

STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
AND WORKERS' COMPENSATION APPELLATE COMMISSION

ROBERT ARBUCKLE, Personal Representative
of the Estate of CLIFTON M. ARBUCKLE,

S.C. NO.: 151277

Plaintiff-Appellee,

C.A. NO.: 310611

v

L.C. NO.: MCAC 11-000043

GENERAL MOTORS LLC,

Defendant-Appellant.

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AMICUS CURIAE BRIEF BY THE MICHIGAN SELF INSURERS' ASSOCIATION

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ISSUE

SHOULD THE COURT REINSTATE THE ORDER OF THE MICHIGAN COMPENSATION APPELLATE COMMISSION AS REFLECTING CORRECT RESOLUTION OF THE WORKERS' COMPENSATION ISSUES IN THIS CASE, WHICH WERE THE ONLY ISSUES PROPERLY BEFORE THE WORKERS' COMPENSATION TRIBUNALS AND COURT OF APPEALS?

Amicus Curiae, The Michigan Self-Insurers' Association (MSIA) Answers:

“Yes.”

STATEMENT OF FACTS

(Parenthetical references are to exhibits attached to defendant's application for leave to appeal, unless otherwise noted).

Plaintiff was a General Motors retiree receiving workers' compensation benefits and a disability pension from a General Motors funded pension program. Eventually, plaintiff also began receiving social security disability benefits. Combining those various benefits, plaintiff earned more money after stopping working for General Motors than his average weekly wage in 1991, the year of his work injury (Exhibit 7).

The pension plan in effect at the time of plaintiff's retirement provided that workers' compensation benefits were not to be reduced (coordinated) by General Motors' payments to plaintiff from its disability pension plan (Exhibit 2). Every three (or later four) years thereafter collective bargaining agreements amending the pension plan expired and were renewed, each continuing the prohibition against coordinating workers' compensation benefits with disability pension benefits (Defendant's application p 17, n 13).

In 2007, however, General Motors and the United Auto Workers (UAW) collectively bargained to amend the pension plan so that workers' compensation benefits paid to those retirees injured on or after October 1, 2007 could be coordinated with disability pension benefits under certain circumstances. It would depend on the outcome of a mathematical formula agreed upon by General Motors and the UAW (Exhibit 3).

In 2009 on the brink of bankruptcy, General Motors and the UAW further amended the pension plan in two ways: it extended application of the 2007 formula for determining whether disability pension payments will be coordinated with workers' compensation payments "to all retirees who retired prior to January 1, 2010, regardless of their date of retirement or injury;"

and, it removed all prohibitions and limitations on coordination of such benefits “for employees who retire on or after January 1, 2010” (Exhibit 4).

Falling into the former category, plaintiff was advised his weekly workers’ compensation benefits would be coordinated with the disability pension payment beginning in 2010, given that under the formula he was receiving more income per week not working (\$770.80) than he had while working (\$655.69). (Plaintiff’s Exhibit 1 in Support of March 10, 2011 Worker’s Compensation Board of Magistrates’ Opinion).

Plaintiff challenged the reduction in his weekly workers’ compensation benefits by requesting a hearing (called a Rule V Hearing) before the Director of the Worker’s Compensation Agency. Plaintiff claimed the coordination ran afoul of section 354 (11) of the Workers’ Disability Compensation Act. MCL 418.354(11) [quoted in the argument portion of this brief] (Exhibit 6). The Director agreed with plaintiff (Exhibit 6).

Defendant appealed the Director’s ruling to workers’ compensation’s Board of Magistrates. The Magistrate found the coordination formula did not violate Section 354(11), but ruled in plaintiff’s favor nevertheless holding that the UAW had no authority to bargain for plaintiff in 2009 (Exhibit 7).

