

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

JANA M. SMITH,
PLAINTIFF,

V

DOCKET #06-0245

PARKLAND INN/CASUALTY RECIPROCAL EXCHANGE AND
MICHIGAN PROPERTY AND CASUALTY GUARANTY ASSOCIATION;
SECOND INJURY FUND (DUAL EMPLOYMENT PROVISION),
DEFENDANTS.

APPEAL FROM MAGISTRATE GUYTON.

MARGARET A. O'DONNELL FOR PLAINTIFF,
MILTON T. MEANS FOR DEFENDANTS PARKLAND INN AND
MICHIGAN PROPERTY AND CASUALTY GUARANTY,
MORRISON R. ZACK FOR DEFENDANT SECOND INJURY
FUND (DUAL EMPLOYMENT PROVISION).

OPINION

PRZYBYLO, COMMISSIONER

Defendant, Second Injury Fund (SIF), appeals the decision of Magistrate Carol Guyton, mailed October 2, 2006, granting defendant, Michigan Property Casualty Guarantee Association's (MPCGA) request for reimbursement under MCL 418.372. In support of its appeal, SIF argues that the magistrate improperly ordered it to reimburse MPCGA because MPCGA does not satisfy the definition of an insurer under MCL 418.601(a). SIF also alleges that the magistrate erred as a matter of law when she utilized the Property and Casualty Guarantee Association Act to support her interpretation of an "insurer" under MCL 418.601(a). We affirm.

FACTS AND PROCEDURE

Because the facts and procedure do not affect any appellate review and because the magistrate accurately summarized them, we exercise our authority under MCL 418.861a(10) and adopt her summary as our own. She wrote:

In December of 1992, plaintiff was granted an open award. The magistrate found that a December 31, 1987 fall at Parkland Inn caused work-related physical injuries and disability. At the time of plaintiff's injury, she had dual employment at Parkland Inn and Andoni's. Plaintiff established an AWW of \$256.60, (\$149.40 from Parkland and \$107.20 from Andoni's). Her workers' compensation rate was set at \$171.07. The Second Injury Fund was ordered to reimburse Parkland/Casualty Reciprocal Exchange for the Fund's proportionate share of plaintiff's weekly benefit rate in accordance with Section 372(1)(b) of the Act. These findings were not disturbed on appeal.

FACTS

Casualty Reciprocal Exchange, the insurance carrier for Parkland, paid plaintiff her full benefit rate in accordance with Magistrate Huntley's decision and sought quarterly reimbursements from the Second Injury Fund for the Fund's share of the benefit rate. Everything went smoothly until Casualty Reciprocal Exchange became insolvent in 2003/2004. At that time, the Michigan Property and Casualty Guaranty Association (MPCGA) began paying plaintiff's full benefit rate as required by the Property and Casualty Guaranty Act, MCL 500.7901. Its quarterly reimbursement request from the Second Injury Fund was rejected. The Second Injury Fund refuses to reimburse MPCGA for the Fund's portion of plaintiff's workers' compensation rate.

STATEMENT OF CLAIM

On October 14, 2005, MPCGA filed a Form C requesting reimbursement from the Second Injury Fund and an Order allowing the Second Injury Fund to pay plaintiff directly.

The parties have agreed to have the magistrate resolve these issues based on the arguments presented within their briefs. Briefs were submitted on June 28, 2006. A supplemental brief was submitted by MPCGA on August 9, 2006. [Magistrate's opinion, pp 1-2.]

LAW

The Worker's Disability Compensation Act and the cases interpreting the Act require the Appellate Commission to interpret the definition of "insurer" to resolve the issue concerning SIF's liability to MPCGA. To do so, we examine MCL 418.372 briefly because that statute creates the SIF's liability to insurers. We exercise our authority under the cases interpreting the Appellate Commission's ability to use legal principles other than those expressly within the Worker's Disability Compensation Act to assist our understanding of the statutes within the Act. Finally, we examine MCL 418.601(a) and interpretations of that statute because that statute defines "insurer" and conclude that MPCGA satisfies the definition of an "insurer" under the Worker's Disability Compensation Act.

MCL 418.372, the “dual employment provision”, establishes the liability of the SIF to reimburse insurers under certain circumstances. That section states the following:

(1) If an employee was engaged in more than one employment at the time of a personal injury or a personal injury resulting in death, the employer in whose employment the injury or injury resulting in death occurred is liable for all the injured employee’s medical, rehabilitation, and burial benefits. Weekly benefits shall be apportioned as follows:

- (a) If the employment which caused the personal injury or death provided more than 80% of the injured employee’s average weekly wages at the time of the personal injury or death, the insurer or self-insurer is liable for all the weekly benefits.
- (b) If the employment which caused the personal injury or death provided 80% or less of the employee’s average weekly wage at the time of the personal injury or death, the insurer or self-insurer is liable for that portion of the employee’s weekly benefits as bears the same ratio to his or her total weekly benefits as the average weekly wage from the employment which caused the personal injury or death bears to his or her total weekly wages. The second injury fund is separately but dependently liable for the remainder of the weekly benefits. The insurer or self-insurer has the obligation to pay the employee or the employee’s dependents at the full rate of compensation. The second injury fund shall reimburse the insurer or self-insurer quarterly for the second injury fund’s portion of the benefits due the employee or the employee’s dependents.

