

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

ROBERT SMITTER,

Supreme Court No. 144354

Plaintiffs-Appellee,

Court of Appeals No. 294768

v

WCAC No. 09-000037

THORNAPPLE TOWNSHIP OF BARRY
COUNTY,

Defendant-Appellee,

and

SECOND INJURY FUND (DUAL
EMPLOYMENT PROVISIONS),

Defendant-Appellant.

The appeal involves a ruling
that a provision of the
Constitution, a statute, rule or
regulation, or other State
governmental action is invalid.

BRIEF ON APPEAL OF APPELLANT SECOND INJURY FUND

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court granted Defendant-Appellant Second Injury Fund (Fund) leave to appeal and thus jurisdiction is vested by MCR 7.302(H)(3) and 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED

The Michigan Worker's Disability Compensation Act obligates an employer, in whose employment the injury arose, to pay the injured employee at the full rate of compensation reduced by employer-funded supplemental sick and accident policy benefits the injured employee receives. When the employee has dual employment, the Act narrowly mandates the Second Injury Fund to reimburse the employer its portion of the benefits due to an employee based on wage loss from the second job. Applying Michigan precedent, the lower court granted the employer the unfettered discretion to *not* coordinate the supplemental benefits, and required the Second Injury Fund to reimburse based on the benefits the employer voluntarily decided to pay. That ruling presents the following question:

Does the Michigan Worker's Disability Compensation Act, in a dual employment situation, recognize that the obligation due to the employee is the coordinated rate paid by the employer and thus, the Second Injury Fund is required to reimburse the employer its portion of the actual benefits due to the employee?

Appellant's answer: Yes.

Appellee's answer: No.

Michigan Compensation Appellate Commission's answer: No

Court of Appeals' answer: No.

The lower court and administrative tribunals were bound by the Court of Appeals' erroneous decision in *Rahman v Detroit Board of Education*, 245 Mich App 103; 627 NW2d 41 (2001) (*Rahman*).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

MCL 418.351 Total incapacity for work; amount and duration of compensation; limitation on conclusive presumption of total and permanent disability; determining question of permanent and total disability. (1) While the incapacity for work resulting from a personal injury is total, *the employer shall pay, or cause to be paid as provided in this section, to the injured employee, a weekly compensation of 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. The conclusive presumption of total and permanent disability shall not extend beyond 800 weeks from the date of injury and thereafter the question of permanent and total disability shall be determined in accordance with the fact, as the fact may be at that time. (Emphasis added.)*

MCL 418.354 Coordination of benefits.

(1) This section is *applicable when either weekly or lump sum payments are made to an employee as a result of liability pursuant to section 351, 361, or 835 with respect to the same time period for which old-age insurance benefit payments under the social security act, 42 U.S.C. 301 to 1397f; payments under a self-insurance plan, a wage continuation plan, or a disability insurance policy provided by the employer; or pension or retirement payments pursuant to a plan or program established or maintained by the employer, are also received or being received by the employee. Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts:*

...(b) The after-tax amount of the payments received or being received under a self-insurance plan, a wage continuation plan, or under a disability insurance policy provided by the same employer from whom benefits under section 351, 361, or 835 are received if the employee did not contribute directly to the plan or to the payment of premiums regarding the disability insurance policy. If such self-insurance plans, wage continuation plans, or disability insurance policies are entitled to repayment in the event of a worker's compensation benefit recovery, the carrier shall satisfy such repayment out of funds the carrier has received through the coordination of benefits provided for under this section. Notwithstanding the provisions of this subsection, attorney fees shall be paid pursuant to section 821 to the attorney who secured the worker's compensation recovery...

(2) To satisfy any remaining obligations under Section 351, 361, or 835, the *employer shall pay or cause to be paid to the employee the balance due in either weekly or lump sum payments after the application of subsection (1).*(Emphasis added.)

MCL 418.371 Weekly loss in wages; average weekly wage. (2) As used in this act, "*average weekly wage*" means *the weekly wage earned by the employee at the time of the employee's injury in all employment, inclusive of overtime, premium pay, and cost of living adjustment, and exclusive of any fringe or other benefits which continue during the disability. Any fringe or other benefit which does not continue during the disability shall be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount which is greater than 2/3 of the state average weekly wage at the time of injury. The average weekly wage shall be determined by computing the total wages paid in the highest paid 39 weeks of the 52 weeks immediately preceding the date of injury, and dividing by 39.* (Emphasis added.)

