2005 ACO #150

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JOHN HAYDEN,
PLAINTIFF,

V DOCKET #04-0085

GENERAL MOTORS CORPORATION,
SELF INSURED,
DEFENDANT.

APPEAL FROM MAGISTRATE SLOSS.

MARK GRANZOTTO, JOEL L. ALPERT AND LAWRENCE E. GURSTEN FOR PLAINTIFF,
MARTIN L. CRITCHELL FOR DEFENDANT.

OPINION

WILL, COMMISSIONER

On November 14, 2002, defendant General Motors Corporation filed a petition for reimbursement of benefits paid and credit towards future liability resulting from plaintiff's settlement of a third party claim. The case was heard by Magistrate Andrew G. Sloss on February 17, 2004 in Mount Clemens.

No testimony was taken. The claim was submitted to the magistrate on stipulated facts. The magistrate's decision was mailed March 1, 2004. The magistrate denied defendant's petition, saying the Board of Magistrates lacks jurisdiction to make the determinations sought by defendant. The magistrate concluded his decision with his analysis and conclusion:

> This matter was submitted on Stipulated Facts (See Exhibit AA to Brief of Petitioner General Motors Corp.), which are hereby incorporated and found as fact. Essentially, Petitioner has voluntarily paid workers compensation benefits to Respondent since September 1, 1999, for an injury incurred in a work-related automobile accident. Respondent has settled a third-party no-fault claim relating to the same incident for a total of $700,000. Petitioner now seeks reimbursement under subsection 5 of §827 of the Act, which states as follows:
>
> > "In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his or her dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery,

> shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall immediately be paid to the employee or his or her dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits." [MCL 418.827(5); MSA 17.237(827)(5)].

This section makes it clear that the workers compensation carrier is entitled to reimbursement from any third-party recovery. However, the amount of reimbursement must take into consideration the expenses involved in that recovery, such as attorney fees, and the carrier must be responsible for its proportionate share. MCL 418.827(6); MSA 17.237(827)(6); *Franges v General Motors Corp*, 404 Mich 590; 274 NW2d 392 (1979). The Bureau is without jurisdiction to divide the attorney fees and apportion the expenses of recovery between the parties. *Seay v Spartan Aggregate, Inc*, 183 Mich App 46, 51; 4545 NW2d 186 (1990). Rather, the court where the third-party action was litigated is the appropriate forum to determine these issues. *Id*.

Petitioner cites *McMiddleton v Great Lakes Steel*, 225 Mich App 326; 570 NW2d 484 (1997), for the proposition that the Magistrate may take the apportionment because no *Franges* calculation is required. (See Reply Brief of Petitioner General Motors Corporation, p 3). However, the language cited by Petitioner from *McMiddleton* by Petitioner in support of this position was specifically "disavowed" by the Supreme Court in its order denying leave to appeal in that case:

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

Accordingly, the parties must first obtain a determination from the court in the jurisdiction where the third party action was litigated before Section 827 of the Act can be applied in this forum. Petitioner's Form 104C Petition to Recoup is therefore denied.[1]

Defendant filed a claim for review. On May 11, 2004 defendant filed its brief on appeal raising four issues:

[1] Magistrate's decision, pp 1-2.

I. THE BOARD OF MAGISTRATES HAS SUBJECT MATTER JURISDICTION TO ANSWER THE QUESTION OF WHETHER THE WORKERS' DISABILITY COMPENSATION THAT WAS PAID BY THE EMPLOYER WHEN THE ACTION IN TORT ENDED MUST BE REIMBURSED FROM WHAT THE EMPLOYEE ACTUALLY RECEIVED FROM THE SETTLEMENT WITH THE TORTFEASORS.

II. THE WORKERS' DISABILITY COMPENSATION THAT WAS PAID BY THE EMPLOYER WHEN THE ACTION IN TORT ENDED MUST BE REIMBURSED FROM WHAT THE EMPLOYEE ACTUALLY RECEIVED FROM THE SETTLEMENT WITH THE TORTFEASORS.

