IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Michael R. Smolenski, Presiding Judge

AUTO-OWNERS INSURANCE COMPANY
Plaintiff-Appellant,

v

Docket No. 119403

AMOCO PRODUCTION COMPANY
Defendant-Appellee.
_____/

BRIEF ON APPEAL - APPELLEE

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COUNTER-STATEMENT OF QUESTION PRESENTED

I

WHETHER THE MEDICAL CARE COST CONTAINMENT RULES WHICH WERE PROMULGATED BY THE BUREAU OF WORKERS' DISABILITY COMPENSATION, 1988 AACS, R 418.101, et seq., LIMIT THE REIMBURSEMENT TO THE AUTO "NO-FAULT" CARRIER FROM THE EMPLOYER FOR THE COSTS OF THE MEDICAL CARE THAT THE EMPLOYEE NEEDED AFTER A PERSONAL INJURY BECAUSE OF WORK.

Plaintiff-appellant Auto-Owners Ins Co answers "No."

Defendant-appellee Amoco Production Co answers "Yes."

Court of Appeals answered "Yes."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates answered "Yes."

COUNTER-STATEMENT OF FACTS

Leroy Smithingell (Employee) was absent from work between January 30 and May 16, 1994 (12b) and received medical care (10b, 11b) because of an injury to the left hand and back (10b) when knocked against an enclosed bulletin board on a wall (8b, 9b) by his truck left running in the garage at defendant-appellee Amoco Production Company (Employer). (8b) During this absence, the Employer continued to pay the salary of the Employee (13b)[1] and Metropolitan Life Insurance Company (Group Carrier) paid some of the expenses of medical care. (17b) Plaintiff-appellant Auto-Owners Insurance Company (Auto "No-Fault" Carrier) paid the Employee wage loss benefits[2] and paid for other medical care[3] because of the insurance the Employee had obtained. (14b)

The Auto "No-Fault" Carrier then filed an application for mediation or hearing with the Bureau of Workers' Disability Compensation (Bureau)[4] for repayment of the wage loss and medical expenses paid to the Employee from the Employer. (1b, 3b) The Employee did not seek or receive any workers' disability compensation.

The Board of Magistrates (Board) denied the claim for repayment of weekly compensation but allowed reimbursement for the costs of the medical care paid by the Auto "No-Fault" Carrier subject to cost containment and with ten percent interest. *Auto Owners Ins Co v Amoco Corp*, unpublished order and opinion of the Board of Magistrates, decided on May 30, 1995 (Docket no. 053095003). (18b, 22b)

The Workers' Compensation Appellate Commission (Commission) affirmed. *Smithingell v Amoco Production Co*, 1998 Mich ACO 1117. (23b, 26b-28b)

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[1] $787.00. (7b)

[2] $669.29 weekly (16b) for sixteen weeks (15b) totaling $10,708.64. (15b)

[3] Totaling $9,636.64. (15b)

[4] Now known as the Bureau of Workers' and Unemployment Compensation. Executive Order No. 2002-1.

The Court of Appeals remanded the case to the Commission for reconsideration in light of *Perez v State Farm Mutual Automobile Ins Co*, 418 Mich 634, 650; 344 NW2d 773 (1984), *Luth v Automobile Inter Ins Exchange*, 113 Mich App 289, 294; 317 NW2d 867 (1982), lv den 417 Mich 867 (1983), and MCL 418.852(1); MSA 17.237(852)(1). *Auto Owners Ins Co v Amoco Production Co*, unpublished order of the Court of Appeals, decided on November 6, 1998 (Docket no. 211679). (29b)

The Commission affirmed on remand. *Smithingell v Amoco Production Co (On Remand)*, 1999 Mich ACO 348. (30b, 33b-34b)

The Court of Appeals again remanded the case to the Commission to determine whether the cost containment rules promulgated by the Bureau limit reimbursement and, if not, establish the amount of reimbursement of the medical costs paid by the Auto "No-Fault" Carrier. *Auto Owners Ins Co v Amoco Production Co (After Remand)*, unpublished order of the Court of Appeals, decided on May 25, 1999 (Docket no. 218310). (35b) In the same order, the Court of Appeals expunged a brief which the Auto "No-Fault" Carrier had filed after the application for leave to appeal declaring that " . . . [the Auto 'No-Fault' Carrier] wrong[ly] noted that the amount of medical benefits paid . . . was $9,636.64. The total amount of medical benefits paid . . . [was] $19,191.81." *Plaintiff-Appellant Auto Owners Insurance Company's Supplemental Brief in support of* ***Application for Leave to Appeal***, 1 (Docket no. 211679). (35b)

The Commission affirmed on second remand. *Smithingell v Amoco Production Co (On Second Remand)*, 1999 Mich ACO 2914. (36b, 39b)

The Court of Appeals then granted leave to appeal from the decision by the Commission on second remand, *Auto Owners Ins Co v Amoco Production Co (After Second Remand)*, unpublished order of the Court of Appeals, decided on April 7, 2000 (Docket no. 223572) (40b), affirmed, *Auto Owners Ins Co v Amoco Production Co*, 245 Mich App 171; 628 NW2d 51 (2001) (41b-45b) and then, denied rehearing. *Auto*

Owners Ins Co v Amoco Production Co, unpublished order of the Court of Appeals, decided on May 17, 2001 (Docket no. 223572). (46b)

The Court granted leave to appeal which was requested by the Auto "No-Fault" Carrier, and the Employer. *Auto-Owners Ins Co v Amoco Production Co*, 466 Mich 859; - NW2d - (2002). (48b)

SUMMARY OF ARGUMENT

There *are* limits to the responsibility of an employer after an employee experiences a personal injury *arising out of and in the course of employment*. One limit is the range of benefits which are available. The other limit is the price of the available benefits.

ARGUMENT

I

THE MEDICAL CARE COST CONTAINMENT RULES WHICH WERE PROMULGATED BY THE BUREAU OF WORKERS' DISABILITY COMPENSATION, 1988 AACS R 418.101, et seq., LIMIT THE REIMBURSEMENT TO THE AUTO "NO-FAULT" CARRIER FROM THE EMPLOYER FOR THE COSTS OF THE MEDICAL CARE THAT THE EMPLOYEE NEEDED AFTER A PERSONAL INJURY BECAUSE OF WORK.

A statute in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101; MSA 17.237(101), et seq., describes the responsibility of an employer after an employee experiences a personal injury *arising out of and in the course of employment*. MCL 418.301(1); MSA 17.237(301)(1). Section 301(1), first sentence, establishes that the responsibility of an employer is to pay the employee those benefits which are described in the WDCA by stating that, "[a]n employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act."

Section 301(1), first sentence, applies because the Employee did experience a personal injury *arising out of and in the course of employment* by the Employer. There is

no other statute in the WDCA or a statute in the Insurance Code of 1956, MCL 500.100; MSA 24.1100, et seq., which applies to preclude the operation of section 301(1), first sentence.

The term *compensation as provided in this act* is not elastic.

Law establishes two limits.

Many individual statutes in the WDCA operate together to limit the responsibility of an employer after an employee experiences a personal injury *arising out of and in the course of employment* to a range of benefits. These statutes can be redacted as primary compensation, pendant compensation, and ancillary compensation benefits.

