

STATE OF MICHIGAN  
IN THE SUPREME COURT  
Appeal from the Michigan Court of Appeals  
J. Talbot, Fitzgerald and Markey

ROBERT SMITTER,

Plaintiff,

v

THORNAPPLE TOWNSHIP OF BARRY COUNTY  
and MICHIGAN MUNICIPAL LEAGUE WORKERS'  
COMPENSATION FUND,

Defendant-Appellees,

and

SECOND INJURY FUND/DUAL EMPLOYMENT  
PROVISION,

Defendant-Appellants.

Supreme Court Case No: 144354

Court of Appeals Case No: 294768

WCAC Docket No: 09-0037  
(2009 ACO #175)

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**DEFENDANT-APPELLEE'S BRIEF ON**  
**APPEAL TO THE MICHIGAN SUPREME COURT**

**Oral Argument Requested**

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**STATEMENT OF JURISDICTION**

The jurisdictional standard stated in the Defendant-Appellant's Brief is correct.

MCL § 418.861a(14) grants jurisdiction to the Michigan Supreme Court to review questions of law involved with a final order of the Workers' Compensation Appellate Commission.

Questions of fact are also governed by MCL § 418.861a(14). The Michigan Supreme Court, in the absence of fraud, shall find findings of fact made by the Workers' Compensation Appellate Commission to be conclusive.

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**STATEMENT OF QUESTION(S) INVOLVED**

**SHOULD THE MICHIGAN SUPREME COURT AFFIRM THE DECISIONS OF MAGISTRATE MCAREE AND THE WCAC BECAUSE *RAHMAN v DETROIT BD OF ED*, 245 MICH APP 103 (2001) IS CONTROLLING, DIRECTLY ON-POINT, WAS CORRECTLY DECIDED, AND PROPERLY INTERPRETED THE RELEVANT STATUTORY PROVISIONS CONCERNING THE FUND'S REIMBURSEMENT LIABILITY IN A DUAL EMPLOYMENT SITUATION**

Defendant-Appellee(s) respectfully answer:                      Yes

Defendant-Appellant answer:    No

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## STATEMENT OF FACTS

This case was initially tried before Magistrate McAree at the Grand Rapids Workers' Compensation Agency based on a stipulated set of facts. The stipulated facts at trial were as follows:

- 1) Plaintiff worked as a paid part-time firefighter for Defendant-Petitioners [Thornapple Township of Barry County]. On May 3, 2005, he tripped over a portable deck while fighting a fire. He underwent surgical repair of a left Achilles' tendon rupture on May 13, 2005.
- 2) On May 3, 2005, plaintiff had dual employment with General Motors Corporation.
- 3) On May 3, 2005, plaintiff's average weekly wage with Defendant-Petitioners was \$136.42. His average weekly wage with General Motors Corporation was \$1,118.12.
- 4) Benefits were paid by Defendant-Petitioners at the maximum rate of \$689.00 per week based on these wages, commencing May 4, 2005.
- 5) Plaintiff was released to work at the dual employer, General Motors Corporation, on November 1, 2005. Therefore, he was disabled from both employments between the period of May 4, 2005 and November 1, 2005.
- 6) Defendant-Petitioners took action by filing a request for reimbursement from the Defendant-Respondents [Second Injury Fund/Dual Employment Provision] requesting reimbursement in the amount of \$17,897.87 for the benefits paid between May 4, 2005 and November 1, 2005 inclusive. During this entire period, Defendant-Petitioners paid benefits at the maximum rate of \$689.00 per week. The Defendant-Respondent offered reimbursement in the amount of \$2,077.99, which was refused by Defendant-Petitioner.
- 7) During the period of May 4, 2005 and November 1, 2005 inclusive, plaintiff also received Sickness & Accident Benefits from Defendant-Petitioner's insurance carrier in the amount of \$800.00 per week pursuant to the policy purchased by Thornapple Township.
- 8) This benefit policy covered part-time firefighters and was in place on the date of the May 3, 2005 injury.
- 9) This benefit policy was fully funded by the Defendant-Petitioner Thornapple Township.