MCL 418.372 Employee engaged in more than 1 employment at time of personal injury or personal injury resulting in death; liability; apportionment of weekly benefits; exception. (1) If an employee was engaged in more than 1 employment at the time of a personal injury or a personal injury resulting in death, *the employer in whose employment the injury or injury resulting in death occurred is liable for all the injured employee's medical, rehabilitation, and burial benefits.* Weekly benefits shall be apportioned as follows:

...(b) 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 or her 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.*

INTRODUCTION

When a worker is injured on the job, he may be entitled to two kinds of benefits: (1) a sickness-and-accident payment under the employer's disability-insurance policy (a non-worker's compensation benefit), and (2) a worker's compensation payment. Under Michigan Workers' Disability Compensation Act, the employer is required to "coordinate" these benefits, i.e., deduct from the amount of worker's compensation owed the sickness-and-accident payment the employee received. This prevents the employee from double dipping and ensures that the Second Injury Fund is not reimbursing an employer for amounts already paid by a third-party insurer under the disability-insurance policy.

Here, Thornapple Township voluntarily elected to pay Mr. Smitter, an injured worker, both his sickness-and-accident payment and the *full* amount of his worker's compensation payment. In other words, the Township chose not to deduct from Smitter's worker's compensation payment his sickness-and-accident payment. This was a benevolent action for the Township to take; but the Township's decision does not control the amount the Second Injury Fund is statutorily required to reimburse. Rather, the Fund must pay only the coordinated benefit, regardless of the Township's benevolence.

Relying on *Rahman v Detroit Board of Education*, 245 Mich App 103; 627 NW2d 41 (2001) (*Rahman*), the Court of Appeals required the Fund to pay the Township the pro rata share of the uncoordinated benefit, even though that amount exceeded the reduced, weekly benefit required under section 354 of the Act, MCL

418.354 (A 32a.)¹ The effect was to transfer to all other Michigan employers paying worker's compensation premiums the benevolent benefit the Township voluntarily chose to give Smitter. But *Rahman* was wrongly decided and conflicts with the statutory-construction principles established in this Court's more contemporary decision of *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90; 754 NW2d 259 (2008) (*Rovas*). Accordingly, The Fund respectfully requests that this Court overrule *Rahman* and reverse the Court of Appeals' decision.

Importantly, the Fund's position is the only one that applies the plain language of the Act. This case is not about whether an employer can voluntarily choose to pay an injured worker more than the Act requires; an employer is free to make that choice. Rather, this case is about whether the employer has the additional power to be reimbursed for those extra dollars from the State administered Second Injury Fund. The Act's answer is "no."

STATEMENT OF FACTS

Nature of the Statutory Scheme and the Dispute

When a person holding more than one job sustains a work-related injury and is entitled to receive weekly workers' compensation benefits from the employer in whose service the injury occurred, section 372(1)(b) of the Act obligates the Fund to reimburse the employer for a portion of the employee's weekly benefit if the employee earned 80% or less of his or her total, average weekly wages in the employment giving rise to the injury. The reimbursable portion equals the *pro rata*

¹ "A" refers to Defendant-Appellant's Appendix.

portion of the weekly benefit attributable to the employee's earnings in the job other than the job giving rise to the injury. MCL 418.372(1)(b).

If, for example, an employee sustains a disabling work-related injury in job "A" with an average weekly wage of \$400 and also holds a second job "B" with an average weekly wage of \$200, section 372(1)(b) requires the Fund to reimburse employer "A" for one-third of the employee's weekly benefit. The Act affords the employee a weekly benefit based on the wages earned at both employer "A" and "B" but requires the Fund to reimburse "A", who must pay the benefit due since employer "B" has no obligation to pay any benefits.

Statutes are not construed in a vacuum but read in context and harmonized with related provisions. This case concerns the proper construction of the final two sentences of section 372(1)(b) – the dual employment provision, and its interplay with sections 351(1), 354(1)(b), and 354(2) of the Act – the coordination provisions. MCL 418.372(1)(b), 351(1), 354(1)(b), and 354(2).