III. THE WORKERS' DISABILITY COMPENSATION THAT WAS PAID BY THE EMPLOYER AFTER THE ACTION IN TORT ENDED MUST BE REIMBURSED FROM WHAT THE EMPLOYEE RETAINED AFTER REIMBURSING THE EARLIER WORKERS' DISABILITY COMPENSATION.

IV. THE WORKERS' DISABILITY COMPENSATION THAT THE EMPLOYER PAYS AFTER THE ACTION IN TORT ENDED MUST BE CREDITED BY WHAT THE EMPLOYEE ACTUALLY RECEIVES FROM THE SETTLEMENT WITH THE TORTFEASORS THEN.

The magistrate decided only the first issue quoted above. The defendant supported its claim that the Board of Magistrates has subject matter jurisdiction with the following:

> The jurisdiction of the Board to hear and decide a question is established by a statute in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101, et seq., that states that, "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable." MCL 418.841(1), first sentence.
>
> In the case of *McMiddleton v Second Injury Fund*, 225 Mich App 326; 570 NW2d 484 (1997), lv den 459 Mich 897; 589 NW2d 276 (1998), the Court of Appeals held that the text in section 841(1), first sentence, all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable, allowed subject matter jurisdiction to decide the validity and extent of the right of reimbursement and credit by the terms of MCL 418.827(5). The Court of Appeals ruled in *McMiddleton, supra*, 331, that,
>
> > "[b]efore *Seay*, this Court had found that the Worker's Compensation Bureau is vested with authority to allocate credit from third-party tort judgments to insurers that paid worker's compensation benefits.

> *Logan v Edward C Levy Co*, 99 Mich App 356, 360; 297 NW2d 664 (1980); *Hakkinen v Lake Superior Dist Power Co*, 54 Mich App 451, 453; 221 NW2d 202 (1974). *Seay* did not purport to overrule the prior holdings of this Court. Accordingly, we conclude that the Worker's Compensation Bureau, the administrative body vested with the power to review '[a]ny dispute or controversy concerning compensation or other benefits' and resolve 'all questions arising under [the Worker's Disability Compensation Act],' MCL 418.841(1); MSA 17.237(841)(1), *Aetna Life Ins Co v Roose*, 413 Mich 85, 90-91; 318 NW2d 468 (1982), is jurisdictionally empowered to determine the validity of a benefits provider's lien arising under MCL 418.827(5); MSA 17.237(827)(5)."

This ruling by the Court of Appeals in *McMiddleton, supra*, 331, was not disturbed by the Supreme Court when plenary review was sought. The Supreme Court denied leave to appeal from the decision by the Court of Appeals in the case of *McMiddleton, supra*, about section 841(1), first sentence. The Supreme Court only criticized the decision by the Court of Appeals about the application of another statute in the WDCA, MCL 418.827(6), which was expressed in the case of *McMiddleton, supra*, 331, n 1, by stating that, "[t]he obligation of the Second Injury Fund for costs of recovery under MCL 418.827(6); MSA 17.237(827)(6) was not contested in this case. The sentence in footnote one of the Court of Appeals opinion regarding that responsibility is disavowed."

The Commission has always recognized that the Board does have subject matter jurisdiction to establish the reimbursement and credit to compensation when the terms of the recovery from tortfeasors is already established. *Hernandez v General Motors Corp*, 1998 Mich ACO 601. *Parker v Michigan Millers Mutual Ins Co*, 1999 Mich ACO 22. *Feister v Baseline, Inc*, 2000 Mich ACO 497. *Vanderbunte v Pulpwood & Forestry Products, Inc*, 2002 Mich ACO 62. The Commission said in the case of *Vanderbunte, supra*, "[the employer] argues that [the Board] lacks [the] authority to apply the *Franges* formula. *McMiddleton, supra*, clearly grants the [Board] that authority . . ."

In this case, the Employer filed an application for mediation or hearing to claim the reimbursement and credit from the recovery that the Employee obtained from the Tortfeasors which was within the jurisdiction recognized by the Court of Appeals in *McMiddleton, supra*.