- 10) Defendant-Petitioner did not coordinate benefits. During the period of May 4, 2005 and November 1, 2005 inclusive, workers' compensation benefits were paid at the maximum rate of \$689.00 per week.
- 11) Defendant-Petitioner filed an Application for Hearing – Form C on February 2, 2007 seeking recoupment of benefits from the Dual Employment Provision for wage loss benefits attributable to earnings from General Motors Corporation for the period between May 4, 2005 and November 1, 2005 inclusive.

In a decision mailed from the Agency on January 20, 2009, Magistrate McAree ordered that the Defendant-Appellant Second Injury Fund/Dual Employment Provision was responsible for full reimbursement to the Defendant-Appellee Thornapple Township of Barry County in the amount of \$15,966.75 for the period between May 4, 2005 and November 1, 2005. This was based on MCL §§ 418.354 and 418.372, as well as the controlling decision of *Rahman v Detroit Bd of Ed*, 245 Mich App 103, *lv denied* 464 Mich 872 (2001), which established that the Second Injury Fund is not entitled to coordinate benefits under the Workers' Disability Compensation Act. The Fund does not argue and has not appealed on the basis that any of the above factual findings were incorrect or improper, and that issue is therefore rendered moot.

The Workers' Compensation Appellate Commission issued its decision on September 29, 2009 (2009 ACO #175). The WCAC affirmed Magistrate McAree's decision, as well as his reasoning that *Rahman* was controlling, and ordered the Defendant-Appellant Second Injury Fund to reimburse the Defendant-Appellee its full responsibility for the closed period involved, or \$15,966.75.

Defendant-Appellant Second Injury Fund then filed an Application for Leave to Appeal to the Michigan Court of Appeals. Leave to Appeal was denied by the Michigan Court of Appeals on April 5, 2010 for lack of merit in the grounds presented. On remand following an Order from the Michigan Supreme Court, the case later proceeded to oral argument before the Michigan Court of Appeals on November 8, 2011. The Michigan Court of Appeals, in an unpublished decision issued on November 22, 2011, affirmed the Magistrate and WCAC.

ARGUMENT

I. THE MICHIGAN SUPREME COURT SHOULD AFFIRM THE DECISIONS OF MAGISTRATE MCAREE AND THE WCAC BECAUSE *RAHMAN v DETROIT BD OF ED*, 245 MICH APP 103 (2001) IS CONTROLLING, DIRECTLY ON-POINT, WAS CORRECTLY DECIDED, AND PROPERLY INTERPRETED THE RELEVANT STATUTORY PROVISIONS CONCERNING THE FUND'S REIMBURSEMENT LIABILITY IN A DUAL EMPLOYMENT SITUATION

The Defendant-Appellant Second Injury Fund/Dual Employment Provision filed its Application for Leave to Appeal on the basis that MCL §§ 418.354 and 418.372(1)(b) dictated that it be ordered to reimburse the Defendant-Appellee at a lower weekly rate than ordered by the Magistrate and Workers' Compensation Appellate Commission, and that these statutory provisions were incorrectly interpreted in the prior decision of *Rahman v Detroit Bd of Ed*, 245 Mich App 103 (2001). It argued that § 418.354 coordination must be applied prior to interpreting the "benefits due the employee" language of § 418.372(1)(b).

MCL § 418.372(1)(b) states:

If the employment which caused the personal injury or death provided 80% or less of the employee's average weekly wage at the time of the personal injury or death, the insurer or self-insurer is liable for that portion of the employee's weekly benefits as bears the same ratio to his or her total weekly benefits as the average weekly wage from the employment which caused the personal injury or death bears to his total weekly wages. The second injury fund is separately but dependently liable for the remainder of the weekly benefits. The insurer or self-insurer has the obligation to pay the employee or the employee's dependents at the full rate of compensation. The second injury fund shall reimburse the insurer or self-insurer quarterly for the second injury fund's portion of the benefits due the employee or the employee's dependents.