Section 354(1) requires the employer to reduce its weekly benefit obligation by the after-tax amount of his employer-financed sickness and accident benefit. That "coordinated benefit" represents the "employer's obligation" "due" to the employee under Section 354(2). As discussed below, the phrase "benefits due the employee" found in section 372(1)(b) encompasses only those benefits that the Act *legally obligates* an employer to pay. And under section 354(1)(b), the employer is only obligated to pay an employee the weekly benefits *reduced by the supplemental benefits* also paid to the employee, otherwise known as the coordinated benefit.

The Second Injury Fund is a statutorily created trust fund housed under the auspices of the Michigan Department of Licensing and Regulatory Affairs. MCL 418.501(1). The Fund is entirely financed via assessments levied on all insurers issuing workers' compensation policies in Michigan and on all Michigan employers self-insuring their workers' compensation liability. The question presented is of significant interest to the Fund, insurers, self-insured employers, and injured employees not recipients of Thornapple's benevolence.

Stipulated Facts

The parties stipulated to and submitted to the worker's compensation magistrate the following facts:

- (1) Appellee Smitter (Smitter) worked as a paid part-time firefighter for Defendant-Petitioners. 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, Smitter had dual employment with General Motors Corporation.
- (3) On May 3, 2005, Smitter's average weekly wage with Thornapple was \$136.42. His average weekly wage with General Motors Corporation was \$1,118.12.
- (4) Benefits were paid by Thornapple at the maximum rate of \$689.00 per week based on these wages, commencing May 4, 2005.
- (5) Smitter 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) Thornapple took action by filing a request for reimbursement from the Fund requesting reimbursement in the amount of \$17,897.87 for benefits paid between May 4, 2005, and November 1, 2005, inclusive.

During this entire period, Thornapple paid benefits at the maximum rate of \$689.00 per week. The Fund offered reimbursement in the amount of \$2,077.99, which Thornapple refused.

- (7) During the period of May 4, 2005, and November 1, 2005, inclusively, Smitter also received Sickness and Accident Benefits from Thornapple's insurance carrier in the amount of \$800.00 per week pursuant to the policy purchased by Thornapple.
- (8) This benefit policy covered part-time firefighters and was in place on the date of the May 3, 2005, injury.
- (9) The Township fully funded this benefit.
- (10) *Thornapple did not coordinate benefits.* During the period of May 4, 2005, and November 1, 2005, inclusive, Thornapple chose to pay workers' compensation benefits at the maximum rate of \$689.00 per week, even though Smitter was also receiving disability-insurance payments.
- (11) Thornapple filed an Application for Hearing on February 2, 2007, seeking recoupment of benefits from the Fund under the Act's dual employment provision for wage loss benefits for the period between May 4, 2005, and November 1, 2005, inclusive based on the \$689.00 per week Thornapple paid. (A 6a.)

PROCEEDINGS BELOW

The worker's compensation magistrate directed the Fund to fully reimburse Thornapple the amount claimed, relying on *Rahman*. (A 12a.) Thus, the Fund had to pay Thornapple based on the amount Thornapple benevolently chose to pay, rather than on the "coordinated" amount the Worker's Disability Compensation Act requires. (*Id.*)

The Fund filed a “Claim for Review” with the Worker’s Compensation Appellate Commission² (Commission). The Commission affirmed, also relying on *Rahman*. (A 15a.) But the Commission acknowledged: “We agree with the Second Injury Fund (Dual Employment Provisions) that it is unfair to allow an employer to forfeit coordination and force another party to fund that choice.” *Id.*

The Fund applied for leave to the Court of Appeals and on April 5, 2010, the Court of Appeals entered its order denying leave to appeal. (A 26a.) Subsequently, the Fund asked this Court to grant leave to appeal from the Court of Appeals’ order. Instead, this Court ordered the case remanded to the Court of Appeals as on leave granted. (A 27a.)

The Court of Appeals entered a *per curiam* opinion affirming the Commission. (A 32a.) In doing so, the Court of Appeals held that section 354(1) of the Act provides the employer with exclusive coordination rights and that the Fund has no legal basis to reduce its reimbursement based on a coordinated rate. It further found only “insignificant differences in semantics” between the statutory construction principles set forth in *Rovas* and *Rahman* that did not disturb *Rahman’s* interpretation of the “plain language of [the] statute.” (A 29a.)

