2023 ACO #3

STATE OF MICHIGAN
WORKERS' DISABILITY COMPENSATION APPEALS COMMISSION

NORMAN E. CARSON,
PLAINTIFF,

V DOCKET #18-0012

BANDIT INDUSTRIES, INCORPORATED AND
ACUITY, A MUTUAL INSURANCE COMPANY,
DEFENDANTS.

ON REMAND FROM MICHIGAN COURT OF APPEALS

J. TODD TRUCKS FOR PLAINTIFF,
LAURI A. READ FOR DEFENDANTS.

OPINION

ROYAL, CHAIRPERSON

This cause comes before the Workers' Disability Compensation Appeals Commission (WDCAC) on remand from the Michigan Court of Appeals.[1] In its September 30, 2021, opinion, the Court remanded the matter "for calculation of the amount Bandit Industries may recoup from [Plaintiff Norman E.] Carson." *Carson v Bandit Industries, Inc,* unpublished per curiam opinion of the Court of Appeals issued September 30, 2021 (Docket No. 350257), at 10. We now issue this opinion and order in response to that directive.

Prior Proceedings

Plaintiff initiated these proceedings by filing an application for mediation or hearing on September 8, 2015, alleging disability as the result of a work injury. Defendant Acuity, a Mutual Insurance Company (Acuity), workers' compensation carrier for employer Bandit Industries,

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[1] The Court actually directed the remand to the former Michigan Compensation Appellate Commission (MCAC). Pursuant to Executive Order No. 2019-13, the MCAC was abolished effective August 11, 2019, and its authorities, powers, duties, functions, and responsibilities were transferred to the Workers' Disability Compensation Appeals Commission (WDCAC).

Incorporated[2] (Bandit Industries), subsequently filed a petition to recoup on April 22, 2016, stating as follows:

> Defendant seeks to recoup an overpayment in wage loss benefits. Defendant miscalculated plaintiff's AWW as being $1,099.80 and paid wage loss benefits at a corresponding weekly rate of $660.86. Plaintiff's AWW is $549.90 and his weekly compensation rate is $361.64. Defendant seeks to recoup an overpayment of $299.22 per week for the entire period during which wage loss benefits were voluntarily paid to plaintiff from 08/05/2014 through 08/14/2015.

The parties stipulated at the hearing that plaintiff's average weekly wage during the period in question, based upon an April 22, 2014, date of injury, was in fact $549.90, and that he had previously been paid benefits at the rate of $660.86. (Trial transcript at 5, 6.)

In an order mailed on February 26, 2018, Magistrate Luke McMurray granted plaintiff an open award of benefits. With respect to defendants' petition to recoup, the magistrate wrote:

> Defendant has filed a petition to recoup, or an Application for Hearing – Form C. This is based upon Plaintiff's working roughly 10 hours per week at his brother's lawn service during the same period of time he was voluntarily paid workers' compensation benefits. With regard to this petition, Plaintiff has cited the cases of Whirl[e]y v JC Penn[e]y, 1997 ACO #247; and Fou[r]cha v Owen[s] Corning, 1999 ACO #124, and Defendant has submitted a trial brief. The cases cited by both the Plaintiff and the Defendant essentially stand for the proposition that in the absence of fraud, Defendant is not entitled to recoup benefits previously paid. Frankly, I do not believe in this case we even get to the issue of whether or not there was fraud involved. I have found Plaintiff to be entirely credible. I accept Plaintiff's testimony that he did not receive payment when he was helping his brother train new employees, and thus there is no basis for a recoupment. Defendant's Application in this regard is denied. (Magistrate's opinion at 15.)

The magistrate incorporated his opinion into his order.

Defendants filed a timely appeal with the Michigan Compensation Appellate Commission (MCAC). In their brief filed with the MCAC, defendants argued (among other things) for recoupment, but limited that request solely to the period one year prior to the filing of their petition to recoup in recognition of MCL 418.833(2),[3] cited in that brief. (Defendants' MCAC brief at 14.) However,

[2] Acuity and Bandit are hereinafter referred to collectively as "defendants."