Defendant appealed to the Michigan Compensation Appellate Commission. The Appellate Commission ruled in defendant’s favor holding the coordination formula did not offend Section 354(11) and that under MCL 418.354(14) [quoted in the argument portion of this brief] there no longer was any viable prohibition preventing coordination of plaintiff’s workers’ compensation and disability pension benefits (Exhibit 8, p 6). The Appellate Commission did not decide whether plaintiff’s union could bargain for him finding “the UAW’s authority to bargain for plaintiff does not alter the result in this case.” (*Id.*).

Plaintiff appealed to the Court of Appeals, which granted leave. The Court reversed the Appellate Commission and held for plaintiff on the same basis as the Magistrate, *i.e.*, plaintiff's union did not have the authority to bargain for plaintiff in 2009 (Exhibit 1).

Defendant has applied to this Court for leave to appeal. *Amicus curiae*, the Michigan Self Insurers' Association, offers the following argument in support of defendant's application.

ARGUMENT

THE COURT SHOULD REINSTATE THE ORDER OF THE MICHIGAN COMPENSATION APPEALTE COMMISSION AS REFLECTING CORRECT RESOLUTION OF THE WORKERS' COMPENSATION ISSUES, WHICH WERE THE ONLY ISSUES PROPERLY BEFORE THE WORKERS' COMPENSATION TRIBUNALS AND COURT OF APPEALS.

The Michigan Self Insurers' Association [MSIA] agrees with defendant's argument that the Court of Appeals and trial Magistrate exceeded their jurisdiction by addressing questions reserved for the federal courts. The only appropriate questions before the Court of Appeals and lower tribunals were those related to the Michigan's Worker's Disability Compensation Act (WDCA). Since the MSIA is a group devoted exclusively to Michigan workers' compensation issues, MSIA will address only those issues in this brief.

IMPORTANCE OF THIS CASE

Before addressing those issues, a preliminary word is necessary with respect to the importance of this case. The Court of Appeals' decision is unpublished and, as such, not binding precedent. MCR 7.215(C) (1). Given that, there may be a tendency to dismiss or diminish the impact of the ruling below. MSIA wishes to dispel any such idea.

There are a number of reasons why this case is significant. The Court of Appeals' holding that plaintiff's union did not bargain for him, given his retiree status, is of obvious significance to all employers, unions, and retirees, as explained by defendant in briefing. No effort by the Court of Appeals to soften the impact of its ruling by limiting it to "the specific circumstances of this case" changes that reality (CA Slip Op at p 2). Indeed, the Court never specifies what makes this case unique rather than typical. To the extent the Court suggests the case turns strictly on the absence of "evidence that plaintiff authorized the UAW to act as his

representative” (CA Slip Op at p 5), the fact is: union representation was not the issue presented by plaintiff in commencing this action (Plaintiff’s Request for Compliance Hearing signed July 1, 2010; See also, Claimant’s Brief Seeking Defendant’s Compliance With Workers’ Disability Compensation Act, signed July 1, 2010). “The *only* issue submitted for consideration was...improper use of SSDIB [social security disability benefits] as a setoff to the weekly benefits award” under MCL 418.354 (11), (Rule V Order, mailed November 3, 2010, p 4, emphasis added). Plaintiff’s complaint “was very specific and limited” at the outset (*Id.* at p 2). The Director of the Workers’ Compensation Agency raised (but did not decide) the union representation issue and it was later used on appeal by the Magistrate on as the sole basis for his decision (Rule V Order pp 4-5; Magistrate’s Opinion, p 10). No wonder then defendant offered no proofs on an issue not pled by plaintiff (and an issue General Motors maintained all along was one exclusively for the federal courts) (See *e.g.* Rule V Order p 2, n 1).

Besides the union representation issue, the case has a real impact on workers’ compensation. General Motors advises it currently has approximately 1,500 open claims like the instant case, *e.g.*, claims where it seeks to coordinate retirees’ disability pensions under the formula at issue here.¹ Resolution of this case will affect those claims. While one could say the Michigan Compensation Appellate Commission (MCAC) and workers’ compensation Magistrates are not technically bound to follow the Court of Appeals’ ruling given its non-precedential character, consider how unlikely and difficult that would be as a practical matter. Can the MCAC and Magistrates realistically be expected to reach a result opposite that of the Court of Appeals? If they did, appeals would be certain, all while over a thousand similar claims crowd the state’s workers’ compensation system.