This Court granted leave to appeal on May 11, 2012. (A 33a.) The Fund seeks to overturn *Rahman*, require an employer to coordinate all non-worker’s compensation benefits listed under the Act, and in a dual employment setting,

² Under Executive Order No. 2011-06, the Workers’ Compensation Appellate Commission was abolished and replaced by the Michigan Compensation Appellate Commission.

require the Fund to reimburse only its *pro rata* portion of the weekly benefits that are actually due to the employee and obligated to be paid by the employer after coordination.

SUMMARY OF ARGUMENT

This case calls for adherence to the statutory construction principal that a court must rely on the common meaning of statutory terms and harmonize related provisions in a statute. Here, the Michigan Worker's Disability Compensation Act's dual employment and coordination of benefits provisions must be read together and harmonized in conjunction with the entire Act. Interpretation of these provisions impacts all Michigan employers and insurance carriers, which are assessed fees for reimbursements the Fund pays.

Relying on *Rahman*, the Court of Appeals interpreted the Act to require the Fund to reimburse Thornapple based on weekly worker's compensation benefits that Thornapple chose to voluntarily pay, rather than the weekly benefit actually due under section 354 of the Act. MCL 418.354. (A 32a.)

But *Rahman* improperly focused on certain words in the Michigan Workers' Disability Compensation Act (Act) while giving no practical effect to other pivotal terms, and placed additional economic burdens on the Fund that the Act does not contemplate. *Rahman* was wrongly decided as it (1) failed to give effect to section 372(1)(b)'s narrow imposition of liability on the Fund for only a portion of "the weekly benefits due the employee" – the coordinated benefit, (2) failed to recognize the mandatory nature of the employer's obligation under section 354(1)(b) for

purposes of determining the Fund's liability, (3) based the Fund's liability on the amount the employer *chose* to pay, instead of the amount *due* the employee under section 354(2), and (4) uses antiquated statutory construction principles now superseded by *Rovas*.

STANDARD OF REVIEW

This Court reviews the statutory construction of the Act *de novo*. *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 32; 732 NW2d 56 (2007).

ARGUMENT

I. This Court should reverse *Rahman* and hold that the Second Injury Fund must reimburse an employer based on a weekly rate reduced by employer-financed sickness and accident benefits.

An employer's obligation to pay worker's compensation benefits must be reduced by certain other benefits, including sickness and accident benefits that the employee received at the same time: "*the employer's obligation to pay or cause to be paid weekly benefits ... shall be reduced by these amounts.*" MCL 418.354(1). The Act identifies the reduced amount as the amount "*due*" to the employee: "*the employer shall pay or cause to be paid to the employee the balance due*" after coordinating the benefits. MCL 418.354(2). The Act imposes a narrow reimbursement liability on the Fund based on the weekly benefits "*due*" the employee. MCL 418.372(1)(b). And the Act does not require the Fund to reimburse the employer more than the amount *due*.

Relying on *Rahman*, a case that was wrongly decided, the Court of Appeals required the Fund to reimburse Thornapple for a portion of Smitter's weekly benefits in excess of the amount the Act deems due. *Rahman's* interpretation of the Act is incorrect as it: (1) fails to give practical effect to Section 372(1)(b)'s narrow imposition of reimbursement liability on the Fund for only a portion of "the weekly benefits due the employee," (2) fails to recognize the mandatory nature of the employer's obligation under Section 354(1)(b) of the Act for purposes of determining the Fund's liability, (3) bases the Fund's liability on the amount the employer *chose* to pay, instead of the amount *due* the employee under Section 354(2), and (4) affords "considerable deference" to the Commission's interpretation, a standard contrary to this Court's subsequent directives in *Rovas*. Provisions in the Act must be considered in context, read together, and harmonized, and an agency's construction of statutory provisions be only given "respectful consideration." *Rovas*, 482 Mich at 102. *Rahman* should be overturned, allowing the Fund to reimburse Thornapple based on the "coordinated benefit" – the amount actually "due" the employee.

A. The Act does not require the Fund to reimburse benefits that a dual employer voluntarily chooses to pay in excess of that mandated by the Act.

