent that the worker's compensation benefits duplicate no-fault benefits otherwise payable to the employee. *Wojciechowski v Central Transport, Inc*, 187 Mich App 116, 119; 466 NW2d 372 (1991) (citing *Great American Insurance Co v Queen*, 410 Mich 73, 96; 300 NW2d 895 (1980)). Thus, where an employer's payments of worker's compensation benefits substitute for no-fault benefits, the employer is not entitled to reimbursement for those payments under the worker's compensation act, but is limited to the reimbursement permitted a no-fault insurer under the no-fault act. *Wojciechowski, supra*, 187 Mich App at 119. On the other hand, to the extent an employer's payment of worker's compensation benefits exceeds the no-fault benefits otherwise payable, the employer is entitled to a lien against an injured employee's third-party recovery for reimbursement of the excess. *Id.*, 119-120. Moreover, it appears irrelevant whether plaintiff actually receives no-fault benefits; the question is merely whether he was *entitled* to them. See *Bialochowski v Cross Concrete*, 428 Mich 219, 222; 407 NW2d 355 (1987), overruled in part by *Winter v Automobile Club of Michigan*, 433 Mich 446; 446 NW2d 132 (1989). Therefore, the trial court properly held that Ohio Casualty's reimbursement for worker's compensation benefits paid to plaintiff must be reduced by the amount of no-fault benefits to which he was entitled regardless of the fact that plaintiff did not actually receive no-fault benefits.

II.

Ohio Casualty next contends that plaintiff was not entitled to no-fault benefits because the backhoe which caused his injury was not a motor vehicle within the meaning of the no-fault act, nor was it being used as such when he was injured. We agree. This Court reviews a trial court's findings of fact for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

The no-fault act, MCL 500.3105(1); MSA 24.13105(1), provides in pertinent part:

> Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . .

"'Motor vehicle' means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels." MCL 500.3101(2)(e); MSA 24.13101(2)(e).

The Supreme Court, in *Bialochowski, supra*, held that a cement truck which had a concrete boom attached to it was a vehicle within the meaning of the no-fault act. The plaintiff in *Bialochowski* was injured when the concrete pump permanently attached to a motorized, four-wheel cement truck exploded, causing the boom to collapse on him. At the time of the accident, the truck was parked and stabilized. *Id.*, 222-223. The Court summarily stated that: "There is no question that the equipment truck here involved meets [the definition of motor vehicle] as it is designed for operation upon a public highway by power other than muscular power and has four wheels." *Id.*, 226.

Although plaintiff here asserted that the front-end loader was "capable" of operating on a public highway, and the loader had been driven a half mile to the construction site, there was no evidence presented that the loader was "designed for operation on a public highway by other than muscular power." The cement truck in *Bialochowski* was clearly a motor vehicle as it was a "truck" designed for operation on a public highway. However, backhoe is defined as "an excavating machine with a bucket attached to a hinged boom that digs by being drawn toward the machine." *Random House Webster's College Dictionary* (1992). It is not clear whether the "machine" was operated or designed for operation on a public highway. Since there was no evidence from which the court could determine that the loader was a motor vehicle within the meaning of the no-fault act, its finding so was clearly erroneous.

III.

Finally, Ohio Casualty argues that it is entitled to recover $14,408.29 plus a future credit of $30,918.68, pursuant to the formula in *Franges v General Motors Corp*, 404 Mich 590; 274 NW2d 392 (1979). The formula for apportioning the recovery and the costs of recovery between the employer or insurer and the employee, both as to past and future benefits, was articulated in *Franges, supra*, 404 Mich 590; *Shoup v Johns-Manville Sales Corp*, 142 Mich App 189, 193; 369 NW2d 470 (1985). The trial court determined that it could not apply the *Franges* formula to calculate the amount of reimbursement to which Auto Owners was entitled because it did not know the amount of no-fault benefits to which plaintiff was entitled, which it was required to deduct. However, because plaintiff was not entitled to no-fault benefits, the trial court should have applied the *Franges* formula to the total amount of worker's compensation benefits paid to plaintiff and determined the proper amount of reimbursement.

Accordingly, we reverse and remand for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Maura D. Corrigan
/s/ Robert A. Benson