The Board refused jurisdiction based on the repudiation of the decision by the Court of Appeals in the case of *McMiddleton, supra*, 331, n 1, by the Supreme Court by stating in *Hayden v General Motors Corp*, unpublished opinion of the Board of Magistrates, decided on March 1, 2004 (Docket no. 030104016), slip op., 2,

". . . the language cited by [the Employer] from *McMiddleton* by [the Employer] in support of this position was specifically 'disavowed' by the Supreme Court in its order denying leave to appeal in that case:

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

Accordingly, the parties must first obtain a determination from the court in the jurisdiction where the third party action was litigated before Section 827 of the Act can be applied in this . . ."

This was errant because the Supreme Court "disavowed" the declaration of the Court of Appeals in the case of *McMiddleton, supra*, 331, n 1, because in that particular case, there was never a dispute that the party that claimed reimbursement and credit of compensation was actually responsible for some of the costs of the recovery from the tortfeasors by stating, "[t]he obligation of the Second Injury Fund for costs of recovery under MCL 418.827(6); MSA 17.237(827)(6) was not contested in this case. The sentence in footnote one of the Court of Appeals opinion regarding that responsibility is disavowed." *McMiddleton v Second Injury Fund*, 459 Mich 897; 589 NW2d 276 (1998). (emphasis supplied) The Supreme Court did not vacate the ruling by the Court of Appeals in *McMiddleton, supra*, 331, n 1, because it was wrong or could never apply.

Unlike the particular situation in the case of *McMiddleton, supra*, in this case, the obligation of the Employer for the costs of the recovery from the Tortfeasor is contested which allows the application of the ruling by the Court of Appeals in *McMiddleton, supra*, 331, n 1.

The Commission must reverse the decision by the Board as an error of law as the question of the subject matter jurisdiction is a question of law. *Ryan v Ryan*, 260 Mich App 315; - NW2d - (2004). The Court of Appeals said in the case of *Ryan, supra*, 331, that, "[w]hether a trial court had subject-matter jurisdiction over a claim is a question of law . . ."

The Commission cannot defer to the decision by the Board as a finding of fact which is supported by competent, material, and substantial evidence because the question of jurisdiction depends upon the allegations and not upon the facts. *Ryan, supra*, 331. In the case of *Ryan, supra*, 331, the Court of Appeals reiterated the

earlier ruling in the case of *Altman v Nelson*, 197 Mich App 467; 495 NW2d 826 (1992) and a host of others by stating that,

> "[j]urisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending. The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry. Jurisdiction always depends on the allegations and never upon the facts. [*Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992) (citations omitted).]"

The Commission may remand the case for the Board to answer the questions which were propounded or may not and answer the questions which were propounded because there is no dispute about the facts. The Commission can establish the law and then apply that to the facts just as well as the Board.[2]

In reading the balance of defendant's brief on appeal, we note that essentially the defendant is seeking a reversal of *Franges v General Motors*, 404 Mich 590 (1979) and *Great American Insurance Company v Queen* 410 Mich 73 (1980). Accordingly, the Commission's decision as to whether the Commission and the Board of Magistrates has jurisdiction is of high importance.

In making our decision in this regard we note that *Seay v Spartan Aggregate, Inc*, 183 Mich 46 (1990) and *McMiddleton v Second Injury Fund*, 225 Mich App 326 (1997) seem to be in conflict with each other. *Seay, supra* held no jurisdiction by the Commission or the Board of Magistrates in situations similar to the instant case. Whereas it seems that *McMiddleton* would give jurisdiction to the Board of Magistrates at least insofar as MCL 418.827(5) is concerned. In *McMiddleton* the Court said:

> On appeal, the Worker's Compensation Appellate Commission affirmed the magistrate's decision, relying on *Seay v Spartan Aggregate, Inc*, 183 Mich App 46; 454 NW2d 186 (1990). The commission found that the determination of disability and benefit rate issues were under the exclusive jurisdiction of the Worker's Compensation Bureau. However, the commission stated that "[w]hen a third party recovery is superimposed upon this situation, the reimbursement and future credit available through §827 and *Franges* is properly the province of the trial court hearing any subsequent third party claim made by a plaintiff." The commission found that the fund's failure to intervene in the third-party tort action was fatal to its attempt to offset the amount of its lien against plaintiff's differential benefits, because, under the circumstances, the Worker's Compensation Bureau lacked jurisdiction to apply the *Franges* formula

[2] Defendant's brief, pp 2-6.

