

STATE OF MICHIGAN
COURT OF APPEALS

JOHN HAYDEN,

Plaintiff-Appellee,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

UNPUBLISHED

November 30, 2006

No. 264060

WCAC

LC No. 04-000085

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals by leave granted an order of the Worker's Compensation Appellate Commission (WCAC) which affirmed a magistrate's dismissal, on jurisdictional grounds, of defendant's petition for reimbursement. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was involved in an automobile accident during the course of his employment with defendant. Defendant voluntarily paid plaintiff worker's compensation benefits. Subsequently, plaintiff filed a third-party no-fault action in circuit court related to the accident. That action settled for \$700,000.

Defendant petitioned the worker's compensation agency for reimbursement under MCL 418.827, which, essentially, provides that where an injured employee recovers in a third-party tort action, the employer is entitled to reimbursement for benefits paid or payable to the employee, after an apportioned allocation of the attorneys' fees and costs incurred by the employee in the third-party action.

In denying defendant's petition, which raised issues related to the apportionment of expenses related to the recovery, the magistrate noted that the proper amount of reimbursement could be determined only after taking into consideration the expenses involved in plaintiff's third-party recovery, and defendant's proportionate share of those expenses. The magistrate concluded that the bureau lacked jurisdiction over defendant's petition because MCL 418.827 requires that the apportionment be made by the court in which the third-party action was litigated.

Defendant appealed the magistrate's decision to the WCAC. Defendant raised several challenges; however, the only argument addressed by the WCAC was defendant's claim that the

magistrate had jurisdiction to decide the reimbursement issue. The WCAC found this claim to be without merit. The WCAC concluded that where, as here, the interpretation or applicability of subsection (6) of MCL 418.827 is at issue, the circuit court was the proper venue. *Hayden v General Motors Corporation*, 2005 Mich ACO 150.

We review questions of law in a WCAC order under a de novo standard. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000). A decision of the WCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework. *Id.* at 401-402.

MCL 418.827 provides in part:

* * *

(5) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his or her dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall immediately be paid to the employee or his or her dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits.

(6) Expenses of recovery shall be the reasonable expenditures, including attorney fees, incurred in effecting recovery. Attorney fees, unless otherwise agreed upon, shall be divided among the attorneys for the plaintiff as directed by the court. Expenses of recovery shall be apportioned by the court between the parties as their interests appear at the time of recovery.

In *Seay v Spartan Aggregate, Inc.*, 183 Mich App 46; 454 NW2d 186 (1990), the plaintiff was injured in a work-related automobile accident. The defendant employer paid worker's compensation benefits. Subsequently, the plaintiff filed a third-party no-fault action against the driver of the other vehicle involved in the accident. The defendant employer was allowed to intervene, claiming a lien on any recovery under MCL 418.827(5). The action settled; however, no determination was sought or made in the trial court in regard to the apportionment of the "expenses of recovery" under MCL 418.827(6). Later, a petition was filed in the worker's compensation bureau seeking a determination regarding the proper apportionment of those expenses. The magistrate and WCAB arrived at differing apportionments. On appeal, this Court reversed, finding that the magistrate and WCAB lacked jurisdiction to make the apportionment decision. The *Seay* Court, citing MCL 418.827(5) and (6), stated that "the clear language of the current statute bestows the responsibility for dividing attorney fees and apportioning the expenses of recovery between the parties on the court, not on the Bureau of Workers' Disability Compensation." *Id.* at 51. The *Seay* Court concluded:

Because the Bureau of Workers' Disability Compensation lacked jurisdiction to apportion expenses resulting from plaintiff's third-party recovery, this Court will not address the merit of the actual apportionment made by the

WCAB at issue in this appeal. A challenge to an apportionment of expenses of a third-party court action, under the authority of MCL 418.827(6); MSA 17.237(827)(6), must come to this Court by appeal after a determination by the trial court. [*Id.*]