[3] That provision reads: "When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than 1 year prior to the date of taking such action."

defendants also requested recoupment of "*all* wage loss benefits that were voluntarily paid to plaintiff from April 19, 2015 through August 14, 2015, at a rate of $660.86 per week" (*id.;* emphasis added), not just the $299.22 per week requested in their petition to recoup. In an order mailed on July 24, 2019, the MCAC held that plaintiff had not proven a medically distinguishable contribution to his underlying pathology by a work injury. As a result, the award granted by the magistrate was reversed. With regard to the issue of recoupment, the MCAC in its opinion held:

> Additionally, the magistrate's observation that the plaintiff received no wages for the work he performed for the landscaping company is irrelevant to the issue of recoupment. Volunteer work is still work. Plaintiff was required to disclose it. He didn't and given the fact that this was disclosed to no one for almost four years, we can only reach the conclusion that this concealment is the "willful failure" contemplated by the statute. The magistrate failed to explore this issue although everything necessary is in the record for him to do so. He is reversed on this issue as well. The defendant is entitled to recoupment of any wage loss benefits paid. See *Whirley v J.C. Penney, Incorporated*, 1997 Mich ACO 247 and *Fourcha v Owens Corning Fiberglass Corporation*, 1999 Mich ACO 124. (*Carson v Bandit Industries, Incorporated,* 2019 Mich ACO #25 at 7.)

The MCAC issued an order simply stating, "IT IS ORDERED that the magistrate's order is reversed." (*Id.*) It did not incorporate its opinion into its order.

Only plaintiff sought leave to appeal to the Court of Appeals. In an order dated January 2, 2020, the Court granted plaintiff's application "in part," limiting the issues to be resolved on appeal to those concerning recoupment. Accordingly, the Court subsequently issued an opinion dated December 17, 2020, limited solely to the issue of recoupment. *Carson v Bandit Industries, Inc,* unpublished per curiam opinion of the Court of Appeals issued December 17, 2020 (Docket No. 350257).

On plaintiff's further application, the Supreme Court vacated this opinion in an order dated June 30, 2021. *Carson v Bandit Industries, Inc,* 507 Mich 1028; 941 NW2d 491 (2021). The Supreme Court remanded the case to the Court of Appeals for consideration on leave granted of the issues the latter Court had declined to review (having to do with plaintiff's entitlement to benefits), as well as the impact any holdings rendered might have upon the issue of recoupment.

On remand, the Court of Appeals issued an opinion dated September 30, 2021, affirming the MCAC's denial of plaintiff's claim of a compensable injury. The Court held that an employer seeking to recoup overpaid benefits did not have to demonstrate that the overpayment was caused by the employee's fraud, citing *Fisher v Kalamazoo Regional Psychiatric Hospital,* 329 Mich App 555; 942 NW2d 706 (2019), and holding that said case was to be applied retroactively. The Court further held:

> As in our prior opinion, we affirm the MCAC's reversal of the magistrate's opinion and order denying Bandit Industries' claim for recovery of benefits overpaid to

> Carson, and we remand for calculation of the amount Bandit Industries may recoup from Carson. On remand, the MCAC shall determine the proper amount of overpaid benefits that Bandit Industries may recover from Carson, taking care to apply the one-year restriction in MCL 418.833(2). The parties may raise other issues relevant to the calculation of the amount Bandit Industries may recover in its recoupment action. (*Carson v Bandit Industries, Inc,* unpublished per curiam opinion of the Court of Appeals issued September 30, 2021 (Docket No. 350257), at 10-11.)

The Court did not retain jurisdiction. Plaintiff's application for leave to appeal this ruling to the Supreme Court was denied in an order dated September 28, 2022, *Carson v Bandit Industries, Inc,* ___ Mich ___; 979 NW2d 659 (2022), and the case now returns to us on remand.

Analysis

As an initial matter, we find that the WDCAC has jurisdiction to consider this matter. While defendant filed no appeal with the Court of Appeals from the MCAC's prior order, that order expressly reversed the magistrate's order, which had in turn expressly denied recoupment. In addition, at the hearing below the parties stipulated to the underlying relevant facts, including the period during which benefits were previously paid, the rate of payment, and the average weekly wage upon which the rate should have been computed. That being so, defendants were not obliged to file an application for leave to appeal to the Court of Appeals on the issue of recoupment. It had already been ordered via the reversal of the magistrate's order precluding it. The amount of recoupment can be precisely ascertained and recoupment effected without the need for further factual development from an adjudicator. As a result, a finding that the employer is entitled to recoupment raises no jurisdictional issues, and we proceed to the issue of the amount of recoupment allowable.