Section 372(1)(b) of the Act requires the Fund to reimburse Thornapple for only the *pro rata* portion of the coordinated benefit *due* to the employee. The Act's plain language readily discerns the Legislature's intent as to the Fund's obligation. Where, as here, the language is unambiguous, this Court presumes that the Legislature intended the meaning clearly expressed and will enforce that statute as

written. *People v Holder*, 483 Mich 168, 172; 767 NW2d 423 (2009). And the words of a statute must be given “their plain and ordinary meaning.” *Id.*

The dual-employment provision calls upon the Fund only when, as here, the employment that caused the injury provided 80% or less of the employee’s average weekly wage. MCL 418.372(1)(b). In that situation, the Fund’s liability is limited to the “portion *due* the employee.” *Id.* (emphasis added). The Act calls into play three other provisions, sections 351, 354, and 371 to determine what is *due*. MCL 418.351, 418.354, 418.371. And where these provisions must be read one after the other to arrive at a result, each of these provisions must be read with reference to every other provision so as to produce a harmonious whole. *Detroit v Detroit Police Officers Ass’n*, 408 Mich 410, 481; 294 NW2d 68 (1980). Neither *Rahman* nor the Court of Appeals read these three sections in concert. Instead, they interpreted in isolation only one section.

The Act can be harmonized by examining the language of these three provisions and reading them according to their “ordinary and generally accepted meaning.” *Shallal v Catholic Soc. Servs.*, 455 Mich 604, 611; 566 NW2d 571 (1997). Using these statutory construction principles, a three-step process shows that the Fund is not mandated to reimburse benefits that a dual employer voluntarily chooses to pay in excess of that mandated by the Act.

First, sections 351(1) and 371(2) require calculation of Smitter’s weekly benefit based on his total average weekly wage in *both* jobs that Smitter held when injured. Section 371(2) defines “*average weekly wage*” as the weekly wage earned in

“all” employments. MCL 418.371(2). Using this definition, section 351(1) mandates an employer to “pay, or cause to be paid” a weekly compensation of 80% of the after-tax *average weekly wage* in both jobs. MCL 418.351(1) (emphasis added). And that sum becomes the employer’s obligation to pay.

Next, section 354(1)(b) requires the employer to reduce its “obligation to pay or cause to be paid” by the after-tax amount of the employer-financed sickness-and-accident (i.e., disability-insurance) benefit. MCL 418.354(1)(b). That coordinated amount represents the “employer’s obligation” and the weekly “benefits due” the employee. MCL 418.354(2).

Finally, section 372(1)(b) requires the Fund to pay the portion of the weekly benefit *to which an employee is legally entitled*: “the benefits *due the employee*.” MCL 418.372(1)(b) (emphasis added).

The word “due” means “owing or owed,” *Frasier v Model Coverall Service, Inc.*, 182 Mich App 741,743; 453 NW2d 301 (1990). Thornapple did not owe Smmitter anything more than the coordinated benefit under section 354, MCL 418.354(1)(b). The Fund’s obligation is thus limited to the coordinated benefit *due* and not what the employer voluntarily chose to pay.

Here, the Act obligated the Township to pay Smmitter his “average weekly wage” *minus* his disability-insurance payment. The Act also obligated the Fund to reimburse the Township the pro rata share of the coordinated amount. The Township elected to pay Smmitter his full worker’s compensation rate without accounting for his disability-insurance payment. That choice was the Township’s to

make; but it did not give the Township the right to pass on the additional cost to other Michigan employers and insurers by demanding reimbursement from the Fund. Yet that is exactly what the Court of Appeals held.

B. *Rahman* failed to recognize section 354(1)'s mandate that the employer coordinate benefits.

Rahman failed to recognize the mandatory nature of the employer's obligation to coordinate benefits under this section of the Act. Section 354(1)(b) provides in relevant part "the employer's obligation to pay or cause to be paid weekly benefits *** *shall be reduced*...by the after-tax amount of the payments received ... under ... a disability insurance policy provided by the same employer from whom benefits ... are received." MCL 418.354(1)(b) (emphasis added). Section 354(1)(b)'s emphasized language *required* Thornapple to coordinate Smitter's weekly benefit because the word "shall" describes mandatory action in the workers' compensation context. *McAvoy v HB Sherman Co*, 401 Mich 419, 446-447; 258 NW2d 414 (1977).