Primary compensation includes the four statutes in the WDCA which describe the redress for a direct consequence of the personal injury experienced by an employee. MCL 418.315(1); MSA 17.237(315)(1). MCL 418.319(1); MSA 17.237(319)(1). MCL 418.351(1); MSA 17.237(351)(1). MCL 418.361(1); MSA 17.237(361)(1). Section 315(1), first and eighth sentences, and section 319(1), first sentence, together describe medical care as one kind of redress for a personal injury experienced by an employee because of work. Section 315(1), first and eighth sentences, provide that,

> "[t]he employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed.
>
> * * *
>
> The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury."

Section 319(1), first sentence, includes medical rehabilitation as compensation for an injured employee by stating that, "[a]n employee who has suffered an injury covered by this act shall be entitled to prompt medical rehabilitation services."

Section 319(1), second sentence, describes vocational rehabilitation as another kind of remedy for the direct consequence of an injury experienced by an employee. Section 319(1), second sentence, states that,

> "[w]hen as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, the employee shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to useful employment."

A third kind of remedy for a direct consequence of an injury experienced by an employee is described by section 351(1), first and second sentences, and section 361(1), first and second sentences. In particular, these statutes describe the remedy of a substitute for the loss of earnings while an employee is disabled by a personal injury. Section 351(1), first and second sentences, describes the remedy while an injured employee is totally disabled by stating that,

> "[w]hile the incapacity for work resulting from a personal injury is total, the employer shall pay, or cause to be paid as provided in this section, to the injured employee, a weekly compensation of 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability."

Section 361(1), first and second sentences, describes a similar remedy while an injured employee is only partially disabled by stating that,

> "[w]hile the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability."

Primary compensation also includes the two statutes in the WDCA which describe the redress when death is the direct consequence of a personal injury experienced by an employee. MCL 418.321; MSA 17.237(321). MCL 418.345; MSA 17.237(345).

Section 321 describes the remedy of a substitute for the loss of the support to certain survivors when an employee dies because of an injury *arising out of and in the course of employment* by stating that,

> "[i]f death results from the personal injury of an employee, the employer shall pay, or cause to be paid, subject to section 375, in 1 of the methods provided in this section, to the dependents of the employee who were wholly dependent upon the employee's earnings for support at the time of the injury, a weekly payment equal to 80% of the employee's after-tax average weekly wage, subject to the maximum and minimum rates of compensation under this act, for a period of 500 weeks from the date of death. If at the expiration of the 500-week period any such wholly or partially dependent person is less than 21 years of age, a worker's compensation magistrate may order the employer to continue to pay the weekly compensation or some portion thereof until the wholly or partially dependent person reaches the age of 21. If the employee leaves dependents only partially dependent upon his or her earnings for support at the time of injury, the weekly compensation to be paid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as 80% of the amount contributed by the employee to the partial dependents bears to the annual earnings of the deceased at the time of injury."

Section 345 is similar to section 315(1), first sentence, by allowing the costs of the care received by an injured employee before death such as hospice services and adds the cost of a funeral and burial after death. Section 345, first sentence, states that, "[i]f death results from the injury, the employer shall pay, or cause to be paid, the reasonable expense of the employee's last sickness, funeral, and burial."

There are two important features of these statutes which allow the characterization as primary compensation. One is that all of these statutes describe a particular kind of benefit to remedy one kind of immediate consequence to the employee such as immediate physical injury that requires medical care; disability from continuing with work that requires a substitute for the end of wages; and disability from resuming any work that requires education or retraining to pursue another line of work. Another feature is that the statutes which describe these primary compensation benefits are not tie-barred to each

other. Each primary compensation benefit is available by its very own terms and is not contingent on the availability of another. For example, medical care is available whether the injured employee has a *disability* which allows for a wage loss substitute because section 315(1), first sentence, explicitly requires medical care for an employee who receives a *personal injury arising out of and in the course of employment*. Statutes in the WDCA explicitly allow medical care and vocational rehabilitation described by section 315(1), first and eighth sentences, and section 319(1), second sentence, when the substitute for lost earnings described by section 351(1), first and second sentences, and section 361(1), first and second sentences, is barred. MCL 418.301(10); MSA 17.237(301)(10). MCL 418.373(2); MSA 17.237(373)(2). For example, section 373(2) explicitly divorces medical care and retiree disability by stating that, "[t]his section shall not be construed as a bar to an employee receiving medical benefits under section 315 upon the establishment of a causal relationship between the . . . work and the need for medical treatment."

Pendant compensation includes the statutes in the WDCA which augment or increase a primary compensation benefit to which the injured employee has established eligibility. MCL 418.352(1)-(11); MSA 17.237(352)(1)-(11). MCL 418.353(3); MSA 17.237(353)(3). MCL 418.356(1); MSA 17.237(356)(1). MCL 418.521(2); MSA 17.237(521)(2). Section 352(1) provides for a supplement to the weekly workers' disability compensation which is paid after January 1, 1982, by the terms of either section 351(1), first sentence, or section 321 because the employee had been injured from working sometime between September 1, 1965, and December 31, 1979. Section 352(1) states that,

> "[b]eginning January 1, 1982, an employee receiving or entitled to receive benefits equal to the maximum payable to that employee under section 351 or the dependent of a deceased employee receiving or entitled to receive benefits under section 321 whose benefits are based on a date of personal injury between September 1, 1965, and December 31, 1979, shall be entitled to a supplement to weekly compensation. The supplement shall be computed using the total annual

> percentage change in the state average weekly wage, rounded to the nearest 1/10 of 1%, as determined under section 355. The supplement shall be computed as a percentage of the weekly compensation rate which the employee or the dependent of a deceased employee is receiving or is entitled to receive on January 1, 1982 had the employee been receiving benefits at that time, rounded to the nearest dollar. The supplement shall not exceed 5% compounded for each calendar year in the adjustment period. The percentage change for purposes of the adjustment shall be computed from the base year through December 31, 1981. A supplement shall not be paid retroactively for any period of disability before January 1, 1982."

The compensation supplement which is described by section 352(1) is not available for weekly workers' disability compensation that is paid by the terms of section 361(1), first sentence. Section 352(9).

Section 353(3) requires the augmentation of the weekly workers' disability compensation which is paid by the terms of either section 351(1), first sentence, or section 361(1), first sentence, when an injured employee has a child while disabled. Section 353(3) states that,

> "[f]or the purposes of sections 351 to 361, dependency shall be determined as follows:
>
> * * *
>
> An increase in payments shall be made for increased numbers of conclusive dependents as defined in this act not so dependent at the time of the injury of an employee."

The augmentation which is allowed by section 353(3) applies only to children who are *conclusive dependents* described by MCL 418.353(1)(a)(ii); MSA 17.237(353)(1)(a)(ii). The employee who marries a wife after an injury cannot have the extant weekly workers' disability compensation increased because MCL 418.353(1)(a)(i); MSA 17.237(353)(1)(a)(i) which also describes a *wife* as a *conclusive dependent* was voided by the decision in *Pike v City of Wyoming*, 431 Mich 589; 433 NW2d 768 (1988).