We reject plaintiff's suggestion that the equitable doctrine of laches would preclude defendants' right to recoupment in this case. "The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Angeloff v Smith,* 254 Mich 99, 101; 235 NW 823 (1931), quoted with approval in *Attorney General v PowerPick Players Club of Michigan, LLC,* 287 Mich App 13, 51; 783 NW2d 515 (2010). While it may be said that the WDCAC's power to apply equitable principles is an open question,[4] we do not find the application of the doctrine of laches appropriate given the facts of this matter.

Plaintiff contends that, "[w]here an employer or carrier makes a determination to pay benefits and the employee relies upon those payments . . . the doctrine of laches prevents an employer or carrier from reneging on those decisions and demanding their money back." (Plaintiff's Responsive Supplemental Brief at 9.) Acceptance of this argument would effectively mean that recoupment of voluntarily paid benefits might never be appropriate, a result contrary to the Court of Appeals'

[4] See *Lulgjuraj v Chrysler Corporation,*185 Mich App 539, 463 NW2d 152 (1990), but also see *Allen v Charlevoix Abstract & Engineering Company,* 326 Mich App 658, 664–665; 929 NW2d 804 (2019).

decision in *Fisher v Kalamazoo Regional Psychiatric Hospital*, 329 Mich App at 560, which holds that recoupment of overpayments is permitted, as limited in time by statute. MCL 418.833(2).[5]

In addition, it must be recalled that the MCAC found that the overpayment was the result of fraud on plaintiff's part (MCAC opinion at 6-7), and that holding was never reversed on further appeal. As a result, plaintiff does not have "clean hands," an elementary and fundamental requirement of any party seeking equitable relief. *Rose v National Auction Group*, 466 Mich 453, 462; 646 NW2d 455 (2002). That being so, if we have the authority to apply equitable principles, we decline to do so given the facts of this case.

In remanding this case, the Court of Appeals expressly directed that we proceed as follows: ". . . we remand for calculation of the amount Bandit Industries may recoup from Carson. On remand, the MCAC shall determine the proper amount of overpaid benefits that Bandit Industries may recover from Carson, *taking care to apply the one-year restriction in MCL 418.833(2).*" *Carson v Bandit Industries, Inc*, unpublished per curiam opinion of the Court of Appeals issued September 30, 2021 (Docket No. 350257), at 10; emphasis added. The cited provision states, "When an employer or carrier takes action to recover overpayment of benefits, no recoupment of money shall be allowed for a period which is more than 1 year prior to the date of taking such action."

Defendant contends that we should not apply this statute, because plaintiff had waived its application by failing to raise it at any prior stage of the case. However, the Court of Appeals expressly directed us to apply the one-year-back restriction, and we ". . . comply strictly with the mandate of the appellate court." *K & K Construction, Inc v Department of Environment Quality*, 267 Mich App 523, 544–45; 705 NW2d 365 (2005). See also *City of Kalamazoo v Department of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). As a result, we must apply § 833(2) as ordered by our judicial superiors. Had defendants wished to challenge this directive, the avenue to do so would have been to file an application for leave to appeal to the Supreme Court. They filed no such application, and may not now suggest that we ignore the clear mandate of the Court of Appeals.

It must further be noted that, in their brief filed with the MCAC, defendants actually *conceded* the applicability of the back rule, writing, "Such intentional concealment of his work from Defendants and from his health care providers triggers MCL 418.833(2) and mandates recoupment of wage loss benefits." (Defendants' MCAC Brief at 14.) Defendants then went on to request recoupment of benefits solely for a period that signaled application of the back rule: "Thus, Defendants are seeking to recoup all wage loss benefits that were voluntarily paid to plaintiff from April 19, 2015 through August 14, 2015, at a rate of $660.86 per week." *Id.* However, April 19, 2015, is a date one year prior to the date defendants' contend they filed their petition, demonstrating that the relief they requested in their brief applied the one-year limitation. Defendants do not assert that any date other than filing date establishes the beginning of the permissible recoupment period. The petition was actually filed

[5] We need not consider the impact of a recent amendment to the Workers' Disability Compensation Agency's administrative rules purporting to limit the extent of permissible recoupment, R 408.40(6), because the amendment did not take effect until December 10, 2021, well after all relevant dates in this case.

on April *22*, 2015, not April 19, recoupment cannot be ordered in this case for any period prior to April 22, 2015. Defendants have waived any right to recoupment prior to that date, regardless of the Court of Appeals' order. It cannot expand its request for relief at this late date.

