

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio Bureau of
Workers' Compensation

Appellant

Court of Appeals No. L-10-1126

Trial Court No. CI0200903595

v.

Michelle Dernier, et al.

Appellees

DECISION AND JUDGMENT

Decided: January 14, 2011

* * * * *

Richard Cordray, Attorney General of Ohio, and David J. Simko,
Special Counsel for the Attorney General, for appellant.

Donald G. Drinko, Holly M. Olarczuk-Smith and David L. Jarrett,
for appellees Western Reserve Mutual Casualty Company.

Kimberly C. Kurek and John L. Huffman, for appellee Michelle Dernier.

* * * * *

SINGER, J.

{¶ 1} Appellant state agency appeals a judgment of the Lucas County Court of
Common Pleas denying its motion for summary judgment and granting cross-motions for

summary judgment by appellee claimant and a casualty insurer on appellant's claim for subrogation. For the reasons that follow, we affirm.

{¶ 2} On August 7, 2006, appellee Michelle Dernier was driving near her home in West Toledo when the car she was driving was struck broadside by a pick-up truck operated by Larry A. Sturton. Appellee Dernier was treated and released at a local hospital. She would later report in deposition testimony that at the time she was not aware of how badly she was injured. Since the accident she has needed two spinal surgeries and it appears she may have a permanent injury.

{¶ 3} Larry Sturton was insured by appellee Western Reserve Mutual Casualty Company ("Western Reserve"). Shortly after the accident, appellee Dernier, through counsel, made a claim against Sturton's policy.

{¶ 4} Appellee Dernier worked for the Toledo chapter of the Arthritis Foundation. Because the charity was closing its local office, appellee Dernier and several others were working principally out of their homes. Appellee Dernier was en route to the office to acquire some needed materials when the accident occurred.

{¶ 5} Appellee Dernier was laid off from the Arthritis Foundation at the end of 2006. Faced with a loss of health insurance, appellee Dernier filed a claim with appellant, Ohio Bureau of Workers' Compensation on May 14, 2007. On June 1, 2007, appellant denied appellee Dernier's claim. On June 6, 2007, appellee Dernier and appellee Western Reserve entered into a settlement agreement for the full amount of the insurer's policy with Larry Sturton, \$100,000. On June 8, 2007, appellee Dernier

appealed the decision denying workers' compensation coverage. On October 5, 2007, appellant's decision denying benefits was overruled. By March 23, 2009, appellant had paid in excess of \$122,000 in wage and medical benefits on appellee Dernier's claim.

{¶ 6} On April 13, 2009, appellant sued appellees pursuant to R.C. 4123.931 to recover sums paid by both appellant and appellee Western Reserve for the same injury to appellee Dernier. Appellant claimed it was a statutory subrogee, legally entitled to advance notice of any settlement agreement, absent which appellant was entitled to recover jointly and severally from appellees.

{¶ 7} In the trial court, both appellees denied liability and all parties moved for summary judgment. On consideration, the trial court granted appellees' motions and denied appellant's. The trial court concluded that appellee Dernier was not a "claimant" as that term is statutorily defined and thus was not required to give appellant notice of her settlement. Moreover, the court concluded, since appellant had paid nothing to appellee Dernier at the time of the settlement, it obtained no statutory subrogation interest in the settlement funds. From this judgment, appellant now brings this appeal. Appellant sets forth the following two assignments of error:

{¶ 8} "Assignment of Error No. 1

{¶ 9} "The trial court erred in ruling that Appellee, Michelle Dernier, was not a 'claimant' as that term is defined in and used throughout R.C. 4123.01, *et seq.*

{¶ 10} "Assignment of Error No. 2

{¶ 11} "The trial court erred in ruling that the Appellant had no subrogation interest when Appellee Dernier settled her claim with Appellee Western Reserve."

Summary Judgment

{¶ 12} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 13} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 14} In this matter, there are no questions of material fact. The sole issue is whether appellees were entitled to judgment as a matter of law.

