2019 ACO #6

S T A T E O F M I C H I G A N
MICHIGAN COMPENSATION APPELLATE COMMISSION

MICHAEL SWAIN (DECEASED),
DONNA SWAIN (PERSONAL REPRESENTATIVE),
PLAINTIFF,

V DOCKET #17-0011

MILES TRUCKING & EXCAVATING COMPANY AND
ACUITY, A MUTUAL INSURANCE COMPANY,
DEFENDANTS.

APPEAL FROM MAGISTRATE GRUNEWALD.

BARRY D. ADLER FOR PLAINTIFF,
LAURI A. READ FOR DEFENDANTS.

OPINION

WEISE, COMMISSIONER

This matter comes to the Michigan Compensation Appellate Commission (Commission) on appeal by defendants of an opinion and order of Magistrate David P. Grunewald mailed January 23, 2017, finding that defendants are obligated to pay ongoing benefits to the plaintiff pursuant to the formula set forth in *Franges v General Motors*, 404 Mich 590; 274 NW2d 392 (1979). For the reasons discussed below, we affirm.

Background

Plaintiff's decedent husband was a mechanic who was killed in a work-related motor vehicle accident on March 29, 2012. Defendants voluntarily paid benefits from March 29, 2012, until August 5, 2015, after finding that plaintiff had settled a third-party wrongful death lawsuit with the parties liable for her husband's death.

Plaintiff then filed an Application for Mediation or Hearing, date-stamped March 4, 2016, claiming that the carrier had illegally stopped payment of survivor's benefits in violation of MCL 418.827(5) and *Franges v General Motors Corporation*, 404 Mich 590; 274 NW2d 392 (1979), also claiming the carrier refused to pay its proportionate share of the costs of recovery as required by statute. Claimant sought $50.00 per day penalty and reinstatement of survivor's loss payments.

The defendants also filed an Application for Mediation or Hearing - Form C, date-stamped March 21, 2016, seeking to recoup benefits from the plaintiff stating, "Plaintiff failed to notify defendant of its third party settlement pursuant to Section 827 of the Workers' Disability

Compensation Act, resulting in an overpayment of benefits." Trial was held on November 1, 2016, on the following issues:

> . . . whether defendants are liable for death benefits when plaintiff received a third party recovery exceeding the workers' compensation benefits payable. And secondary to that issue whether the defendants are entitled to recoupment for amounts overpaid.

Following trial, Magistrate Grunewald found in favor of the plaintiff on all issues, except that of penalties, and the defendants appeal.

Standard of Review

The Worker's Disability Compensation Act requires this Commission to perform two essential functions when reviewing a magistrate's decision under two different standards. First, we examine the magistrate's fact findings under the competent, material, and substantial evidence standard. MCL 418.861a(3). We must review the entire record. MCL 418.861a(4). The review must include both a qualitative and quantitative analysis of the evidence. MCL 418.861a(13). After our review of the record, we must determine whether a reasonable person would find the evidence adequate to support the magistrate's findings. MCL 418.861a(3). The former Workers' Compensation Appellate Commission expounded on these statutory mandates in *Isaac v Masco Corporation*, 2004 Mich ACO 81:

> The magistrate's credibility determination is entitled to deference because the hearing officer has the opportunity to view and judge witnesses. Moreover, the magistrate is not obligated to deal with the credibility issue like a light switch, turning it either on or off.
>
> The magistrate's choice of which medical expert opinion or opinions to adopt is within his or her discretion and we defer to that choice, if it is reasonable. The magistrate need not adopt expert opinions in their entirety but may give differing weight to different portions of testimony. And, although a magistrate may give preference to a treating expert's opinion, she need not do so. (Footnotes omitted.)

In addition to our fact-finding review, magistrate statements and applications of the law are reviewed under a de novo standard. The Commission's review of statements of law are only limited to the extent that upon appeal, a party must articulate which statements and applications of law are submitted for review. MCL 418.861a(11).

Defendant-Appellant's Issues on Appeal

I. DOES THE MICHIGAN WORKERS' COMPENSATION AGENCY HAVE JURISDICTION TO DETERMINE THE APPORTIONMENT OF

THE THIRD PARTY RECOVERY BETWEEN AND AMONG THE PARTIES?