There is no issue with the factual determinations regarding the percentages relied upon by Magistrate McAree and the Workers' Compensation Appellate Commission. The plaintiff's earnings with the non-injury employer, General Motors Corporation, constituted 89.13% of his average weekly wage. The average weekly wage with the injury employer, Defendant-Appellee Thornapple Township, constituted only 10.87% of the plaintiff's total earnings. Pursuant to the

above cited section of the WDCA, the Defendant-Appellee Thornapple Township paid the plaintiff 100% of the total benefit rate for the period between May 4, 2005 and November 1, 2005, and then sought reimbursement from the Second Injury Fund for 89.13% of the benefits due to the plaintiff that were attributable to his much higher paying position with the non-injury employer, General Motors Corporation.

This procedure is clearly established in MCL § 418.372(1)(b). The Defendant-Appellant Second Injury Fund asserts, however, that the “benefits due the employee” should not be calculated until after § 418.354 has been applied. There is nothing in the statute that mandates this method of calculation. The Defendant-Appellant Second Injury Fund cites four cases to support its position, none of which is directly applicable to the instant matter, and all of which were issued prior to the 2001 decision of *Rahman*. It should also be noted that the Fund was not a party to any of the four cases that it relies upon, and therefore the issue of the Fund’s reimbursement obligations under § 418.354 and § 418.372(1)(b) was not addressed in any of these decisions.

First, Defendant-Appellant cited the case of *Franks v White Pines Copper Division*, 422 Mich 636 (1985). This case primarily addressed whether the provisions of § 418.354 as effectuated on March 31, 1982 were applicable to employees injured prior to that date. This issue is not directly pertinent to the pending litigation, since Mr. Smitter’s alleged period of disability was in 2005. However, the Court in *Franks* did hold that:

...[A]n employer may reduce the amount of workers’ compensation benefits payable after March 31, 1982, for periods of disability *after* that date, by deducting other employer-financed benefits...which are being received by the injured employee and are attributable to the same compensable periods *after* March 31, 1982. *Franks*, 422 Mich at 664.

This is not inconsistent with *Rahman*, which, as will be discussed in greater detail below, leaves to the decision to coordinate benefits to the injury employer alone and not to the Second

Injury Fund or any other party. *Franks* stated that the employer “may reduce” the amount of workers’ compensation benefits payable by deducting other employer-financed benefits. When it does not perform those deductions, as is the case here, the Fund is precluded from reducing its own reimbursement obligation by subsequently claiming an entitlement to coordinate under § 418.354. This concept was further clarified in *Rahman* which concluded that there is no statutory provision to support the Fund’s argument:

There is *no suggestion* that the [Second Injury Fund], in a dual employment situation, may take advantage of the injury-employer’s entitlement to coordination. *Rahman*, 245 Mich App at 121 (emphasis added).

Next, the Defendant-Appellant cited to *Tyler v Livonia Pub Schs*, 459 Mich 382 (1999). This case concerned whether or not disability benefits under the Public School Employees Retirement Act were exempt from the coordination exceptions found in § 418.354(14). *Id* at 384. Neither the PSERA nor any specific interpretation of subsection 14 is at issue in the instant matter. Similarly, the Defendant-Appellant relied upon the case of *Scheuneman v GMC (on remand)*, 243 Mich App 210 (2000). *Scheuneman* addressed whether § 418.354 is preempted by the federal ERISA statute, which again is not at issue in this particular case. *Id* at 217.

Finally, the Defendant-Appellant cited the case of *Frasier v Model Coverall*, 182 Mich App 741 (1990), which addressed the retirement presumption codified at § 418.373. There is no mention in *Frasier* of § 418.354 coordination provisions, nor does this case provide any support for the Fund’s argument that § 418.354 coordination must be applied prior to determining what benefits are “due the employee” under § 372(1)(b). *Id* at 743.

The Defendant-Appellant states in its Brief that § 418.354 must be applied by the Defendant-Appellee or the “injury-employer” prior to calculating the reimbursement amount under § 372(1)(b). However, as evidenced by the four cases mentioned in previous paragraphs,

there is absolutely no case law support mandating this approach nor did the Second Injury Fund cite any specific statutory provision in support of this assertion.