Section 356(1) allows for an increase in the rate of weekly workers' disability

compensation when an injured employee is continuously disabled for two years. Section 356(1) states that,

> "[a]n injured employee who, at the time of the personal injury, is entitled to a rate of compensation less than 50% of the then applicable state average weekly wage as determined for the year in which the injury occurred pursuant to section 355, may be entitled to an increase in benefits after 2 years of continuous disability. After 2 years of continuous disability, the employee may petition for a hearing at which the employee may present evidence, that by virtue of the employee's age, education, training, experience, or other documented evidence which would fairly reflect the employee's earning capacity, the employee's earnings would have been expected to increase. Upon presentation of this evidence, a worker's compensation magistrate may order an adjustment of the compensation rate up to 50% of the state average weekly wage for the year in which the employee's injury occurred. The adjustment of compensation, if ordered, shall be effective as of the date of the employee's petition for the hearing. The adjustments provided in this subsection shall be paid by the carrier on a weekly basis. However, the carrier and the self-insurers' security fund shall be entitled to reimbursement for these payments from the second injury fund created in section 501. There shall be only 1 adjustment made for an employee under this subsection."

Section 521(2) provides a pendant compensation by establishing an annual increase in the weekly workers' disability compensation when the injured employee experiences one of the conditions which constitute a *total and permanent* disability described by MCL 418.361(3)(a)-(g); MSA 17.237(361)(3)(a)-(g).[5] Section 521(2) states that,

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[5] "[t]otal and permanent disability, compensation for which is provided in section 351 means:
(a) Total and permanent loss of sight of both eyes.
(b) Loss of both legs or both feet at or above the ankle.
(c) Loss of both arms or both hands at or above the wrist.
(d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).
(e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.
(f) Incurable insanity or imbecility.
(g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury."

> "[a]ny permanently and totally disabled person as defined in this act, if such total and permanent disability arose out of and in the course of his employment, who, on and after June 25, 1955, is entitled to receive payments of workmen's compensation in amounts per week of less than is presently provided in the workmen's compensation schedule of benefits for permanent and total disability, and for a lesser number of weeks than the duration of such permanent and total disability, after the effective date of any amendatory act by which his disability is defined as permanent and total disability, or by which the weekly benefits for permanent and total disability are increased, *shall receive weekly from the carrier on behalf of the second injury fund differential benefits equal to the difference between what he is now or shall hereafter be entitled to receive from his employer under the provisions of this act as the same was in effect at the time of his injury, and the amounts now provided for his permanent and total disability by this or any other amendatory act,* with appropriate application of the provisions of sections 351 to 359. Such payments shall continue after the period for which the person is otherwise entitled to compensation under this act for the duration of the permanent and total disability. Any payments so made by a carrier pursuant to this section shall be reimbursed to the carrier by the second injury fund as provided in this chapter." (emphasis supplied)

The feature of these four statutes in the WDCA which allows the characterization as a pendant compensation benefit is that each *is* tie-barred to a primary compensation benefit to which the injured employee has qualified to receive. Section 352(1)-(11), section 353(3), section 356(1), and section 521(2) cannot apply to supplement, increase, or augment the primary compensation when the injured employee has not already qualified for the particular primary compensation benefit which is described in each statute. For example, an injured employee who is totally disabled may not receive the supplement established by section 352(1)-(11) or the increase established by section 353(3) when barred from receiving the primary compensation of the substitute for lost earnings described by section 351(1), first sentence, or section 361(1), first sentence, having refused

an offer of reasonable employment, MCL 418.301(5)(a); MSA 17.237(301)(5)(a), or having been jailed. Section 361(1), last sentence.[6]

There are four particular statutes in the WDCA that establish an ancillary benefit. MCL 418.161(1)(l); MSA 17.237(161)(1)(l). MCL 418.801(2), (3), (6); MSA 17.237(801)(2), (3), (6).

Section 801(2) describes a penalty for a delay in the delivery of one kind of the primary compensation. Section 801(2), first sentence, states that,

> "[i]f *weekly compensation* benefits or accrued weekly benefits are not paid within 30 days after becoming due and payable, in cases where there is not an ongoing dispute, $50.00 per day shall be added and paid to the worker for each day over 30 days in which the benefits are not paid." (emphasis supplied)

Section 801(3) also describes a penalty for a delay in the delivery of another primary compensation benefit. While section 801(2), first sentence, applies to the weekly workers' disability compensation for an injured employee who is disabled whether by the terms of section 351(1), first sentence, or section 361(1), first sentence, and for the survivors of an injured employee who dies because of a personal injury arising out of and in the course of employment by the terms of section 321, section 801(3) imposes a penalty for a delay in delivering medical compensation by the terms of section 315(1), first sentence, and section 319(1), first sentence. Section 801(3), first sentence, states that,

> "[i]f *medical bills or travel allowance* are not paid within 30 days after the carrier has received notice of nonpayment by certified mail, in cases where there is no ongoing dispute, $50.00 or the amount of the bill due, whichever is less, shall be added and paid to the worker for each day over 30 days in which the medical bills or travel allowance are not paid." (emphasis supplied)

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[6] ". . . an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime."

Section 801(6) describes a penalty for the delay in the delivery of one kind of primary compensation. The sanction described by section 801(6) is interest and the delay is the time between the eligibility of the injured employee to weekly workers' disability compensation and an adjudication of that when a claim is contested by the employer. Section 801(6) states that,

> "[w]hen *weekly compensation* is paid pursuant to an award of a worker's compensation magistrate, an arbitrator, the board, the appellate commission, or a court, interest on the compensation shall be paid at the rate of 10% per annum from the date each payment was due, until paid." (emphasis supplied)

Section 161(1)(l) describes a penalty for an employer when the injured employee was a child who had been illegally hired. Section 161(1)(l), second sentence, states that,

> "[a]ny minor under 18 years of age whose employment at the time of injury shall be shown to be illegal, in the absence of fraudulent use of permits or certificates of age in which case only single compensation shall be paid, shall receive compensation double that provided in this act."

These four statutes in the WDCA have features which establish each as an ancillary compensation benefit. These four statutes address subjects that are profoundly different from the subject of both primary compensation and pendant compensation. Section 161(1)(l), second sentence, concerns the subject of the contract of employment between an employee and employer which is ancillary to a personal injury performing service contemplated by that contract or the consequences of the injury. Section 801(2), first sentence, section 801(3), first sentence, and section 801(6) concern the subject of the delivery of the primary compensation benefits after an adjudication of a contested claim which is ancillary. None of these four statutes address the subject of the remedy for the immediate personal injury or the consequences of the injury as such. All describe a penalty to an employer more than describe some compensation for an injured employee. While the measure for the sanction is different as section 161(1)(l), second sentence, uses the weekly

workers' disability compensation for the injured employee who was illegally employed as the standard for a one hundred percent penalty while section 801(2), first sentence, section 801(3), first sentence, and section 801(6) use the length of the time for delivery as the standard for a daily penalty and for interest, it is plain that all prescribe a penalty for particular conduct which is to be avoided. Courts have always recognized this. *Williams v Adrian Ind, Inc*, 110 Mich App 363, 366-367; 313 NW2d 127 (1981), "[s]ection 161[(1)(l), second sentence] is a punitive measure. Logic also supports this conclusion. If the double award is not punitive, it is difficult to comprehend why minors should receive a twofold award when the regular compensation scheme is designed to adequately compensate." *Townsend v M-R Products, Inc*, 436 Mich 496, 503; 461 NW2d 696 (1990), reh den 437 Mich 1202 (1990) referring to section 801(2) and (3) as "the $1,500 *penalty* provision . . . added in 1977 . . ." (emphasis supplied) The Court has observed that interest was added to the WDCA four years after the enactment of the late payment penalty of section 801(2), first sentence. *Townsend, supra*, 503.