* * *

II. MUST DEFENDANTS-APPELLANTS APPLY PLAINTIFFS' ENTIRE PRESENT NET RECOVERY FOR PURPOSES OF DETERMINING ITS CREDIT TOWARD FUTURE COMPENSATION OBLIGATIONS WHEN THE FACTS OF THE CASE NECESSARILY LIMIT ITS FUTURE OBLIGATIONS TO A FINITE PERIOD OF TIME?

* * *

Discussion

Defendants' first issue on appeal will not be considered for several reasons. First, defendants claim that plaintiff sought to avoid the MCL 428.827 requirements by failing to seek apportionment from the U.S. District Court for the Eastern District of Michigan. Defendants failed to make that argument to the magistrate and presented no testimony or evidence on the matter. The issue first appears in the appeal before us. Therefore, the argument is not preserved.

Second, the record below is clear that the parties are quite content in acknowledging that defendants' future credit interest, the crux of the second issue, is approximately $1,002,355.36. The parties also agree that given the nature of the case, defendants would only be liable for a maximum of 344 more weeks of benefits after subtracting out the 156 non-recoverable weeks covered by the No Fault Act. The defendants also admit in their post-trial brief that their maximum liability on the 344 remaining weekly payments is $140,438.00. Reversing the magistrate on the newly announced apportionment issue would be pointless as the record shows that the pertinent amounts have been agreed to.

Third, it is also clear, contrary to defendants' assertions, that the magistrate did not apportion the third-party settlement at issue. His opinion contained no calculations and merely held that the defendants are obligated to pay benefits pursuant to the formula set forth in *Franges,* supra. How the parties choose to work through the *Franges* Worksheet is up to them.

Defendants second issue is that the *Franges* calculations should not apply to this case because the defendants' total potential liability is limited to 344 weeks since it is a death case arising from a motor vehicle accident. The raw *Franges* calculations generate a potential future credit available to the defendants of $1,002,355.36. However, the future potential liability of the defendants is a maximum of $261,450.00 (344 weeks x $760.03). Defendants argue that since their future credit is limited to 344 weeks, they should not be required to pay their full proportional share of the costs of recovery as required in *Franges*. We disagree with defendants' analysis for two reasons.

First, the *Franges* court identified their approach as one where the employer/carrier pays their share of the costs of recovery as they receive the benefit of that recovery. In other words, the future credit taken for each week is reduced in that week by the proportionate amount of the costs associated with obtaining the credit for that week. In that way, the total cost of recovery paid by defendants over the 344 weeks of credit is the proportionate cost of obtaining 344 weeks of credit, not the full proportionate costs of recovering the $1,002,355.36.

Second, the *Franges* decision is binding precedent from the Michigan Supreme Court and has been settled law for many decades, such that we are bound to follow its mandates. We also decline to carve out an exception to the application of *Franges* in certain types of cases absent direction from a higher authority.

The Commission acknowledges defendants' argument that application of the *Franges* formula matter, under some circumstances, can lead to absurd results contrary to the legislative purpose behind 827(6). Perhaps it's "high time" for Michigan courts to take another look at whether or not the *Franges* decision and formula is contrary to the intention of the legislature and deprives employers of the full reimbursement of workers' compensation benefits paid as provided for in 827(6).

In *Bonarek v Second Injury Fund* and *Bonarek v Wayne County Board of Institutions*, 433 Mich 880; 446 NW2d 168 (1989), the Michigan Supreme Court had noticed the following issues for hearing: (1) whether *Franges* should be overruled; (2) if *Franges* is overruled what is the appropriate disposition of the case? On September 27, 1989, after examination of the briefs invited and after oral argument, the case was dismissed, a majority of the Court having been persuaded that *Franges* should not be overruled.

This was apparently the last time the Michigan Supreme Court looked at the further validity of the *Franges* decision and formula.

Based on the above, we affirm the magistrate's opinion.

Commissioners Wheatley and DeGraw concur.

Kevin L. Weise	Commissioner
Jack F. Wheatley	Commissioner
David J. DeGraw	Commissioner

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This cause came before the Michigan Compensation Appellate Commission (Commission) on a claim for review filed by defendants from Magistrate David P. Grunewald's order, mailed January 23, 2017. The Commission has considered the record and counsel's briefs and believes that the magistrate's order should be affirmed. Therefore,

IT IS ORDERED that the magistrate's order is affirmed. This is a final order closing this appeal.

Kevin L. Weise Commissioner

Jack F. Wheatley Commissioner

David J. DeGraw Commissioner