There is no statutory support for the commission's conclusion that the magistrate lacked jurisdiction to apply the *Franges* formula. MCL 418.827(5); MSA 17.237(827)(5) provides:

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

MCL 418.827(6); MSA 17.237(827)(6) provides for the apportionment of attorney fees and expenses of recovery by the court. In *Seay v Spartan Aggregate, Inc, supra* at 51, this Court held that the specific references to the division of attorney fees and apportionment of expenses in §827(6) bestowed exclusive responsibility on the trial court for dividing attorney fees and allocating expenses. The *Seay* panel held that the Worker's Compensation Bureau lacked jurisdiction to apportion expenses resulting from the plaintiff's third-party tort recovery and attorney fees and that any challenge to the determination of fees and expenses must come to the Court of Appeals after a decision by the trial court. *Id.*[3]

Accordingly, it would seem that the jurisdiction of the Board of Magistrates appears appropriate if the application of MCL 418.827(6) is not a necessary component of the litigation. To put it another way, if the focal point of the litigation is MCL 418.827(6), the interpretation thereof or the applicability thereof, Circuit Court would appear to be the proper venue. MCL 418.827(6) provides:

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

In the instant case, we believe that 827(6) plays a most important role because in seeking to have *Frange* overruled the defendant is attempting to change the apportionment of the expenses of

[3] *McMiddleton v Second Injury Fund*, 225 Mich App 326 (1997).

recovery because, in truth, the *Frange* payments are a return of attorney fees and costs to the plaintiff over the duration of the reimbursement of benefits previously paid by the defendant.

Under this set of circumstances the Court mentioned in section 827(6) is called upon to act. It goes without saying that neither the Board of Magistrates or the Appellate Commission are courts. *Mead v Peterson King*, 24 Mich App 530 (1970).

The disavowal of the footnote found at 225 Mich App 331 in *McMiddleton* as determined by the Supreme Court at 459 Mich 897 (1998) is an additional factor pointing toward the use of Circuit Court in cases calling for the application of section 827(6). The disavowed footnote language found at 225 Mich App 311 reads as follows:

> We note that calculation and apportionment of attorney fees and recovery expenses are an inherent part of a full application of the *Franges* formula to the facts of a given case. See *Franges, supra* at 617-623. Of course, under *Seay, supra*, the magistrate is prohibited from making these calculations. However, application of the *Franges* formula in the instant case does not implicate the verboten determinations, because the Second Injury Fund did not participate in the third-party action, and therefore is not responsible for fees or costs of recovery.

Thus, we agree with the magistrate that the action of the Supreme Court in *McMiddleton* is a basis for denying jurisdiction and we believe the attack on the *Franges* doctrine advanced by defendant makes the use of the Board of Magistrates in this case even more clearly inappropriate.

Defendant's argument that it should not be called upon to share in the expenses of litigation because it did not participate when the third-party case was tried, even though it could secure appropriate reimbursement without participation, also goes to the issue of apportionment of expenses under 827(6) thus calling for circuit court action.

The decision of the magistrate is affirmed.

Acting Chairperson Glaser and Commissioner Przybylo concur.

Rodger G. Will	Commissioner
Martha M. Glaser	Acting Chairperson
Gregory A. Przybylo	Commissioner

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JOHN HAYDEN,
PLAINTIFF,

V DOCKET #04-0085

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SELF INSURED,
DEFENDANT.

This cause came before the Appellate Commission on defendant's appeal from Magistrate Andrew G. Sloss' decision, mailed March 1, 2004, denying benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed.

Rodger G. Will Commissioner

Martha M. Glaser Acting Chairperson

Gregory A. Przybylo Commissioner