The only case cited by the Defendant-Appellant that is on-point with the instant matter is that of *Rahman v Detroit Bd of Ed*, 245 Mich App 103 (2001), and the holding of that case is directly contrary to the Fund's position. In *Rahman*, the plaintiff was injured on November 28, 1991 while in the employ of the Detroit Board of Education. *Rahman*, 245 Mich at 107. At the time of his injury, he was engaged in dual employment while also working for the City of Detroit. *Id.* The Magistrate granted an open award of benefits against the Detroit Board of Education, and ordered the defendant Second Injury Fund to reimburse the defendant Detroit Board of Education its share of benefits attributable to the dual employer. *Id.*

The plaintiff in *Rahman* was also receiving a pension from the defendant Detroit Board of Education. *Id.* at 119. The Fund argued in *Rahman*, as it does here, that the amount it should have been ordered to reimburse the injury employer Detroit Board of Education should be calculated *after* the plaintiff's pension benefits were deducted from the total amount of weekly benefits owed to the plaintiff based on dual employment. *Id.* at 119-120. The Michigan Court of Appeals disagreed with the Fund's assertion, stating:

Subsection 354(1) provides that "the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits...shall be reduced by [specified] amounts...." A plain reading of the subsection indicates that the employer's obligation to pay the employee benefits may be reduced by the amount of pension the employer pays to the employee.

We reject the SIF's argument that the total amount of workers' compensation benefits payable to the plaintiff should be reduced by the amount of the pension benefits plaintiff receives from the board. Again, we consider the clear and unambiguous language of the statute. See *DiBenedetto, supra* at 402. Section 354 provides for a reduction in an employer's obligation to pay benefits if *that employer* provides the employee a pension. This reduction is clearly premised on the fact that the employer is providing another wage benefit to the employee; the statute allows the employer to coordinate that benefit with its obligation to pay worker's compensation wage-loss benefits to the employee. It is apparent from the language of the statute that the Legislature intended that the employer whose

employment caused an injury alone may take advantage of the coordination provisions. There is no suggestion that the SIF, in a dual employment situation, may take advantage of the injury-employer's entitlement to coordination. Therefore, the SIF's argument is rejected. *Rahman*, 245 Mich App at 120-21.

The Second Injury Fund's position in the instant matter – namely, that it is only required to reimburse the Defendant-Appellee the amount that would result *after* the plaintiff's Sickness & Accident benefits are deducted from the total amount of the weekly benefit entitlement – is the same argument that was rejected by the Michigan Court of Appeals in *Rahman*. As the same factual situation was presented before the Court in *Rahman*, the Court could have opted to interpret that the "benefits due the employee" language of § 418.372(1)(b) should be based solely upon the coordinated rate. It did not. Rather, the Court harmonized the statutory provisions involved to determine that once the Fund's liability is triggered by the 80% threshold found in § 418.372(1)(b), the Fund is responsible to reimburse the appropriate percentage of the total wages attributable to the non-injury employer, and cannot later reduce its own liability by claiming entitlement to § 418.354 coordination, particularly when the injury employer – as in the instant case - exercised its right not to do so.

The *Rahman* decision was fairly recently issued by the Court of Appeals in 2001, and was premised upon "the clear and unambiguous language of the statute." *Rahman* at 120. The Michigan Supreme Court denied leave to appeal the *Rahman* case following the decision by the Michigan Court of Appeals. *Id*, *lv denied* at 464 Mich 872 (2001).

There is abundant support for the argument that *Rahman* was correctly decided, and that the Michigan Court of Appeals properly weighed those considerations in arriving at its conclusions. There is no statutory authority allowing for an alternate holding. This point is expanded upon by Commissioner Granner Ries, in his concurring opinion to the Workers' Compensation Appellate Commission's decision:

**The Act does not provide the Second Injury Fund with the authority to compel an employer to assert a defense which the employer may (or may not) have and does not provide the Fund with the authority to look behind the employer's actions.** Rather, it is the employer's decision – and only the employer's decision – to determine what arguments to present regarding what is due the employee. While the Fund creatively suggests that this is making it shoulder the burden of the employer's provision of an alternative disability benefit to the employee, no such thing has occurred. Indeed, the provision of the alternative disability benefit is irrelevant to the Fund, as the Fund is merely required to reimburse its share of the worker's compensation benefit attributable to the non-injury employment. This is the theory underlying Fund liability in all dual employment cases....