With the exception of *Rahman*, Michigan appellate courts have consistently recognized the mandatory nature of section 354 of the Act in its requirement that employers coordinate benefits. In fact, this Court has unequivocally described section 354's application as mandatory: "*this statute clearly and unambiguously requires coordination of workers' compensation and other specified benefits for all compensable periods....*" *Franks v White Pine Copper Division, Cooper Range Co*, 422 Mich 636,651; 375 NW2d 715 (1985) (emphasis in original).

Section 354 was designed to end “duplicative payment” of workers’ compensation benefits and other benefits. *Tyler v Livonia Public Schools*, 459 Mich 382, 384; 590 NW2d 560 (1999). Thus, this Court described the weekly benefit reduction as “*mandated*” by noting the word “shall” found in section 354(1). *Tyler*, 459 Mich at 384. Accord, e.g., *Scheuneman v General Motors Corp*, 243 Mich App 210,212; 622 NW2d 525 (2000); *Frasier v Model Coverall Service, Inc*, 182 Mich App 741,742; 453 NW2d 301 (1990) (weekly benefit must be coordinated with retirement benefits.)

With the exception of *Rahman*, the Michigan courts agree that section 354 imposes mandatory coordination of weekly workers’ compensation benefits. Thus, under the Act, an employer *must* reduce its weekly workers’ compensation obligation under all the circumstances described in section 354, unless the benefit falls within an exception, none of which are applicable here.

C. The *Rahman* Court afforded the Commission a legally impermissible level of deference in its statutory interpretation.

Rahman afforded the Commission an impermissible level of deference in interpretation of the Act. And the Court of Appeals exacerbated this error by adhering to *Rahman*’s deference in direct contravention with *Rovas* and *Rowell v Security Steel Processing Co.*, 445 Mich 347, 354; 518 NW2d 409 (1994).

1. The *Rahman* Court afforded “considerable deference” while current law accords “respectful consideration” of an Agency’s statutory construction.

Since *Rahman*, this Court has clarified the proper level of deference the appellate courts should afford to administrative agencies, such as the Commission. “Agency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute.” *Rovas*, 482 Mich at 117-118. In *Rovas*, this Court afforded “respectful consideration” *but not deference* to the Public Service Commission when it overruled its statutory interpretation. This Court acknowledged that use of the word “deference” has added to the confusion: “[B]y employing words such as ‘deference’ which can imply that the judiciary must accede to the agency’s interpretation of a statute, this Court has unmistakably added to the confusion in this area of the law.” *Rovas*, 482 Mich at 107. *Rovas* significantly altered the environment in which a court reviews an administrative agency’s interpretation of a statute and demonstrates why the 2001 *Rahman* decision should no longer be treated as precedential.

The *Rahman* Court afforded the Commission’s statutory interpretation “considerable deference” and would not overturn that interpretation unless “clearly incorrect.” *Rahman*, 245 Mich App at 117. Here, the Court of Appeals likewise announced that the courts must give the Commission’s interpretation “considerable deference,” even in the face of this Court’s *Rovas* decision. (A 29a.) In a footnote, the Court of Appeals characterized the *Rovas* decision only as “an insignificant

difference in semantics,” since the *Rahman* court recognized the “primacy of the Legislature’s intent as expressed in the plain language of the statute.” (A 29a.)

But *Rahman* looked in isolation at the plain language of one of the three applicable provisions. In *Rovas*, this Court held that statutes must be interpreted within their context: “A word or phrase is given meaning by its context of setting.” *Rovas*, 482 Mich at 114. Unfortunately, neither the *Rahman* court nor the Court of Appeals looked at the plain language and harmonized sections 354(1), 354(2), and 372. *Detroit Police Officers Ass’n*, 408 Mich at 481.

The Commission in *Rahman* considered only one of the three applicable provisions. And affording such an interpretation “considerable deference” today is wrong in light of *Rovas*.

2. The *Rahman* Court failed to read sections 351, 354, and 372 in their context and harmonize it with the Act as the law requires.

The Act must be harmonized and sections 351, 354, and 372 read in their proper context. This Court has held that “words and clauses will not be divorced from those which precede and those which follow and “[w]hen construing a series of terms . . . we are guided by the principle that words grouped in a list should be given related meaning.” *Rovas*, 482 Mich at 114 (citations omitted).