Interpreting Section 372(1), the Court of Appeals failed to define “insurer”, but specifically excluded an employee and an uninsured employer as potential “insurers”. In *Sharpe v Angora Enterprises*, 185 Mich App 32 (1990), Sharpe worked on an Angora Enterprises farm herding goats. While at work, Sharpe suffered a fatal heart attack. Sharp’s widow filed a petition seeking benefits from Angora Enterprises and SIF. She prevailed and the referee ordered SIF to pay Sharpe’s widow 62% of the weekly benefits as well as the funeral costs. On appeal, the Workers’ Compensation Appeal Board reversed the award against SIF. Then, Sharpe’s widow appealed the Appeal Board’s decision. Affirming the Appeal Board’s decision, the Court of Appeals held that neither Sharpe’s widow nor Angora Enterprises possessed a right to reimbursement. In so doing the Court found that the statute permitted SIF to reimburse only an employer’s insurer or a self insured employer. Because they could not satisfy the definition of an insurer, Sharpe’s widow and Angora Enterprises could not demand reimbursement from SIF. The Court offered absolutely no insight into the entities that would qualify as an employer’s insurer.

Because neither Section 372 nor *Sharpe* provides any guidance as we interpret the term “insurer”, we must explore other legal resources. As we do, we reference the broad authority the courts afford the Appellate Commission when resolving workers’ compensation issues. The premiere case, *St Paul Fire and Marine v Littky*, 60 Mich App 375; 230 NW2d 440 (1975), announced the pervasive nature of the authority to decide workers’ compensation related questions under the Worker’s Disability Compensation Act. While often criticized for its overstatement of exclusive jurisdiction, the statements concerning the breadth of the Worker’s Compensation Agency’s, Board of Magistrates’ and Appellate Commission’s authority remain unchallenged.¹

Following the *St. Paul Fire and Marine v Littky, Id.*, the appellate courts have issued numerous decisions upholding the Appellate Commission’s authority to examine the law beyond the Worker’s Disability Compensation Act to resolve issues in workers compensation cases. In *Michigan Property & Casualty Guarantee Association v Checker Cab Co*, 138 Mich App 180 (1984), the Court discussed the necessity to decide insurance contract coverage issues. Most recently, the Court of Appeals mandated that the Appellate Commission apply equitable principles and interpret contracts in *Chase v Terra Nova Industries*, 272 Mich App 695 (2006).

While the appellate courts issue numerous and clear decisions granting us the authority to apply other laws and legal principles to decide workers’ compensation issues, the courts have not issued any decisions interpreting the definition of an “insurer” under Section 601(a), although the Court of Appeals has interpreted the definition of a carrier under Section 601(c). Section 601 contains the following language:

Sec. 601. Whenever used in this act:

(a) “Insurer” means an organization that transacts the business of worker’s compensation insurance within this state.

(b) “Carrier” means a self-insurer or an insurer.

At one time, Section 601 also included the Accident Fund as a “carrier”. When interpreting the definition of a “carrier”, *Kihrotris v Ford Motor Co*, 183 Mich App 367 (1990), held that the SIF satisfied the definition of a “carrier.” However, the Court did not explain whether SIF met the definition of a “carrier” because it also satisfied the definition of a self-insurer or an insurer under Section 601. Thus, the *Kihrotis* decision does not assist us as we examine the definition of an insurer.

¹ In *St. Paul Fire and Marine* the Court actually discussed the authority of predecessor entities. Subsequent amendments to the Worker’s Disability Compensation Act and subsequent Executive Orders included changing the titles of the administrative personnel, the trial judges and the appellate judges, but we reference the most current titles only.

We find the Section 601 definition of an “insurer” unambiguous; it does not need any interpretation. According to Section 601, an “insurer” must be an organization. The organization must transact the business of workers’ compensation insurance. Finally, the organization must transact the business within Michigan. Clearly, transacting the business of workers’ compensation insurance encompasses the normal insurance functions: claim processing and claim litigation.

To decide whether MPCGA constitutes an organization that transacts the business of workers’ compensation insurance in Michigan, we find the Property and Casualty Guaranty Association Act, MCL 500.7901 *et seq.*, helpful. The Property and Casualty Guarantee Association Act (MPCGA Act) constitutes a portion of the Michigan Insurance Code which codifies the essential statutes governing insurance in the state of Michigan. The MPCGA Act creates an association of insurance companies that operates to discharge certain obligations of insolvent insurance companies that are members of the association. The MPCGA Act grants the association the authority to perform the functions of an insurance company in Section 7931, which reads as follows:

(1) The association shall pay and discharge covered claims for the amount by which each covered claim exceeds \$10.00. The association may pay or discharge the claims directly, through a servicing facility, or through a contract for reinsurance or transfer of liabilities with a member insurer, in accordance with the plan of operation.