¹ This figure was relayed to counsel for MSIA on May 1, 2015 by General Motors’ personnel overseeing their Michigan workers’ compensation claims, along with input from General Motors’ third-party administrator, (cont’d)

Consider as well other employers may now be contemplating collective bargaining agreements affecting retirees receiving workers' compensation. The Court of Appeals' ruling, at a minimum, chills pursuit of any such negotiations.

In sum on this point, this case is significant for what it says about the scope of union bargaining, for what it says to all similarly situated General Motors retirees, and for what it says to the operation of the state's workers' compensation system.

TWO PROVISIONS OF THE WORKER'S DISABILITY COMPENSATION ACT

-Section 354 (11), The Social Security Disability Benefit Provision

Two provisions of the WDCA are at the center of the current dispute. Section 354(11) is the provision – the only provision – that served as the basis for plaintiff commencing this case.

It reads:

“Disability insurance benefit payments under the social security act shall be considered to be payments from funds provided by the employer and to be primary payments on the employer's obligation under section 301(7) or (8), 351, or 835 as old-age benefit payments under the social security act are considered pursuant to this section. The coordination of social security disability benefits shall commence on the date of the award certificate of the social security disability benefits. Any accrued social security disability benefits shall not be coordinated. However, social security disability insurance benefits shall only be so considered if section 224 of the social security act, 42 USC 424a, is revised so that a reduction of social security disability insurance benefits is not made because of the receipt of worker's compensation benefits by the employee.” MCL 418.354(11).

Plaintiff argues General Motors' coordination of his weekly workers' compensation benefits with a portion of his disability pension benefits is improper because the coordination formula refers to his social security disability benefits.

Sedgwick (see attached affidavit).

General Motors' coordination formula is:

Weekly workers' compensation rate
 + initial social security disability benefit (expressed in a weekly amount)
 + initial GM disability pension amount (expressed in a weekly amount)

TOTAL

If this TOTAL exceeds the employee's average weekly wage at the time of injury, then the excess disability pension (and that excess only) is coordinated with weekly workers' compensation benefits under MCL 418.354(1).

Under plaintiff's view, the formula's reference to social security disability benefits runs afoul of Section 354(11)'s last sentence, *i.e.*, social security disability benefits were improperly "so considered." Plaintiff cited no authority for his reading of Section 354(11). And, plaintiff's reading is textually unsupportable.

Section 354(11) explains an employer *can* coordinate social security disability benefits because they "shall be considered to be payments from funds provided by the employer." MCL 418.354(11) [first sentence]. But, the provision adds that social security disability benefits "shall only be so considered if" the United State Congress amends the social security act to disallow its present reduction of social security disability benefits for state workers' compensation payments. This proscription is obviously meant to prevent a double dip reduction (*i.e.*, subtracting workers' compensation benefits from social security disability benefits *and simultaneously* subtracting such social security benefits from workers' compensation benefits). There is no dispute Congress has not amended the social security act to stop the reduction the federal government takes for state workers' compensation payments. Consequently, social security disability benefits cannot presently be "considered to be payments from funds provided by the employer". And, as a result, social security disability benefits cannot presently be coordinated.

That said, the salient point for present purposes is: Section 354(11) does not say social security disability benefits cannot be referenced in a formula determining how much of a disability pension can be coordinated.² The fallacy of plaintiff's argument can be illustrated by considering this: If defendant and plaintiff's union had referenced something other than social security disability benefits in the formula, say the state's average weekly wage, could it be said defendant is thereby coordinating the state average weekly wage? The answer is obvious. Plaintiff's social security disability benefits are but an ingredient in the formula's calculation of how much – if any – disability pension payments may be coordinated. Mere mention of social security disability benefits in a formula does not mean such benefits were considered in the sense the words “so considered” are used in Section 354(11)'s last sentence. Read in context the words “so considered” clearly refer back to the “considered” in 354 (11)'s first sentence. That is, social security disability benefits may be considered like old age social security benefits only if Congress acts.

