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UNPUBLISHED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.

MARKEY, J. (concurring in part and dissenting in part)

I respectfully dissent in part.

As his sole issue on appeal, plaintiff asserts that summary disposition was erroneously granted because genuine issues of material fact existed. With respect to the income plaintiff received from the date of his automobile accident on February 27, 1992 until the end of April, 1992, I agree. With respect to the income that plaintiff received after April 1992 when he resumed working in a limited capacity, I disagree, as do my colleagues, and join in their opinion.

As the majority notes it appears that a genuine issue of fact existed as to whether plaintiff's income loss was attributable to his injury, 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). Rather than pass judgment on whether plaintiff's lost income was attributable to the injuries he sustained in the February 1992 automobile accident, however, the trial court focused on what it believed to be the dispositive fact that plaintiff's net income exceeded the statutory cap under §3107(1)(b), so that, in any event, he was not entitled to wage-loss benefits from defendant. With respect to the income plaintiff received after April 1992, I agree with the majority.

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

However, I believe that for a proper analysis, one needs to look both at the nature of the income to determine if it is, in fact, "earned," and at more specific time segments as the statute clearly speaks of thirty-day increments. 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 establish that he was working at approximately fifty percent of his capacity within one month of his accident. Thus, a question of fact exists as to whether plaintiff in fact worked immediately after his injury and whether any income plaintiff received during or that was attributed to this two-month period was a gratuitous collateral payment that is not discounted or set-off against the work-loss benefits cap.[1] Accordingly, with respect to this brief window of time, I would find that the trial court erred in granting summary disposition.

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 the Insurance Bureau Bulletin 93-95. Plaintiff paid a higher premium, however, to contract for an additional $1,000 of work-loss benefits, so plaintiff is entitled to $4,077 in work-loss benefits per 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). Notably, however, any income plaintiff received as a gratuity 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's average monthly income of $9,500 in 1992 based on an annual income of $114,000 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. 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 is not entitled to work-loss benefits under §3107(1)(b) for lost income after April 1992.

Thus, unlike my colleagues, I would find that the trial court erred in granting summary disposition regarding plaintiff's claim for work-loss benefits from February 27, 1992 through April 1992.

/s/ Jane E. Markey

[1] How much income plaintiff may have received during this time is unclear. I do not believe we can simply compute or assume a monthly average income based on the $114,000 per year annual income.