If the Fund were entitled to benefit via a reduction in its reimbursement liability to account for the fact that the employer provided (i.e., paid for) an alternative disability benefit, one likely consequence is that the employer will simply stop providing the benefit that accrues to the benefit of its employees (and, derivatively, to its own benefit). If the employer did not provide the alternative benefit, the Fund's reimbursement liability would be as the magistrate provided. There is, as a result, ample reason why the Legislature would not grant the Fund the authority to inquire about, and take into consideration, what other benefits might be paid to the employee to set its reimbursement liability. 2009 ACO #175, pg. 12. (emphasis added).

The *Rahman* decision is supported by strong public policy in addition to the legislative authority and proper statutory interpretation analysis upon which it is based. If the Fund were entitled to reduce its own reimbursement liability by coordinating benefits, the one clear result would be that the injury employer would cease to offer any such alternative disability benefits such as those at issue in this case. In that circumstance, the end result would be that the Fund would remain responsible for reimbursement based on the full rate of compensation. The Fund's obligation would remain the same, with the only difference being that the injured employee would not have this supplemental benefit available during the period that he or she is unable to work.

This is of particular importance in the instant matter, where we are confronted with a highly compensated General Motors employee (\$1,118.12 weekly) who is willing to risk his health for relatively small remuneration as a firefighter for the Defendant-Appellee (\$136.42

weekly). The knowledge that he and his family will be fully compensated with workers' compensation and other disability benefits in the event of an injury provides an incentive for him to engage in this crucial service for a small township and its residents, which might otherwise be left with no fire protection whatsoever, or otherwise be forced to contract with a private firefighting service at a much higher financial cost or a more remote neighboring community that would risk longer response times. This factual scenario reflects strong policy underpinnings as to why *Rahman* was correctly decided, and is one example as to why, as Commissioner Ries observed, the legislature reserved such decision to the injury employer alone and not to the Second Injury Fund.

The Defendant-Appellant Second Injury Fund does not meaningfully distinguish *Rahman* from the instant case. While *Rahman* dealt with the issue of an employer-funded pension benefit, while the instant case deals with an employer-funded wage benefit, there is no distinction between these benefits in MCL § 354(1). As Magistrate McAree noted in his original opinion:

The Second Injury Fund takes the position that *Rahman* is not applicable because it deals with coordination of pension benefits as opposed to wage continuation benefits. However, as the petitioner [Defendant-Appellee Thornapple Township] pointed out in his oral argument, coordination of pension and coordination of wage continuation and/or disability insurance are found in not only the same section, but the same subsection of the WDCA, at 354(1). Indeed, they are in the same sentence. Opinion, at 7.

Ultimately, even irrespective of each of these policy implications, the pertinent statutory and case law would not allow the Defendant-Appellant Second Injury Fund to reduce its reimbursement liability by taking advantage of the coordination provisions in § 418.354. It does not cite any statutory or case law authority to support the assertion that it is entitled to coordination, and does not include any statutory or case law stating that the "benefits due the employee" provision in § 418.372(1)(b) must be interpreted only after § 418.354 has already

been applied. *Rahman*'s holding is based on and supported by the plain language of §§ 418.354 and 418.372(1)(b), and there has not been any interim amendments of significance to these statutory provisions since that decision. In the instant matter, although the Defendant-Appellant Fund continues to argue that its reimbursement obligations should be calculated after the "mandatory" imposition of § 354(1), the Michigan Court of Appeals properly found at Page 3 of its unpublished Opinion that "the SIF has not shown that the pertinent statutes provide a basis for the SIF to reduce its reimbursement or to force an employer to coordinate benefits." In doing so, the Court of Appeals specifically rejected any argument that the Act allows for the Fund to reduce its own reimbursement obligations by recalculating the "benefits due the employee" under § 372(1)(b).