In sum on this point, defendant is not reducing its workers' compensation payments by social security disability benefits. It is reducing its payments by a portion of the company funded disability pension benefit. The trial Magistrate ruled correctly on this particular point, saying: “The use of Plaintiff's SSDIB (social security disability insurance benefit) is only a tool to decide how much of the disability pension could be coordinated.” (Magistrate's opinion, p 7, parenthetical words added). And, the Michigan Compensation Appellate Commission correctly held:

² There is no dispute company funded disability pensions are an enumerated company provided benefit in the coordination provision of the WDCA, MCL 418.354 (1). There is likewise no dispute defendant entirely funds the disability pension paid plaintiff.

“Plaintiff’s interpretation of the single phrase prohibiting “consideration” distorts the plain meaning of the entire statute. The statute clearly prevents a double reduction of payments that could lead to elimination of all payments. The section does not preclude using the social security disability amount to determine the amount of disability pension to coordinate.” (MCAC Slip Op at p 6).

-Section 354(14), Prohibitions Against Coordinating Employer Disability Pensions

The other provision of the state workers’ compensation statute relevant to this matter is Section 354(14). MCL 418.354(14) says:

“This section does not apply to any payments received or to be received under a disability pension plan provided by the same employer, which plan is in existence on March 31, 1982. Any disability pension plan entered into or renewed after March 31, 1982 may provide that the payments under the disability pension plan provided by the employer shall not be coordinated pursuant to this section.”

This is an important provision because it illustrates coordination of disability pensions is the norm. Coordination is in fact mandatory. *Smitter v Thornapple Township*, 494 Mich 191, 138; 833 NW2d 875 (2013). Coordination of disability pensions can only be avoided where there is an extant prohibition in a disability pension plan explicitly prohibiting the coordination from occurring. That is, an employee must be able to point to something in the plan whereby the employer agrees that the otherwise automatic coordination is *not* to take place. If an employee cannot do so, then the coordination occurs. *Murphy v City of Pontiac*, 221 Mich App 639, 643-644; 561 NW2d 882 (1997); *Colegrove v Kroger Co*, 1996 ACO #509; 1996 Mich WCACO 2468, 2471; *Rouser v City of Pontiac*, 1995 ACO #220; 1995 Mich WCACO 1090, 1092.

Here, plaintiff originally could and did point to such a prohibition. It was the September 17, 1990 letter agreement amending the 1990 GM-UAW Pension Plan. It said no coordination of disability pension can occur. The prohibition in that 1990 letter agreement continued “until

termination or earlier amendment of the 1990 Collective Bargaining Agreement” (Exhibit 2 attached to defendant’s application.) The same prohibition continued in subsequent collective bargaining agreements every 3 and (later) 4 years until the employer decided it could no longer afford to forego this offset (See, defendant’s application, p 17, n 13 and Exhibits 3 and 4 attached to defendant’s application.)

Specifically, in 2009, defendant – two weeks before filing for bankruptcy – and plaintiff’s union agreed to end the prohibition against coordinating the disability pensions for employees retiring on or after January 1, 2010 and *partially* end the prohibition against for all retirees who retired prior to January 1, 2010. For those pre- January 1, 2010 retirees the formula described earlier would apply and the retiree may or may not experience a disability pension offset depending on the math (Exhibit 4 attached to defendant’s application).

