

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

ROBERT SMITTER

Plaintiffs-Appellee

v

THORNAPPLE TOWNSHIP OF BARRY
COUNTY,

Defendant-Appellee

and

SECOND INJURY FUND (DUAL
EMPLOYMENT PROVISIONS)

Defendant-Appellant

Supreme Court No. 144354

Court of Appeals No. 294768

WCAC No. 09-000037

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

REPLY BRIEF OF APPELLANT SECOND INJURY FUND

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INTRODUCTION

The simple issue presented in this case is whether an employer may decide to pay an injured worker more workers' compensation benefits than the law requires, then shift that extra cost to the Second Injury Fund. The answer must be no.

Thornapple Township paid Smitter private disability benefits and decided not to coordinate those benefits with (i.e., deduct private-insurance benefits from) his workers' compensation benefits, as the Michigan Workers' Disability Compensation Act requires. Thornapple was free to make that choice, but the Fund should not have to pay for it.

The Fund's interpretation is based on a harmonious reading of the three statutory provisions involved, strictly construes the language in the statute, and places the burden of a financial gift to the injured worker at the doorstep of the party providing the gift – Thornapple. In contrast, Thornapple's interpretation is based on nothing more than the *Rahman* opinion, a wrongly decided Court of Appeals decision that this Court should overrule. The Fund respectfully requests that this Court reverse the Court of Appeals.

ARGUMENT

- I. **A proper calculation of liability requires Thornapple to coordinate its private benefits to Smitter before determining the apportionment of payment between Thornapple and the Fund.**
 - A. **The Act recognizes that the obligation ‘due’ to the employee is the coordinated rate, and that the Fund is required to reimburse Thornapple based on that coordinated rate.**

The Fund’s Brief on Appeal provides a lengthy and detailed explanation of the interplay between Sections 352, 354, and 372 of the Worker’s Disability Compensation Act, (Act), and why the coordination of benefits must take place *before* a determination of liability between Thornapple and the Fund can occur. (Brief on Appeal of Appellant Second Injury Fund, pp 9-12.) These statutory sections must be read in harmony and be interpreted within their context: “A word or phrase is given meaning by its context of setting.” *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008).

The Act says specifically that employers are required to reduce the amount of workers’ compensation benefits paid to employees by the amount provided to an employee through other benefit plans: “the employer’s obligation to pay or cause to be paid weekly benefits . . . shall be reduced by . . . [t]he 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). The Act refers to this reduced amount—the coordinated rate—as the amount “due” to the employee. MCL 418.354(2).

At the same time, the Act imposes a narrow reimbursement liability on the Fund (in the context of a claim for dual employment benefits) based on the weekly benefits “due the employee.” MCL 418.372(1)(b). The Fund is only required to reimburse the employer its proportional share of the amount “due the employee” under the Act. Because the coordinated rate is the amount “due the employee,” regardless of the amount the employer *chooses* to pay, the Fund cannot be liable for a sum greater than the coordinated rate. That is the end of the analysis.

B. *Rahman* failed to recognize the mandatory nature of coordination and improperly deferred to the Appellate Commission.

Thornapple continues to rely on *Rahman v Detroit Board of Education*, 245 Mich App 103; 627 NW2d 41 (2001), but the *Rahman* decision is incorrect and conflicts with the statutory construction principles this Court articulated in *Rovas*.

The Fund’s reimbursement obligation is tied to the amount of benefits actually *due* to an employee, which in this case is the coordinated benefit. With the exception of *Rahman*, Michigan courts agree that section 354 imposes *mandatory* coordination of weekly worker’s compensation benefits. E.g., *Franks v White Pine Copper Division, Copper Range Co*, 422 Mich 636; 375 NW2d 715 (1985); *Tyler v Livonia Public Schools*, 459 Mich 382; 590 NW2d 560 (1999); *Scheuneman v General Motors Corp.* 243 Mich App 210; 622 NW2d 525 (2000); and, *Frasier v Model Coverall Service, Inc*, 182 Mich App 741; 453 NW2d 301 (1990).

Thornapple goes to lengths to argue that it, and all other employers, have discretion regarding the coordination of benefits. Thornapple goes so far as to claim

that it “exercised its *right* not to do so.” (Defendant-Appellee’s Brief on Appeal to the Michigan Supreme Court, p 12 (emphasis added).) But this purported “right” is directly contrary to Section 354’s plain language. Accordingly, while Thornapple may choose to pay an uncoordinated payment, that choice cannot obligate the Fund to *reimburse* based on the uncoordinated payment.