More recently, this Court decided *McMiddleton v Second Injury Fund*, 225 Mich App 326; 570 NW2d 484 (1997), disavowed in part 459 Mich 897 (1998), wherein the plaintiff was injured at work when she fell down an elevator shaft. The plaintiff filed a third-party action against the elevator company. The plaintiff's employer intervened in the third-party action, but the defendant Second Injury Fund did not.¹ At the conclusion of the third-party action, since the Second Injury Fund had not yet been determined to be liable for payment of any benefits to the plaintiff, no apportionment of the "expenses of recovery," in regard to the Second Injury Fund, was made by the trial court. Subsequently, the worker's compensation bureau found the plaintiff to be totally and permanently disabled, and ordered the Second Injury Fund to pay differential benefits. The Second Injury Fund paid the plaintiff benefits, but reduced the payment in light of its lien on the plaintiff's prior third-party recovery. The plaintiff objected to the reduction and filed a petition in the worker's compensation bureau. The magistrate and the WCAC, citing *Seay, supra*, concluded that jurisdiction was with the circuit court, not the bureau. On appeal, the *McMiddleton* Court reversed, finding that *Seay, supra*, was grounded in MCL 418.827(6), whereas the case at issue was to be decided under MCL 418.827(5). The *McMiddleton* Court acknowledged that the "calculation and apportionment of attorney fees and recovery expenses" could not be made by the magistrate, but stated that the case at issue did not "implicate the verboten determinations, because the Second Injury Fund did not participate in the third-party action, and therefore is not responsible for fees or costs of recovery." *Id.* at 331 n 1.

An application for leave to appeal this Court's decision in *McMiddleton, supra*, was filed in our Supreme Court. Although leave was denied, the Supreme Court also stated:

The obligation of the Second Injury Fund for costs of recovery under MCL 418.827(6); MSA 17.237(827)(6) was not contested in this case. The sentence in footnote one of the Court of Appeals opinion regarding that responsibility is disavowed. [*McMiddleton v Second Injury Fund*, 459 Mich 897; 589 NW2d 276 (1998).]

Applying *Seay, supra*, and *McMiddleton, supra*, to the case at bar, we are not persuaded that the WCAC erred. Essentially, *Seay, supra*, held that, under MCL 418.827(6), the apportionment of the expenses of recovery must be made by the "court." In *McMiddleton, supra*, as evidenced by the Supreme Court's order, there was no need for such an apportionment by the "court" because "[t]he obligation of the Second Injury Fund for costs of recovery under MCL 418.827(6); MSA 17.237(827)(6) was not contested" in that case. Here, because defendant's obligation for the costs of recovery under MCL 418.827(6) is contested,² and must

¹ However, the Second Injury Fund filed a notice of lien in the third-party action.

² Defendant makes the argument that MCL 418.827(6) is inapplicable. However, plaintiff disagrees and contends that defendant must share in the expenses of recovery under MCL (continued...)

be determined before the proper amount of reimbursement to defendant can be ordered, *McMiddleton, supra*, is distinguishable, and pursuant to *Seay, supra*, the WCAC properly concluded that the bureau lacked jurisdiction.

Defendant argues that the magistrate had jurisdiction in this matter by virtue of MCL 418.841(1), which states in part that, “[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker’s compensation magistrate, as applicable.” Defendant contends that this broad grant of jurisdiction to consider “any dispute or controversy” and “all questions arising under” the worker’s disability compensation act must certainly include the “controversy” and “questions” at issue in the case at bar. However, to the extent MCL 418.841(1) can be read as a grant of jurisdiction, that broad provision must succumb to the more specific provisions of MCL 418.827. See generally, *Apsey v Memorial Hospital (On Reconsideration)*, 266 Mich App 666, 675; 702 NW2d 870 (2005) (stating that where a specific statutory provision differs from a related general one, the specific one controls).

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

(...continued)

418.827(6).