“In determining legislative intent, individual provisions should be considered in conjunction with the entire act.” *Rowell*, 445 Mich at 354. Literal constructions that produce unreasonable and unjust results that are inconsistent with the purpose of the act should be avoided. *Id.* Here, the Commission acknowledged that

forcing the Fund to fund Thornapple's choice to forfeit coordination is unfair. "We agree with the Second Injury Fund (Dual Employment Provision) that it is unfair to allow an employer to forfeit coordination and force another party to fund that choice." (A 15a.)

The *Rahman* construction of section 354 in isolation produced an unreasonable and unjust result that is inconsistent with the purpose behind the Act for two reasons. *First*, in *Rahman*, the employer coordinated the weekly benefits due but only after requesting reimbursement of the full dual employment rate from the Fund. Here, no coordination occurred for a period of time. Thus, Smitter received a windfall not readily available to any other employee injured in Michigan, contrary to the legislative intent to avoid duplicative benefits. *Tyler*, 459 Mich at 389. *Second*, it is unfair to allow an employer to voluntarily forfeit coordination and shift the cost burden of the employer's choice to carriers and other self-insured employers.

Rahman and the Court of Appeals in the instant case erroneously focused solely on the Section 354(1)'s phrase "*the employer's obligation to pay or cause to be paid weekly benefits...*" *Rahman*, 245 Mich App at 120-121 (emphasis supplied). By focusing solely on that phrase, the *Rahman* Court failed to take into consideration section 354(1)'s interplay with other sections and in particular section 354(2) where the employer's obligation due to the employee is the coordinated amount and section 372(1)(b) of the Act, where it, too, discusses the employer's "*obligation to pay the employee*" MCL 418.372(1)(b) (emphasis added).

Reading the Act's pertinent sections in context of each other demonstrates the following:

1. The *average weekly wage* for an injured employee is based on the combined wages earned from all employment. MCL 418.371(2). Thus, if the employee works two jobs, the employer shall pay weekly benefits based upon the combined average weekly wage from both jobs. MCL 418.351(1).
2. Where dual employment is present, the employer where the injury occurred who provided 80% of the employee's average weekly wage or less, "has the obligation to pay" at the full rate of compensation. MCL 418.372(1)(b).
3. That employer's "*obligation to pay*" must be reduced by the after-tax value of any other wage-loss benefits paid by the employer and received by the employee, such as the sickness and accident benefits paid to Smither. MCL 418.354(1)(b),(2).
4. Since the average weekly wage is determined by the combined employers' wages, and the weekly benefits to be paid are based on that combined average weekly wage, the coordination of such weekly benefits applies to the entire weekly benefit due and not solely to the average weekly wage due by the employer where the injury occurred.
5. Whatever weekly benefit amount remaining, after this mandatory coordination, is "*due*" to the employee. MCL 418.354(2).
6. The Fund is responsible only for the pro-rata share of benefits "*due*" to the employee, not for any portion that an employer voluntarily chooses to pay. MCL 418.372(2).

The Act's proper construction, read together in context and harmonized, demonstrates that the Fund's narrow reimbursement liability is confined to its pro-rata share of the coordinated benefit rate – the amount "*due*" the employee.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals relied on a case that was wrongly decided and one that this Court should overturn. *Rahman's* interpretation of the Act is incorrect as it: (1) fails to give practical effect to section 372(1)(b)'s imposition of narrow reimbursement liability on the Fund for only its pro rata share of the "weekly benefits due the employee"; (2) fails to recognize the mandate for the employer to coordinate its obligation with other benefits received by the employee under section 354(1)(b); (3) fails to determine the benefit "due the employee" in context with section 354(2) and section 372(1)(b); and (4) contravenes this Court's current directives in *Rovas* and *Rowell* that provisions in the Act are to be considered in context, read together and harmonized with the courts only to give "respectful consideration" to an agency's construction of statutory provisions. This case affords this Court the opportunity to reverse a lower court case that was wrongly decided, provide a clear interpretation of the statutory provisions involved, and rectify the conflict in statutory construction principles between *Rovas* and *Rahman*.

Accordingly, the Second Injury Fund respectfully asks this Court to reverse the Court of Appeals' decision by overruling *Rahman v Detroit Board of Education* and to hold the Michigan Workers' Disability Compensation Act only obligates the Fund to reimburse its portion of the benefit actually due to Smitter after mandatory coordination.

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