Other law applies to limit the actual cost of the benefits that are within the range of the *compensation as provided in this act*. Law describes a maximum price for every primary compensation benefit, every pendant compensation benefit, and every ancillary compensation benefit.

A statute in the WDCA limits the price of the primary compensation benefit of weekly workers' disability compensation which is available by the terms of section 351(1), first sentence, and section 361(1), first sentence. MCL 418.355(2); MSA 17.237(355)(2). Section 355(2) limits the amount of weekly workers' disability compensation from an employer to a ratable amount of the state average weekly wage by stating that, "[e]ffective January 1, 1982, and each January 1 thereafter, the maximum weekly rate of compensation for injuries occurring within that year shall be established as 90% of the state average weekly wage as of the prior June 30, adjusted to the next higher multiple of $1.00."

Section 355(2) applies to the weekly workers' disability compensation that is paid for a total disability with an actual tie-bar in section 351(1), first sentence, which states that,

> "[w]hile the incapacity for work resulting from a personal injury is total, the employer shall pay, or cause to be paid as provided in this section, to the injured employee, a weekly compensation of 80% of the employee's after-tax average weekly wage, *but not more than the maximum weekly rate of compensation, as determined under section 355*." (emphasis supplied)

Section 355(2) applies to the weekly workers' disability compensation that is paid for a partial disability with a like tie-bar in section 361(1), first sentence, which states that,

> "[w]hile the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, *but not more than the maximum weekly rate of compensation, as determined under section 355*." (emphasis supplied)

The price of the primary compensation benefit of weekly workers' disability compensation for a qualified survivor of an employee who dies after a personal injury arising out of and in the course of employment which is available by the terms of section 321 is limited by section 355(2). Section 355(2) is implicitly tie-barred by section 321, first sentence, which states that,

> "[i]f death results from the personal injury of an employee, the employer shall pay, or cause to be paid, subject to section 375, in 1 of the methods provided in this section, to the dependents of the employee who were wholly dependent upon the employee's earnings for support at the time of the injury, a weekly payment equal to 80% of the employee's after-tax average weekly wage, *subject to the maximum and minimum rates of compensation under this act*, for a period of 500 weeks from the date of death." (emphasis supplied)

A statute in the WDCA limits the price of the funeral and burial of an employee who dies after an injury from work. Section 345, second sentence. Section 345,

second sentence, states that, "[t]he cost of the funeral and burial shall not exceed $6,000.00 or the actual cost, whichever is less."

The price of all of the pendant compensation benefits is limited by statutes in the WDCA. The supplement to the weekly workers' disability compensation which is available by the terms of section 352(1), first sentence, is limited by section 355(2) that is implicitly tie-barred by section 352(6) which states that, "[t]he supplement paid pursuant to this section, when added to the original benefit, *shall not exceed the maximum weekly rate of compensation*." (emphasis supplied)

The actual price of the other pendant compensation benefit which is available by the terms of section 356(1), first and second sentences, is limited by law. Section 356(1), *third* sentence. Section 356(1), third sentence, states that, "[u]pon presentation of this evidence, [the Board] may order an adjustment of the compensation rate *up to 50% of the state average weekly wage for the year in which the employee's injury occurred*." (Emphasis supplied)

The statutes which establish the ancillary compensation benefits that are available from an employer limit the final price. For example, the price of the sanction for an employer when the employee who experiences a personal injury or death arising out of and in the course of employment is a minor child is limited by section 161(1)(l), last sentence, to the amount of the weekly workers' disability compensation paid as the primary compensation benefit. Section 161(1)(l), last sentence, states that,

> "[a]ny minor under 18 years of age whose employment at the time of injury shall be shown to be illegal, in the absence of fraudulent use of permits or certificates of age in which case only single compensation shall be paid, shall receive compensation double that provided in this act."

The final cost of the penalty for the tardy delivery of the primary compensation benefit of weekly workers' disability compensation from an employer by the terms of section 801(2), first sentence, is limited to $1,500.00 by statute. Section 801(2),

second sentence. Section 801(2), second sentence, states that, "[n]ot more than $1,500.00 in total may be added pursuant to this subsection." The final cost of the analogue penalty for the tardy payment of the bills for medical care or medical rehabilitation is also limited to $1,500.00 by law. Section 801(3), second sentence.

The price of medical care and medical rehabilitation which are primary compensation benefits allowed by section 315(1) and section 319(1), first sentence, are also limited by law. 1988 AACS R 418.101, et seq. These rules which were promulgated by the Bureau in 1988 and revised regularly are commonly known as the medical care cost containment rules. They are voluminous as the Table of Contents reflects that there are no less than two hundred and fifty-nine rules which have many individual sub-rules and forms spanning four hundred and fifty-nine pages. (51b-58b) The rules dwarf the WDCA itself.

The reason for the volume is that the medical care cost containment rules establish the price for every single medical test and procedure constituting the *reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal* allowed as primary compensation by section 315(1), first sentence, and *medical rehabilitation services* allowed as primary compensation by section 319(1), first sentence.

The general rule is that an employer must pay only the price of the medical care provided to an injured employee which is in the catalogue of prices in the medical care cost containment rules. 1988 AACS R 418.2101(1). Rule 2101(1) states that,

> "[a] provider that is authorized to practice in the state of Michigan shall receive the maximum allowable payment, in accordance with these rules and the process specified in part 19 of these rules for resolving differences with a carrier regarding payment, for appropriate health care services that are rendered to a person who is entitled to health care services under section 315 of the act." (79b)

There is only one exemption. An employer must pay the actual price of the medical care when paid by the employee. 1988 AACS R 418.2102. Rule 2102 states that,

"[n]ot withstanding any other provision of these rules, if an employee has paid for a health care service and at a later date a carrier is determined to be responsible for the payment, then the employee shall be fully reimbursed by the carrier." (79b-80b)

These administrative rules of the Bureau have the full force of law.

Any administrative rule must be properly promulgated by an agency which has authority to render rules or the rule is only explanatory. *Clonlara v State Bd of Ed*, 442 Mich 230; 501 NW2d 88 (1993). *Goins v Greenfield Jeep Eagle, Inc*, 449 Mich 1; 534 NW2d 467 (1995). *Gage v Medina*, 450 Mich 889; 539 NW2d 508 (1995). *Danse Corp v City of Madison Heights*, 466 Mich 175; - NW2d - (2002). In the case of *Goins, supra*, 8, the Court reiterated the prior ruling in the case of *Clonlara, supra*, by stating that when "a rule is properly promulgated, then it adopts the force and effect of law."