The *Rahman* opinion did not offer a cogent textual explanation for its contrary conclusion. Rather, the opinion simply gave “considerable deference” to the Appellate Commission’s interpretation of Section 354 and refused to overturn that interpretation because it was not “clearly incorrect.” But as explained in the Fund’s initial brief on appeal, that is the wrong standard of agency deference: “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 (emphasis added). Accordingly, Thornapple has no statutory or case authority supporting its position.

C. Thornapple is wrong when it argues that the Act does not mandate the Fund’s method of benefit calculation.

Thornapple continues to argue that “there is nothing in the statute that mandates [the Fund’s] method of calculation.” (Defendant-Appellee’s Brief on Appeal to the Michigan Supreme Court, p 9.) But Thornapple does not respond to the Fund’s argument based on the plain language of the phrase “benefit due,” other than reject that position and claim that it does not have support in the statute.

Instead of grounding its position in the statutory language, Thornapple goes to great lengths to criticize the Fund's citation to four cases: *Franks v White Pine Copper Division, Copper Range Co*, 422 Mich 636; 375 NW2d 715 (1985); *Tyler v Livonia Public Schools*, 459 Mich 382; 590 NW2d 560 (1999); *Scheuneman v General Motors Corp.* 243 Mich App 210; 622 NW2d 525 (2000); and, *Frasier v Model Coverall Service, Inc.*, 182 Mich App 741; 453 NW2d 301 (1990). Thornapple argues that the cases do not support the Fund's statutory interpretation argument. That is true. But the Fund was not citing the cases for that proposition. The Fund cited the cases for the principle that Section 354's coordination language is *mandatory* and cannot be avoided, a principle that even Thornapple apparently does not contest.

To the extent that Thornapple, or any other employer, chooses not to coordinate benefits as Section 354 requires, the benefits the employer *pays* are not the same as the benefits *due*. Accordingly, it is the employer—not the Fund—that must bear the ultimate financial responsibility for that choice. Section 354's plain language dictates that result, and Thornapple offers no contrary argument.

II. Public policy concerns favor the Fund's position.

This case must be decided on principles of statutory construction and a proper recognition of the role of reviewing courts over agency decisions. But to the extent that Thornapple attempts to interject issues of public policy into this debate, those arguments are wrong.

Thornapple argues that “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.” (Defendant-Appellee’s Br on Appeal to the Michigan Supreme Court, p 13.) This statement is unsupported by reference to any portion of the record, case law, or the Act. It ignores Section 354’s mandate that these alternative disability benefits be coordinated with workers’ compensation benefits. Lastly, the statement ignores a significant reason why employers might offer “alternative disability benefits”: to protect employees against disability emanating from *non-work-related* injuries.

Conversely, public policy supports the Fund’s position. Forcing the Fund to pay for an employer’s choice not to coordinate allows an employee to receive duplicative benefits for his injuries, first from his private insurer, then again from the Fund. The Legislature designed Section 354 intentionally to *end* “duplicative payment” of workers’ compensation and other benefits. *Tyler v Livonia Public Schools*, 459 Mich 382, 384; 590 NW2d 560 (1999).

In addition, forcing the Fund to pay for an employer’s voluntary benevolence shifts the cost of that benevolence to the Fund, and by extension, the other Michigan employers and insurance companies who pay for the Fund. It is implausible that the Legislature intended such a result, and the plain language the Legislature chose in enacting Section 354 indicates that the Legislature’s intent was actually just the opposite.

CONCLUSION AND RELIEF REQUESTED

The Act requires that an employer coordinate workers' compensation benefits (i.e., deduct from such benefits the amounts paid under a private insurance contract) and obligates the Fund to reimburse only those benefits the employer is actually required to pay. The Court of Appeals' contrary conclusion in *Rahman* (1) failed to give practical effect to section 372(1)(b)'s imposition of narrow reimbursement liability on the Fund for only a portion of the "weekly benefit due the employer"; (2) failed to recognize the mandatory nature of the employer's coordination obligation under sections 354(1)(b) and 354(2) of the Act; and (3) contravened this Court's directives in *Rovas* and *Rowell*.

Accordingly, the Second Injury Fund respectfully requests that this Court reverse and overrule *Rahman*.

Respectfully submitted,

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