(2) The association shall be a party in interest in all proceedings involving a covered claim and shall have the same rights as the insolvent insurer would have had if not in receivership, including the right to appear, defend, and appeal a claim in a court of competent jurisdiction; to receive notice of, investigate, adjust, compromise, settle, and pay a covered claim; and to investigate, handle, and deny a noncovered claim. The association shall not have a cause of action against the insureds of the insolvent insurer for any sums it has paid out, except those causes of action which the insolvent insurer would have had if the sums had been paid by the insolvent insurer, or except as otherwise provided by this chapter.

APPLICATION

We conclude, as the magistrate concluded, that MPCGA transacts the business of workers’ compensation insurance in Michigan. The MPCGA constitutes an organization. It possesses the “same rights as the insolvent insurer.” Those rights include the enumerated rights to litigate and process claims. Those rights allow MPCGA to transact the business of workers’ compensation insurance in Michigan.

We reject SIF’s argument that the Appellate Commission lacks the authority to examine the MPCGA Act when we interpret the meaning of “insurer” under Section 601. Clearly, the appellate courts have consistently and continuously upheld the Appellate Commission’s

obligation to utilize legal concepts from outside the Worker's Disability Compensation Act to resolve questions arising under the WDCA. In addition, SIF offers diametrically opposing arguments concerning the Appellate Commission's ability to utilize legal concepts from outside the WDCA. Initially SIF argues that because MPCGA does not constitute an actual insurance company, it cannot transact the business of workers' compensation insurance in Michigan. In support of its argument, SIF explains that the MPCGA Act empowers the MPCGA to pay obligations of the insolvent members and does not allow the MPCGA to operate an insurance company. This difference between paying obligations and operating an insurance company mandates the conclusion that the MPCGA "is not an "insurer" as defined in Section 601(a) of the WDCA" according to SIF. However, SIF then contends that the Appellate Commission cannot examine Section 7931 of the MPCGA Act to determine whether MPCGA transacts the business of workers' compensation insurance in Michigan under Section 601 of the WDCA. In essence, SIF asks the Appellate Commission to use the MPCGA Act when the Act assists SIF's arguments, but to refrain from using it when the Act contradicts its arguments. We find our ability to use the MPCGA Act requires us to use the MPCGA without bias.

We also reject SIF's contention that an "insurer" under Section 601 only includes insurance companies. If that were the legislature's intent, then Section 601 would read "insurer" means insurance companies. It does not. Instead the legislature intended to include all organizations transacting the business of workers' compensation insurance. Obviously, some organizations transacting the business of workers' compensation insurance may not constitute insurance companies.

In addition, we find no merit in SIF's argument that MPCGA does not constitute an "insurer" under other sections of the WDCA. Initially, SIF references MCL 418.551. That section provides formulas for SIF to calculate assessments for each "insurer". The assessments constitute a legal liability for every "insurer" and "self-insurer". SIF argues that because MPCGA does not satisfy the definition of an "insurer", it cannot force payments of assessments. According to SIF, if MPCGA does not pay assessments to SIF, it cannot seek reimbursements from SIF. SIF also references MCL 418.356; 418.521; 418.541; and 418.925. Those sections authorize SIF to reimburse only "carriers". SIF contends that because MPCGA does not constitute an "insurer" under the WDCA, it cannot satisfy the definition of a "carrier" under the WDCA.

Both arguments contain nothing more than unpersuasive circular logic. SIF's arguments assume that MPCGA does not constitute an "insurer" under the WDCA. Then, SIF reasons that without "insurer" status, MPCGA escapes assessment liability and misses reimbursement opportunities. SIF asks the Appellate Commission to conclude that MPCGA does not satisfy the definition of an "insurer" because SIF does not seek assessments from MPCGA. In other words, MPCGA does not satisfy the definition of an "insurer" because SIF has decided that MPCGA does not satisfy the definition. We disagree. MPCGA satisfies the definition of an "insurer" under every section of the WDCA because the Section 601 definition of an "insurer" applies to the term "whenever used in the act." MCL 418.601.

CONCLUSION

Therefore, we affirm the magistrate's decision.

Commissioners Will and Grit concur.

Gregory A. Przybylo Commissioner

Rodger G. Will Commissioner

Donna J. Grit Commissioner

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DEFENDANTS.

This cause came before the Appellate Commission on a claim for review filed by defendants Second Injury Fund (Dual Employment Provision) from Magistrate Carol R. Guyton's order, mailed October 2, 2006, granting defendant Michigan Property Casualty Guaranty Association's request for reimbursement under MCL 418.372. 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.

Gregory A. Przybylo	Commissioner
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Rodger G. Will	Commissioner
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Donna J. Grit	Commissioner
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