In the most recent case of *Danse Corp, supra*, 181, the Court held that, "[i]n order for an agency regulation, statement, standard, policy, ruling or instruction of general application to have the force of law, it must fall under the definition of a properly promulgated rule. If it does not, it is merely explanatory. [citation omitted]."

The medical care cost containment rules *were* properly promulgated by the Bureau because of the authority extended by the WDCA. MCL 418.315(2); MSA 17.237(315)(2). Section 315(2) states that,

> "[e]xcept as otherwise provided in subsection (1), all fees and other charges for any treatment or attendance, service, devices, apparatus, or medicine under subsection (1) are subject to rules promulgated by the bureau of worker's compensation pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. The rules promulgated shall establish schedules of maximum charges for such treatment or attendance, service, devices, apparatus, or medicine, which schedule shall be annually revised. A health facility or health care provider shall be paid either its usual and customary charge for the treatment or attendance, service, devices, apparatus, or medicine, or the maximum charge established under the rules, whichever is less."

The process by which the medical care cost containment rules were promulgated by the Bureau was lawful. The reason for the delay was a challenge to section 315(2).

The medical care cost containment rules are not invalid or subordinate to section 315(1), first sentence, as the Auto "No-Fault" Carrier suggests in the *Brief on Appeal - Appellant*, Argument VI, 27-28. Section 315(2) establishes that the medical care cost containment rules subordinate section 315(1) by stating that, "charges for any treatment or attendance, service, devices, apparatus, or medicine under subsection (1), are subject to [the medical care cost containment] rules . . ."

The general rule of Rule 2101 applies in this case because it was in effect when the Employee was injured and received the medical care. See *Lahti v Fosterling*, 357 Mich 578; 99 NW2d 490 (1959) holding that the law concerning medical care which was in effect at the time of service applied instead of the law which was in effect at the time of injury to the employee.

The exemption of Rule 2102 does not apply because the Auto "No-Fault" Carrier is not an *employee*. *Employee* in Rule 2102 is only the individual human being who was actually injured or the personal representative of that person when incompetent or deceased. While the rules do not define *employee*, the WDCA does. MCL 418.161(1)(a) - (n); MSA 17.237(161)(a) - (n). Section 161(1)(a)-(n) states that,

> "[a]s used in this act, 'employee' means:
>
> A person in the service of the state, a county, city, township, village, or school district, under any appointment, or contract of hire, express or implied, oral or written. A person employed by a contractor who has contracted with a county, city, township, village, school district, or the state, through its representatives, shall not be considered an employee of the state, county, city, township, village, or school district which made the contract, when the contractor is subject to this act.
>
> Nationals of foreign countries employed pursuant to section 102(a)(1) of the mutual educational and cultural

exchange act of 1961, 22 U.S.C. 2452, shall not be considered employees under this act.

Police officers, fire fighters, or employees of the police or fire departments, or their dependents, in municipalities or villages of this state providing like benefits, may waive the provisions of this act and accept like benefits that are provided by the municipality or village but shall not be entitled to like benefits from both the municipality or village and this act; however, this waiver shall not prohibit such employees or their dependents from being reimbursed under section 315 for the medical expenses or portion of medical expenses that are not otherwise provided for by the municipality or village. This act shall not be construed as limiting, changing, or repealing any of the provisions of a charter of a municipality or village of this state relating to benefits, compensation, pensions, or retirement independent of this act, provided for employees.

On-call members of a fire department of a county, city, village, or township shall be considered to be employees of the county, city, village, or township, and entitled to all the benefits of this act when personally injured in the performance of duties as on-call members of the fire department whether the on-call member of the fire department is paid or unpaid. On-call members of a fire department of a county, city, village, or township shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the county, village, city, or township for the purpose of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage.

On-call members of a fire department that contracts with or receives reimbursement from 1 or more counties, cities, villages, or townships shall be entitled to all the benefits of this act when personally injured in the performance of their duties as on-call members of a fire department whether the on-call member of the fire department is paid or unpaid. On-call members of a fire department shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the fire department for the purpose of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage.

The benefits of this act shall be available to a safety patrol officer who is engaged in traffic regulation and management for and by authority of a county, city, village, or township, whether the officer is paid or unpaid, in the same manner as benefits are available to on-call members of a fire department under subdivision (d), upon the adoption by the legislative body of the county, city, village, or township of a resolution to that effect. A safety patrol officer or safety patrol force when used in this act includes all persons who volunteer and are registered with a school and assigned to patrol a public thoroughfare used by students of a school.

A volunteer civil defense worker who is a member of the civil defense forces as provided by law and is registered on the permanent roster of the civil defense organization of the state or a political subdivision of the state shall be considered to be an employee of the state or the political subdivision on whose permanent roster the employee is enrolled when engaged in the performance of duty and shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the state or political subdivision for purposes of calculating the weekly rate of compensation provided under this act.

A volunteer licensed under section 20950 or 20952 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.20950 and 333.20952 of the Michigan Compiled Laws, who is an on-call member of a life support agency as defined under section 20906 of Act No. 368 of the Public Acts of 1978, being section 333.20906 of the Michigan Compiled Laws, shall be considered to be an employee of the county, city, village, or township and entitled to the benefits of this act when personally injured in the performance of duties as an on-call member of a life support agency whether the on-call member of the life support agency is paid or unpaid. An on-call member of a life support agency shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the county, city, village, or township for purposes of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage.

A volunteer licensed under section 20950 or 20952 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.20950 and 333.20952 of the Michigan Compiled Laws, who is an on-call member of a life support agency as defined under section 20906 of Act No. 368 of the Public Acts of 1978, being section 333.20906 of the Michigan Compiled Laws, that contracts with or receives reimbursement

from 1 or more counties, cities, villages, or townships shall be entitled to all the benefits of this act when personally injured in the performance of his or her duties as an on-call member of a life support agency whether the on-call member of the life support agency is paid or unpaid. An on-call member of a life support agency shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the life support agency for the purpose of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage.

If a member of an organization recognized by 1 or more counties, cities, villages, or townships within this state as an emergency rescue team is employed by a state, county, city, village, or township within this state as a police officer, fire fighter, emergency medical technician, or ambulance driver and is injured in the normal scope of duties including training, but excluding activation, as a member of the emergency rescue team, he or she shall be considered to be engaged in the performance of his or her normal duties for the state, county, city, village, or township. If the member of the emergency rescue team is not employed by a state, county, city, village, or township within this state as a police officer, fire fighter, emergency medical technician, or ambulance driver, and is injured in the normal scope of duties, including training, as a member of the emergency rescue team, he or she shall be considered to be an employee of the team. For the purpose of securing the payment of compensation under this act, on activation, each member of the team shall be considered to be covered by a policy obtained by the team unless the employer of a member of the team agrees in writing to provide coverage for that member under its policy. Members of an emergency rescue team shall be considered to be receiving the state average weekly wage at the time of injury, as last determined under section 355, from the team for the purpose of calculating the weekly rate of compensation provided under this act except that if the member's average weekly wage was greater than the state average weekly wage at the time of the injury, the member's weekly rate of compensation shall be determined based on the member's average weekly wage. As used in this subdivision, 'activation' means a request by the emergency management coordinator appointed pursuant to section 8 or 9 of the emergency management act, Act No. 390 of the Public Acts of 1976, being sections 30.408 and 30.409 of the Michigan Compiled Laws, made of and accepted by an emergency rescue team.