It bears emphasizing that General Motors could have insisted on the *full* coordination permitted by statute for pre-January 1, 2010 retirees, but did not. Instead, it self limited the amount of its offset for those retirees by agreeing with the union to coordinate their disability pension only to the extent the initial pension amount (after being added to their weekly workers’ compensation and initial social security disability benefit) might exceed their average weekly wage at the time of injury.³

It is worth pausing here to consider as an aside the fallout to General Motors for *not* insisting on the full allowable offset for pre-January 1, 2010 retirees. Besides the obvious loss of financial savings full coordination would have afforded, the employer now continually faces

³ Plaintiff in briefing argues as a matter of policy that inflation has had an erosive effect on his weekly workers’ compensation benefits based, as they are, on his average weekly wage while working. When so moved, the legislature can add (and has added) inflation supplements to weekly workers’ compensation benefits. See, MCL 418.352.

charges the coordination formula is wholly improper (despite being approved by the UAW); has been assessed a penalty by the former Director of the Worker's Compensation Agency for coordinating pursuant to the formula; incurred the costs and expenses inherent in years of litigation; and, prompted a court to rule unions cannot bargain away an advantage retirees possess at the time of retirement (but the same retirees may, nevertheless, enjoy increases in their pension benefits via their union's collective bargaining efforts in subsequent years).

Consider as well the 1990 collective bargaining agreement said the prohibition against coordination would continue only "until termination or earlier amendment of the 1990 Collective Bargaining Agreement." (Exhibit 2, attached to defendant's application). If the collective bargaining agreement was not repeatedly amended thereafter over the years, then the 1990 prohibition against coordination "terminat[ed]" when the 1990 Collective Bargaining Agreement ended. Under such reasoning, plaintiff cannot now point to anything to stop full coordination from occurring. That is, by this reckoning, there is no currently extant prohibition stopping full coordination because the 1990 letter agreement terminated. This irony was not lost on the Michigan Compensation Appellate Commission. (MCAC Slip Op at p 6).

The Court of Appeals erred by embracing the idea that plaintiff's pension plan was unalterable. The Court explicitly "agree[d] with the reasoning of Magistrate Birch," who had relied on "*Yard-Man*" i.e. *International Union, United Auto, Aerospace & Agricultural Implement Workers of Am. v Yardman, Inc.* 716 F2d 1476 (6th Circuit 1983) for his holding (CA Slip Op at p 5; Magistrate's opinion pp 8 – 10). The United States Supreme Court has since abrogated *Yardman* in *M & G Polymers USA, LCC v Tackett*, 135 S Ct 926 (2015). Furthermore, the Court of Appeals overlooked the fact the pension plan is amended via collective bargaining agreements through the years and an amendment is "applied as if it were

therein incorporated” in the pension plan. (See *e.g.* Exhibit 2 attached to defendant’s application).

Finally, plaintiff in briefing to this Court makes much of where the burden of proof lies. Plaintiff argues the burden is on the employer to prove its coordination complies with the law. The question is more involved than that. Coordination applies automatically by operation of law, as explained earlier. *Smitter, supra* at 138; *Franks v White Pine Copper Division*, 422 Mich 636, 660-661; 375 NW2d 715 (1985). All an employer need do in circumstances like this is rely on the self executing statute and, if challenged, demonstrate the employee’s receipt of benefits qualifying for coordination (*e.g.*, company funded pensions, wage continuation payments, disability pensions benefits, *etc.*) and provide the arithmetic. MCL 418.354 (10); *Franks, supra* at 660-661. In cases like this where the employee does not dispute receipt of a company funded disability benefit and does not dispute the arithmetic, the burden is on the employee to point to a currently viable prohibition to stop coordination of the disability pension. MCL 418.354 (14) (last sentence). Here, plaintiff could not do so.

For these reasons, on the only issues properly in the state system, the Michigan Compensation Appellate Commission properly ruled and the Court should reinstate its order.

RELIEF REQUESTED

The Michigan Self Insurers' Association, *amicus curiae*, requests the Court peremptorily reverse the Court of Appeals and reinstate the order of the Michigan Compensation Appellate Commission or, in the alternative, grant defendant's Application for Leave to Appeal.

Respectfully submitted,

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