STATE OF MICHIGAN

COURT OF APPEALS

ANGEL JONES, Plaintiff-Appellee,	UNPUBLISHED July 24, 2014
v	No. 311051 Wayne Circuit Court
HOME-OWNERS INSURANCE COMPANY, Defendant-Appellant.	LC No. 10-002883-NF

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

SAAD, J. (*dissenting).*

I respectfully dissent. Because defendant is unable to show a causal connection between the accident and an "actual loss" of income—which is required to obtain wage-loss benefits pursuant to MCL 500.3107(1)(b), and, by incorporation, MCL 500.3107a—I would reverse the ruling of the trial court and grant defendant's motion for JNOV.

The concept of "work-loss benefits" is governed by MCL 500.3107(1)(b), which defines "work loss" as: "consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." Work-loss benefits are intended to

> [c]ompensate injured persons for the income they would have received *but for* their accidents. Accordingly, a party seeking work loss benefits under § 3107(b) must show actual loss; a mere loss of earning capacity is not sufficient. [*Davis v State Farm Mut Auto Ins Co*, 159 Mich App 734, 738; 407 NW2d 1 (1987), citing *Struble v DAIIE*, 86 Mich App 245, 251, 255–256; 272 NW2d 617 (1978) (emphasis added).][1]

MCL 500.3107a takes this measured definition of work loss benefits and applies it to a special category of accident victim: the "temporarily unemployed." It reads:

[1] See also *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 152; 350 NW2d 233 (1984) ("[s]tated otherwise, work-loss benefits compensate the injured person for income he would have received but for the accident").

> Subject to the provisions of section 3107(1)(b), work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident. [MCL 500.3107a.]

As such, MCL 500.3107a allows "persons temporarily unemployed at the time of an automobile accident to recover benefits notwithstanding that they have no existing wage, and it allows those already receiving work-loss benefits to continue receiving benefits for those temporary periods when they would have had no wage had the accident not occurred." *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 153; 350 NW2d 233 (1984). The subsection of the statute applies "when a claimant suffers an *unavailability* of work at the time of the accident." *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 469; 521 NW2d 831 (1994) (emphasis original).

"[A]n insured may be found to be 'temporarily unemployed' where he is, or would have been but for the accident, actively seeking employment and there is evidence showing the unemployed status would not have been permanent if the injury had not occurred." *Frazier v Allstate Ins Co*, 231 Mich App 172, 176; 585 NW2d 365 (1998). A plaintiff who asserts that he is "temporarily unemployed" must present "independent corroboration"[2] of both intent and actions taken to secure employment—a "bare assertion of intent to secure employment without any corroboration of such intent or actions taken to secure employment . . . is insufficient to render an injured party 'temporarily unemployed.'" *Id*., citing *Oikarinen v Farm Bureau Mut Ins Co of Mich*, 101 Mich App 436, 439; 300 NW2d 589 (1980).

MCL 500.3107a therefore requires claimants to demonstrate: (1) that they are "temporarily unemployed," in that they are "actively seeking employment" or "would have been but for the accident," and can provide "evidence showing the unemployed status would not have been permanent if the injury had not occurred"[3]; and (2) a "work loss" pursuant to MCL 500.3107(1)(b), in that the accident actually caused them to lose income, not a "mere loss of earning capacity."[4] It is thus possible for a claimant to be "temporarily unemployed" and not eligible for work loss benefits per MCL 500.3107a. "Regardless [of] whether plaintiff was 'temporarily unemployed,' under MCL 500.3107a, he must still show a 'loss of income from work an injured person would have performed . . . if he had not been injured.' In other words, [a temporarily unemployed] plaintiff must show the automobile accident caused an actual loss of

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[2] *Clute v Gen Accident Assurance Co of Canada*, 179 Mich App 527, 537; 446 NW2d 839 (1989).

[3] *Frazier*, 231 Mich App at 176.

[4] *Davis*, 159 Mich App at 738.

income." *Artrip v HBIC Enterprises, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2008 (Docket No. 277848), quoting MCL 500.3107(1)(b).[5]

Here, plaintiff did not show any "actual loss" of income that resulted from the accident. At the time of the accident, she was unemployed. Under MCL 500.3107(1)(b), a claimant's efforts to obtain employment before and after the accident are irrelevant—the only relevant inquiry is an actual loss of income that is caused by the claimant's accident-related injuries. Though plaintiff indicated the possibility of obtaining work as a parent advocate and at a passport call center, she was not offered a job, nor did she show that her accident-related injuries prevented her from taking a position. Accordingly, plaintiff did not demonstrate any causal connection between the accident and an "actual loss" of income, which is required to obtain wage-loss benefits pursuant to MCL 500.3107(1)(b), and, by incorporation, MCL 500.3107a. See *Davis*, 159 Mich App at 738.

Nor is plaintiff's effort to secure employment enough to qualify her for the protections of MCL 500.3107a. As noted, "an insured may be found to be 'temporarily unemployed' where he is, or would have been but for the accident, actively seeking employment *and there is evidence showing the unemployed status would not have been permanent if the injury had not occurred*." *Frazier*, 231 Mich App at 176 (emphasis added). Although plaintiff provided "independent corroboration" of both intent and actions taken to secure employment, she provided no "evidence showing [her] unemployed status would not have been permanent if the injury had not occurred." She is thus not "temporarily unemployed" per MCL 500.3107a, nor has she shown that she lost income or wages due to the injuries at issue, and therefore she is not entitled to wage-loss benefits.

Accordingly, I would reverse the ruling of the trial court and grant defendant's motion for JNOV.

/s/ Henry William Saad

[5] "Although unpublished opinions of the Court of Appeals are not binding precedent, they may . . . be considered instructive or persuasive." *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010) (citations omitted); see also MCR 7.215(C)(1).