I. "Claimant"

{¶ 15} In its first assignment of error, appellant suggests that the trial court improperly concluded that appellee Dernier was not a "claimant" within the meaning of the law.

{¶ 16} When compensation or benefits are paid pursuant to the workers' compensation statutes, the source of those benefits, whether the administrator of workers' compensation or a self insured employer, becomes a "statutory subrogee" for a

formulated amount of any payment the recipient of such benefits becomes entitled to receive from an individual or insurer that may be liable for the underlying injury. R.C. 4123.931(A); R.C. 4123.93(B)(C). The statutory subrogee has a right of recovery against any third party so liable. Id.

{¶ 17} R.C. 4123.931(G) provides:

{¶ 18} "A claimant shall notify a statutory subrogee and the attorney general of the identity of all third parties against whom the claimant has or may have a right of recovery, except that when the statutory subrogee is a self-insuring employer, the claimant need not notify the attorney general. No settlement, compromise, judgment, award, or other recovery in any action or claim by a claimant shall be final unless the claimant provides the statutory subrogee and, when required, the attorney general, with prior notice and a reasonable opportunity to assert its subrogation rights. If a statutory subrogee and, when required, the attorney general are not given that notice, or if a settlement or compromise excludes any amount paid by the statutory subrogee, the third party and the claimant shall be jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest."

{¶ 19} Appellant maintains that when appellee Dernier instituted her claim for workers' compensation she became a claimant. Since she did not notify appellant of her claim with appellee Western Reserve, appellee Dernier, as the claimant, and appellee Western Reserve, as the third party, are jointly and severally liable to pay appellant the amount of its subrogation interest.

{¶ 20} Appellees argue, and the trial court concluded, that appellee Dernier was not a statutorily defined "claimant" when the third party settlement was reached. Moreover, appellees insist, since it is the payment of workers' compensation benefits which "creates" a right of recovery, no such right existed at the time of the settlement distribution.

{¶ 21} R.C. 4123.93(A) states:

{¶ 22} "As used in sections 4123.93 and 4123.931 of the Revised Code:

{¶ 23} "(A) 'Claimant' means a person who is eligible to receive compensation, medical benefits, or death benefits under [the workers' compensation statutes.] * * *."

{¶ 24} The plain unambiguous meaning of this provision, appellees insist, is that for purposes of the subrogation provisions a "claimant" is one who has a present right to compensation or benefits under workers' compensation. At the time appellee Dernier settled with appellee Western Reserve, appellee Dernier's worker's compensation claim had been rejected. As a result she had no present right to compensation or benefits in the system. Since appellee Dernier was not within the statutory definition, none of the portions of R.C. 4123.931 relative to "claimants" are applicable to her.

{¶ 25} Appellant responds that appellee Dernier was a "claimant" because she filed a claim and because she currently receives wage and medical benefits from workers' compensation and will continue to do so in the future. Moreover, the language throughout the other portions of the workers' compensation code uses the word "claimant" as meaning merely one who has filed a claim. Appellant provides numerous

examples. Finally, appellant argues it would be inequitable to allow appellee Dernier to collect twice for her damages.

{¶ 26} It is a court's responsibility to enforce the literal language of a statute wherever possible; to interpret, not legislate. Unless a statute is ambiguous, the court must give effect to its plain meaning. *Cablevision of the Midwest, Inc. v. Gross* (1994), 70 Ohio St.3d 541, 544; R.C. 1.49.

{¶ 27} "Where a statute defines terms used therein, such definition controls in the application of the statute, even though such definition may vary from that employed as to similar words in other statutes." *Good Samaritan Hosp. v. Porterfield* (1972), 29 Ohio St.2d 25, 30. "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.42.

{¶ 28} In R.C. 4123.93(A), the legislature has defined the word "claimant" as it is used in the workers' compensation subrogation statutes as "* * * a person who is eligible to receive compensation * * *." "Eligible" means "qualified to be chosen." Merriam Webster's Collegiate Dictionary (10 Ed. 1996) 374.