A political subdivision of this state shall not be required to provide compensation insurance for a peace officer of the

> political subdivision with respect to the protection and compensation provided by Act No. 329 of the Public Acts of 1937, being sections 419.101 to 419.104 of the Michigan Compiled Laws.
>
> Every person in the service of another, under any contract of hire, express or implied, including aliens; a person regularly employed on a full-time basis by his or her spouse having specified hours of employment at a specified rate of pay; working members of partnerships receiving wages from the partnership irrespective of profits; a person insured for whom and to the extent premiums are paid based on wages, earnings or profits; and minors, who shall be considered the same as and have the same power to contract as adult employees. Any minor under 18 years of age whose employment at the time of injury shall be shown to be illegal, in the absence of fraudulent use of permits or certificates of age in which case only single compensation shall be paid, shall receive compensation double that provided in this act.
>
> Every person engaged in a federally funded training program or work experience program which mandates the provision of appropriate worker's compensation for participants and which is sponsored by the state, a county, city, township, village, or school district, or an incorporated public board or public commission in the state authorized by law to hold property and to sue or be sued generally, or any consortium thereof, shall be considered, for the purposes of this act, to be an employee of the sponsor and entitled to the benefits of this act. The sponsor shall be responsible for the provision of worker's compensation and shall secure the payment of compensation by a method permitted under section 611. If a sponsor contracts with a public or private organization to operate a program, the sponsor may require the organization to secure the payment of compensation by a method permitted under section 611.
>
> Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act."

MCL 418.375(3); MSA 17.237(375)(3) includes a personal representative of a deceased employee as an *employee* stating that,

> "[i]f an application for benefits has been filed but has not been decided by a worker's compensation magistrate, or on appeal and the claimant dies from a cause unrelated to his or her injury, the proceedings shall not abate but may be continued in the name of his or her personal representative."

Certainly, there is no occasion for the Court to redact the term *employee* in Rule 2102. *Twp of Leoni v Taylor*, 20 Mich 148 (1870). *Sun Valley Foods Co v Ward*, 460 Mich 230; 596 NW2d 119 (1999). *Hesse v Ashland Oil, Inc*, 466 Mich 21; 642 NW2d 330 (2002). The Court held in *Twp of Leoni, supra*, 154-155, that, "[w]hen the meaning of the words is plain and obvious, the only safe course is to suppose the [intention] of those things which the words denote, and to abstain from all attempts to discover a different meaning by suppositions and conjectures." Most recently, the Court held in *Hesse, supra*, 30, that,

> " . . . as with our predecessors, we should continue to accord a plain reading to the current exclusive remedy provision, which unambiguously bars from suit 'any other person to whom a claim accrues by reason of the injury to, or death of, the employee.'
>
> No one would disagree with the dissent that the death underlying this case occurred under tragic and horrific circumstances. However, our empathy for plaintiffs does not justify this Court ignoring the plain language of MCL 418.131, which bars the imposition of liability on defendant in the present circumstances. It could be argued, as undoubtedly it has been before the Legislature, that the law should allow a cause of action under circumstances like those in this case. Yet, as Justices SMITH and O'HARA and the many others on this Court who have written or signed opinions to a similar effect have understood, this is a policy matter—which is to say, it is not this Court's choice to make. Rather, we, as judges, must apply the legislation as it is written. As Justice CAVANAGH stated for a unanimous Court in *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915 (2001):
>
>> If the statutory language is clear and unambiguous, then we conclude that the Legislature intended the meaning it clearly and unambiguously expressed, and the statute is enforced as written. No further judicial construction is necessary or permitted."

A statute in the WDCA establishes that those statutes which describe the range of primary compensation, pendant compensation, and ancillary compensation and the limits of the price of each are the only statutes and the *only* remedies which are available from an employer, MCL 418.131(1); MSA 17.237(131)(1). Section 131(1), first sentence, states that, "[t]he right to the recovery of benefits as provided in this act shall be the employee's

exclusive remedy against the employer for a personal injury or occupational disease." Exceptions to this *exclusive remedy* statute for an intentional tort, section 131(1), second sentence, and the social and recreational activity, MCL 418.301(3); MSA 17.237(301)(3), second and third sentences, do not apply in this case.

Section 131(1), first sentence, is a statute which operates as an analogue to the familiar rule announced by the Court in cases such as *Galloway v Holmes*, 1 Doug (Mich) 330 (1844), *Taylor v Michigan Pub Utilities Comm*, 217 Mich 400; 186 NW 485 (1922), *Sebewaing Ind, Inc v Village of Sebewaing*, 337 Mich 530; 60 NW2d 444 (1953), and *Stowers v Wolodzko*, 386 Mich 119; 191 NW2d 355 (1971), that the express mention of one subject in a statute implies the exclusion of all other related subjects.

Another statute in the WDCA provides a similar rule. MCL 418.827(1); MSA 17.237(827)(1). Section 827(1), first sentence, allows an employee who was injured at work to pursue anyone with a responsibility except the employer or a co-employee by stating that,

> "[w]here the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with the this section."

See *Bitar v Wakim*, 456 Mich 428; 572 NW2d 191 (1998).

Section 827(1), first sentence, is the authority which allowed the Employee to seek and receive benefits from the Auto "No-Fault" Carrier which was not either the *employer* or a co-employee regardless of whether the Employer recognized or denied responsibility for any primary compensation.

Section 131(1), first sentence, is the authority for requiring the application of the WDCA to the Auto "No-Fault" Carrier who proceeds against the Employer.

MCL 418.131(2); MSA 17.237(131)(2). Section 131(2) states that for the purpose of making and effecting a claim for compensation the term *employee* means the individual human being the employee . . ." Certainly, the Auto "No-Fault" Carrier is an *other person to whom a claim against the employer accrues by reason of the injury to . . . the employee* because the Auto "No-Fault" Carrier is not the same person as the Employee but who has a claim that accrued from the injury which is the claim for reimbursement of the payments made after the injury that were required for medical care.

The two statutes in the WDCA cited by the Auto "No-Fault" Carrier in the *Brief on Appeal - Appellant*, Argument I, 12-14, MCL 418.841(1); MSA 17.237(841)(1), first sentence, and MCL 418.847(1); MSA 17.237(847)(1) do not alter this case. Section 841(1), first sentence, and section 847(1) allow the Bureau and the Board subject matter jurisdiction to hear and to decide claims but do not describe a primary compensation, pendant compensation, or an ancillary compensation benefit. Section 847(1), first sentence, states that, "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the [Bureau] or [Board], as applicable."

Section 847(1) states that,

> "[e]xcept as otherwise provided for under this act, upon the filing with the bureau by any party in interest of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the case shall be set for mediation or hearing, as applicable. [The Board] shall hear a case that is set for hearing."

Together these two statutes in the WDCA empower the Board to convene a hearing, establish the facts, and allow the remedy of the primary compensation, pendant compensation, or ancillary compensation benefits. The Court has always recognized this and contradicted the idea that these statutes empowered the Board to allow any other remedy by declaring a statute void or by incorporating some remedy recognized by the common law or equity. *Mackin v Detroit-Timkin Axle Co*, 187 Mich 8; 153 NW 49 (1915). *Michigan*

Mutual Liability Co v Baker, 295 Mich 237; 294 NW 168 (1940). *Dation v Ford Motor Co*, 314 Mich 152; 22 NW2d 252 (1946).