The applicability of MCL 418.833(2) means that we do not order recoupment of any benefits paid prior to April 22, 2015.

While this conclusion establishes the retroactive limitation upon defendants' right to recoup, they now seek the right to recoup not only those benefits that formed the basis for their petition to recoup, paid during a discrete period in 2014 and 2015, but also benefits they paid during the course of the instant appeal pursuant to MCL 418.862. These benefits are not properly a part of this litigation in that they were paid *after* the date of the hearing below and the order of the magistrate that followed. Furthermore, a request for recoupment of those benefits must be directed to the Second Injury Fund: "The clear wording of the statute provides that reimbursement for benefits paid during the pendency of an appeal, which subsequently reduces or rescinds those benefits, 'shall be paid * * * from the second injury fund'." *McAvoy v H B Sherman Company*, 401 Mich 419, 446; 258 NW2d 414 (1977). Accordingly, defendants may seek recoupment of the Section 862 benefits they paid, but not in this matter, to which the Second Injury Fund is not a party.

Defendants' MCAC brief requested recoupment of the *full* benefit rate paid plaintiff during the period in question, and not merely the $299.22 sought in their petition. However, the request in the petition was very specific, asking for repayment of precisely $299.22 per week and not the entire benefit paid. The petition was never amended, either through a formal amended petition or via a verbal amendment during the hearing. While amendments are to be freely granted in the absence of surprise or prejudice, there must in fact *be* an amendment. *DePottey v Marketing Worldwide, LLC*, 2009 Mich ACO #23 at 7. Absent an amendment, defendants' petition permits only recoupment of the amount requested therein. This is the only fair result, since plaintiff did not have the opportunity to address or rebut defendants' modified request by the time it was made after the proofs had already been closed. See *Morgan v General Motors*, LLC, 491 Mich 869; 809 NW2d 565 (2012).

We therefore conclude that defendants' right to recoupment is limited to the weekly benefit rate requested in their petition, $299.22 per week, and is further limited by the one-year-back rule, MCL 418.833(2), to the period of April 22, 2015, through August 14, 2015.

Daryl Royal	Chairperson
Duncan A. McMillan	Commissioner
Granner S. Ries	Commissioner

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BANDIT INDUSTRIES, INCORPORATED AND
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DEFENDANTS.

This cause came before the Michigan Compensation Appellate Commission (MCAC) on a claim for review filed by defendants from Magistrate Luke McMurray's order, mailed February 26, 2018, and upon remand to the Workers' Disability Compensation Appeals Commission (WDCAC) as successor to the MCAC[1] by the September 30, 2021, opinion of the Court of Appeals. The Court remanded the matter "for calculation of the amount Bandit Industries may recoup from Carson." *Carson v Bandit Industries, Inc*, unpublished per curiam opinion of the Court of Appeals issued September 30, 2021 (Docket No. 350257), at 10-11. The WDCAC has considered the record and the briefs of the parties and, for the reasons set forth in the attached opinion, order recoupment limited to those amounts and periods detailed in that opinion. Therefore,

IT IS ORDERED that defendants may recoup an overpayment of benefits in the amount of $299.22 for the period of April 22, 2015, through August 14, 2015. This is a final order. No appeals pend.

Daryl Royal Chairperson

Duncan A. McMillan Commissioner

Granner S. Ries Commissioner

[1] The Court directed the remand to the former Michigan Compensation Appellate Commission (MCAC). Pursuant to Executive Order No. 2019-13, the MCAC was abolished effective August 11, 2019, and its authorities, powers, duties, functions, and responsibilities were transferred to the Workers' Disability Compensation Appeals Commission (WDCAC).