{¶ 29} Appellee Dernier was not qualified to be chosen to receive workers' compensation benefits when she first filed her application for benefits. Although an application for benefits is a prerequisite, in and of itself the application does not qualify the applicant to be chosen for benefits. More is clearly required. Moreover, at the time

she settled with appellee insurer, appellee Dernier's application had been rejected and she was certainly not qualified for benefits. The resolution to the question of whether her subsequent qualification for benefits brings her under the statute then is dependent on the temporal requirement of the definition. We need to know what the definition of "is" is.

{¶ 30} "Is" is the present tense third person singular of the verb "to be." Id. 620. It is something in being in the present as opposed to the past or the future. As appellees point out, had the legislature intended to define a "claimant" as one who is presently eligible or who will become eligible for benefits, it is a simple task of adding a few words to the definition to accomplish this.

{¶ 31} Applying the rules of grammar and common usage, we find no ambiguity in R.C. 4123.93(A), absent ambiguity there is no reason to consider matters outside the language of the statute itself to determine legislative intent. The plain language of the statute defines a "claimant" for purposes of the subrogation statutes as one presently eligible to receive benefits.

{¶ 32} It is undisputed that, at the time appellees reached their settlement, appellee Dernier was not qualified to receive benefits and was, therefore, not a "claimant" for purposes of the subrogation provisions. Accordingly, appellant's first assignment of error is not well-taken.

II. Subrogation Interest

{¶ 33} In its second assignment of error, appellant insists that the trial court's determination that it had no subrogation interest with respect to the settlement between

appellees was erroneous. Appellant directs our attention to R.C. 4123.93(D) which defines its "subrogation interest" as "past, present, and estimated future payments" paid to or for a claimant for compensation, medical benefits and the like. The purpose of these provisions is to prevent a claimant from enjoying a double recovery. To uphold the trial court on this matter, appellant claims, would defeat that policy and allow claimant's double recovery merely by settling claims with third parties before filing a workers' compensation claim.

{¶ 34} Whatever the policy underlying a provision, we may advance that policy only to the limits of the legislative enactment. With respect to appellee Western Reserve, there are two statutory provisions that might give rise to liability. R.C. 4123.931(A) provides:

{¶ 35} "The payment of compensation or benefits pursuant to [the workers' compensation statutes] creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The net amount recovered is subject to a statutory subrogee's right of recovery."

{¶ 36} The meaning of this provision is clear, once workers' compensation payments to a claimant begin, the administrator of the Bureau of Workers' Compensation or the self insured employer is vested with the same right to pursue and recover on any claim that the claimant has against a third party. On the facts of this case, this provision is unavailing to appellant with respect to appellee Western Reserve. Once payments on

this claim began, any liability from appellee Western Reserve to appellee Dernier had long since been extinguished by the settlement. Consequently, appellant cannot claim a subrogation right against appellee Western Reserve premised on this provision.

{¶ 37} The other provision by which liability might arguably attach to appellee Western Reserve is R.C. 4123.931(G), quoted above.

{¶ 38} The application of this provision to the present facts comes back to our discussion of the definition of a "claimant." The R.C. 4123.931(G) notification requirement applies wholly to the "claimant." If, as we have concluded in the first assignment of error, appellant became a "claimant" only on the qualification to receive benefits, there was no longer a right of recovery for which appellant was entitled to be notified. At the very least, this absolves appellee Western Reserve from statutory joint and several liability.

{¶ 39} This reasoning applies to appellee Dernier as well, at least with respect to the statutory claims advanced here. Since the claim against the tortfeasor was extinguished prior to her becoming a statutorily defined "claimant," she had no duty to inform or otherwise act in conformity with these provisions. While appellant may have recourse to other theories of recovery for her, she is not liable under the statutory subrogation provisions. Accordingly, appellant's remaining assignment of error is not well-taken.

{¶ 40} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.