In the case of *Michigan Mutual Liability Co, supra*, 242, the Court held that,

> "[w]hile the department has jurisdiction to determine 'all questions' (2 Comp. Laws 1929, § 8455 [Stat. Ann. § 17.190]) arising under the compensation law, it must be borne in mind that it is an administrative tribunal only and not a court possessing general equitable and legal powers. *Mackin* v. *Detroit-Timkin Axle Co.*, 187 Mich. 8.
>
> 'While the industrial accident board * performs quasi-judicial duties, it is not possessed of judicial power.' *Jones v St. Joseph Iron Works*, 212 Mich. 174, 178.
>
> In some jurisdictions, the tribunal administering the workmen's compensation law may have complete power to adjudicate legal and equitable questions relating to insurance matters because of specific constitutional provision or different constitutional interpretation. [citations omitted]. This is not so in Michigan . . ."

The Court held in *Dation, supra*, 160, that the "all questions" text in section 841(1), first sentence, did not include deciding that a statute in the WDCA was void as a violation of the constitution which perforce meant that the "all questions" text could not authorize any avoidance of the statutes in the WDCA in favor of some other legal or equitable relief,

> ". . . the statute cited to 'All questions arising under this act,' must be given an interpretation consistent with the powers vested in the department. It was unquestionably the intention of the legislature that the department in its factfinding capacity should pass on factual issues presented in proceedings brought under the workmen's compensation law. The limitations on the power of the department, under the section cited by defendant, are clearly indicated by the language above quoted from *Michigan Mutual Liability Co.* v. *Baker, supra,* cited with approval in *Stuart v. Spencer Coal Co.*, 307 Mich. 685."

Most recently, the Court reiterated this in the case of *Solakis v Roberts*, 395 Mich 13, 20, 21; 233 NW2d 1 (1975),

> "[w]hen an employee's injury is within the scope of the act, workmen's compensation benefits are the exclusive remedy against the employer. MCLA 418.131; MSA 17.237(131);

> *Ladner v Vander Band*, 376 Mich 321, 325; 136 NW2d 916 (1965).
>
> In *Tews v C F Hanks Coal Co*, 267 Mich 466, 468-469; 255 NW 227, 228 (1934), this Court stated:
>
> 'The compensation act is in derogation of the common law and, therefore, its measure of relief may not be extended beyond its express terms; it is a legislative creation permitting no enlargement by principles of equity or common-law adaptations. It is arbitrary and where it speaks nothing can be added nor changed by judicial pronouncement. It imposes liability upon operatives under its provisions and measures exclusive relief in its own terms.'
>
> * * *
>
> . . . this Court has often stated that [the Workers' Compensation Appeal Board] is not a 'court' and 'is not possessed of judicial power'. *Modeen v Consumers Power Co*, 384 Mich 354, 360; 184 NW2d 197, 200 (1971)."

The Insurance Code does not apply. No statute in the Insurance Code that concerns workers' disability compensation, MCL 500.2301; MSA 24.12301, et seq., or automobile "no-fault" insurance, MCL 500.3101; MSA 24.13101, et seq., applies to either describe the range of benefits or the price of allowable benefits under the WDCA or exempt the benefits or the price of the benefits which are described by the WDCA.

The rules of the priority of insurance which are suggested by the Auto "No-Fault" Carrier in the *Brief on Appeal - Appellant*, Argument IV, 22-24, are not germane because the case here is not about which of two workers' disability compensation carriers is responsible for workers' disability compensation to the Employee as in *Dressler v Grand Rapids Die Casting Corp*, 402 Mich 243; 262 NW2d 629 (1978) or which of two automobile "no-fault" carriers is responsible for automobile "no-fault" insurance benefits as in *Martin v Detroit Auto Inter Insurance Exchange*, 135 Mich App 588; 354 NW2d 267 (1985). This case is only about the responsibility of one person, the Employer, for benefits under one law, the WDCA.

The Revised Judicature Act of 1961 (RJA), MCL 600.101; MSA 27A.101, et seq., which includes the statute concerning death by a wrongful act, MCL 600.2922; MSA 27A.2922, that is referenced by the Auto "No-Fault" Carrier in the *Brief on Appeal - Appellant*, Argument I, 11-12, does not apply. *Solakis, supra*, 21,

> "[i]n *Siebert v Northport Point Cottage Owners' Assn*, 378 Mich 661, 680; 148 NW2d 790, 799 (1967), Justice KELLY wrote in a well reasoned dissent:
>
> 'Appellee refers to the revised judicature act of 1961, and particularly to section 2921 of Chapter 29 and section 151 of chapter 1 thereof.
>
> 'The revised judicature act does not apply to workmen's compensation as is evidenced by the title of the act, which reads in part:
>
> ' 'An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts; * * * the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts.'
>
> 'The words upon which appellee relies in regard to 'judicial power,' which he claims include 'any other agencies,' were eliminated by the 1963 legislature by the enactment of PA 1963 (2d Ex Sess), No 18.'"

See also: *East Jordan Iron Works v Workers' Compensation Appeal Bd*, 124 Mich App 324; 335 NW2d 23 (1983).

No rule of subrogation applies. There are two types of subrogation. One is legal subrogation and the other is conventional subrogation. The difference between the two is the origin of the authority for subrogation. Legal subrogation arises by operation of law while conventional subrogation arises by convention or contract. *French v Grand Beach Co*, 239 Mich 575; 215 NW 13 (1927). In the case of *French, supra*, 480, the Court held that,

> "[t]he doctrine of subrogation rests upon the equitable principle that one who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect. This doctrine is sometimes spoken of as 'legal subrogation' and has long been applied by courts of equity. *Stroh v O'Hearn* (1913), 176 Mich 164, 177.

> There is also what is known as 'conventional subrogation.' It arises from an agreement between the debtor and a third person whereby the latter, in consideration that the security of the creditor and all his rights thereunder be vested in him, agrees to make payment of the debt in order to relieve the debtor from a sacrifice of his property due to an enforced sale thereof. It is wholly independent of any interest in the property which the lender may have to protect. It does not, however, inure to a mere volunteer who has no equities which appeal to the conscience of the court. Cited with approval in *Machined Parts Corp v Schneider* (1939), 289 Mich 567, 574."