The Fund attempts to argue that the *Rahman* holding should now be overturned as a result of statutory construction principles found in a 2008 case of *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90 (2008). The Fund asserts that *Rahman* should no longer be treated as precedent because *Rovas* dictated that agency interpretations are entitled to "respectful consideration" as opposed to "considerable deference," but "cannot conflict with the plain meaning of the statute." *See Rovas*, 482 Mich at 117-18. This particular decision was mentioned for the first time by the Fund at oral arguments before the Michigan Court of Appeals in the instant matter and it is unclear how its application would change any of the lower court interpretation in this case. The Court of Appeals rightly noted in its decision that application of *Rovas* would have no impact on *Rahman* or its interpretation of same:

At oral argument, the Attorney General asserted that *Rahman* was no longer good law because its statement of the standard of review had been overruled by *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90; 754 NW2d 259 (2008). We disagree. In *Rovas*, our Supreme Court clarified long-standing Michigan law. The proper standard of appellate review of an agency's construction of a statute "requires 'respectful consideration' and 'cogent reasons' for overruling an agency's interpretation....However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the

language of the statute at issue.” *In re Complaint of Rovas*, 482 Mich at 103, quoting *Boyer-Campbell v Fry*, 271 Mich 282, 296; 260 NW 165 (1935). Because the *Rahman* Court recognized the primacy of the Legislature’s intent as expressed in the plain language of the statute...we find only an insignificant difference in semantics between it and *Rovas*. See *Smitter v Thornapple Township*, Michigan Court of Appeals, unpublished, November 22, 2011, pg. 2, footnote 1.

The Michigan Court of Appeals was correct in describing the *Rovas* standard as not appreciably different from prior statutory construction standards. Further, it was correct in noting that even considering *Rovas*, the result in *Rahman* and the instant matter would remain unchanged since the Fund has still failed to cite any statutory authority for the proposition that it is entitled to reduce its own reimbursement obligation was coordinating benefits. The Court of Appeals stated, “we believe that *Rahman* is consistent with the statutory language, whereas the SIF’s position is not.” See *Smitter*, Michigan Court of Appeals, unpublished, November 22, 2011 at 4.

In *Rovas*, the Court reversed in part on the basis that “the plain language of the statute” involved did not support the agency interpretation. See *Rovas*, 482 Mich at 94. In the instant matter, the decision of the Workers’ Compensation Appellate Commission is consistent with the statute and *Rahman* is consistent with statute, thus clearly distinguishing them from *Rovas*. *Rovas* becomes essentially inapplicable to the instant case when considering that the plain language of the statute supports the agency interpretation in favor of the Defendant-Appellee Township under either the “respectful consideration” or the “considerable deference” standard. The outcome would be the same because the Fund – as noted by the Magistrate, WCAC and the Michigan Court of Appeals – has not cited any authority for its conclusion that it is entitled to coordinate benefits when calculating its reimbursement obligations under the Act.

Finally, it should be noted that *Rovas* itself makes absolutely no mention of the decision in *Rahman*, the Michigan Workers’ Disability Compensation Act, § 418.354, or the Michigan

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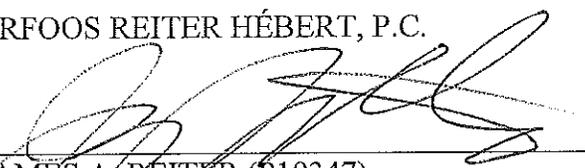
Workers' Compensation Agency/Appellate Commission in arriving at its conclusions. *Rovas* is a 2008 decision and was not cited in any fashion by the Defendant-Appellant Fund in any of the briefs before the Workers' Compensation Appellate Commission or the Michigan Court of Appeals.

**REQUEST FOR RELIEF**

For the aforementioned reasons, the Defendant-Appellees, Thornapple Township of Barry County and Michigan Municipal League Workers' Compensation Fund, respectfully request that the Michigan Supreme Court AFFIRM the Michigan Court of Appeals' Opinion and reaffirm *Rahman v Detroit Bd of Ed*, 245 Mich App 103 (2001).

Respectfully submitted,

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