An example of *legal* subrogation is the subrogation of an employer for reimbursement of workers' disability compensation from a tortfeasor who is responsible for money damages because of injury to an employee because that is allowed by law, the WDCA. Section 827(1). An example of *conventional* subrogation is a contract or bond that expresses the obligation and consideration paid by the subrogee. *City of Detroit v Bridgeport Brass Co*, 28 Mich App 54; 184 NW2d 278 (1970). Conventional subrogation is a pro tanto assignment. *City of Detroit, supra.*

The decision of the Court in *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210; 600 NW2d 630 (1999) illuminates this. In the case, Michael Klecha (Car Owner) bought an auto from the Used Car Factory, Inc (Car Seller), "[i]n January, 1990, Michael Klecha bought a 1981 Datsun from The Used Car Factory, Inc." *Hartford Accident & Indemnity Co, supra*, 211. Later, the Car Owner collided with a tractor-trailer which was operated by Eugene Bunt (Employee) who was an employee of Total Petroleum, Incorporated (Employer) which was insured for workers' disability compensation and auto "no-fault" insurance by Hartford Accident & Indemnity Co (Comp/No-Fault Carrier). *Hartford Accident & Indemnity Co, supra*, 212,

> "Klecha was killed when he drove the car directly into the path of a tractor-trailer unit owned by Total Petroleum, Inc. The collision damaged the truck and caused significant injury to its driver, Eugene Bunt.
>
> * * *

> Total Petroleum was insured by Hartford Accident, which had issued a variety of insurance, including worker's compensation and motor vehicle insurance."

The Employee received both workers' disability compensation, " . . . Hartford [the Comp Carrier] paid workers' [disability] compensation to Bunt [the Employee]," *Hartford Accident & Indemnity Co, supra*, 210, and auto "no-fault" insurance benefits,

> "[m]r. Klecha [the Car Owner] was uninsured, Mr. Bunt [the Employee] filed a claim for uninsured motorist benefits under the motor vehicle policy that [the Comp/No-Fault Carrier] had issued to Total [the Employer]. The policy evidently provided that such a claim was to be submitted to arbitration, and the matter was heard by a three-member panel in July 1992. [The Employee] and [Comp/No-Fault Carrier] were the only parties . . .
>
> In an August 1992 decision, the arbitrators unanimously awarded [the Employee] a total of $680,000. Of this sum, $518,833 was for lost wages and the balance was for noneconomic loss, including pain and suffering."

Then the Employer and Comp/No-Fault Carrier sued the Car Seller claiming negligent entrustment of the vehicle to the Car Owner and respondeat superior liability for the negligence of the operation of the car by the Car Owner,

> "[h]artford [Comp/No-Fault Carrier] and Total Petroleum [the Employer] sued the Used Car Factory [the Car Seller] in circuit court asserting . . . breach of a duty not to allow Mr. Klecha [the Car Owner] to take possession . . . without insurance [and] was liable for the negligent operation of the vehicle . . ." *Hartford Accident & Indemnity Co, supra*, 213, 214.

The civil action by the Comp/No-Fault Carrier and Employer against the Car Seller involved legal subrogation because the authority for claiming reimbursement of the workers' disability compensation that had been paid to the Employee was a statute in the WDCA, section 827(1). Also, the civil action involved conventional subrogation because the authority for claiming reimbursement of the auto "no-fault" benefits that were paid by the Comp/No-Fault Carrier was the contract of insurance with the Employer making the Employee an intended third party beneficiary.

The contract of insurance between the Comp/No-Fault Carrier and the Employer with the Employee as an intended third party beneficiary in *Hartford Accident & Indemnity Co, supra,* is NOT present here to allow conventional subrogation. Here, the contract of insurance by the Auto "No-Fault" Carrier was with the Employee and not the Employer. The only subrogation is legal subrogation which the WDCA recognizes but limits. That is, the claim by the Auto "No-Fault" Carrier is legal subrogation because the authority for the claim is the WDCA and that law limits the dollar amount of the relief which is available.

The Auto "No-Fault" Carrier does not cite any provision of the Insurance Code allowing subrogation of an auto "no-fault" carrier for reimbursement of the costs of medical care from an employer responsible for workers' disability compensation to establish legal subrogation separately from the WDCA. There is none. While the Auto "No-Fault" Carrier cites a statute in the Insurance Code that concerns a credit for workers' disability compensation, MCL 500.3109(1); MSA 24.13109(1), *Brief on Appeal - Appellant,* Argument I, 7, this does not establish legal subrogation. The credit is not a statutory lien for an auto "no-fault" carrier against the workers' disability compensation from an employer. *Allstate Ins Co v Sentry Insurance Co,* 175 Mich App 157; 437 NW2d 338 (1989). There, the Court of Appeals held,

> "[the] proposed construction of § 3109 is undetermined by the language of the statutory provision. The statute does not specifically create a lien in favor of the no-fault carrier but, instead, simply provides the no-fault carrier the right to subtract other payments from its own payments. Where the Legislature has otherwise intended to create a lien, it has used express language to do so. MCL 418.821(1); MSA 17.237(821)(1) provides for a lien upon an employer's property for workers' compensation liability in the case of the insolvency of the employer. The Legislature is presumed to be familiar with principles of statutory construction and to legislate in harmony with existing law. *Broadwell v Secretary of State,* 158 Mich App 681, 686; 405 NW2d 120 (1987); *Hasty v Broughton,* 133 Mich App 107, 113; 348 NW2d 299 (1984). The language of § 3109 fails to evince legislative intent to create a lien in favor of the no-fault carrier.

> Furthermore, to hold that §3109(1) creates an automatically perfected statutory lien would subject the workers' compensation carrier to responsibility for protecting the no-fault carrier's right to recovery, with consequent liability to the no-fault carrier, notwithstanding the compensation carrier's unawareness that no-fault payments were being made. We think the more logical and reasonable procedure for protecting the no-fault carrier's setoff rights is for the no-fault carrier to ascertain whether a workers' compensation claim has been or will be filed, and then to seek intervention in the workers' compensation proceeding. Se *Russell v Welcor, Inc,* 157 Mich App 351, 354-356; 403 NW2d 133 (1987), lv den 429 Mich 860 (1987), where this Court upheld the no-fault carrier's right to intervene in the workers' compensation proceeding. Intervention by the no-fault carrier is authorized by §847 of the Workers' Disability Compensation Act. MCL 418.847; MSA 17.237(847). It encourages swift payment of no-fault benefits (one purpose of the no-fault act) and protects the no-fault carrier's financial interest in the workers' compensation award. *Russell, supra,* pp 355-356.
>
> Accordingly, we find no statutory lien arose in favor of plaintiff under §3109(1) through payment of survivor loss benefits to McNeilly's widow."

The description of a credit for workers' disability compensation from an employer by section 3109(1) in no way implicates the limits on the price of the workers' disability compensation required from an employer. That is, the WDCA and the medical care cost containment rules establish the price for the particular charges for medical care while section 3109(1) of the Insurance Code allow directing a credit or reimbursement of that amount.

The Auto "No-Fault" Carrier did not present any contract or bond to establish a conventional subrogation. This distinguishes the Auto "No-Fault" Carrier from Blue Cross Blue Shield of Michigan which has conventional subrogation by the terms of the group disability insurance contract which includes an assignment clause which the WDCA recognizes. MCL 418.821(1), (2); MSA 17.237(821)(1), (2). Section 821(1), first sentence, prohibits conventional subrogation by an employee by stating that "[a] payment under this act shall not be assignable or subject to attachment or garnishment or be held liable in any way for a debt" while section 821(2) allows conventional subrogation for a group disability

carrier such as Blue Cross by excluding the assignment by the employee from the prohibition in section 821(1), first sentence,

> "[t]his section shall not apply to or affect the validity of an assignment made to an insurance company; health maintenance organization licensed under former Act No. 264 of the Public Acts of 1974, or part 210 of Act No. 368 of the Public Acts of 1978, as amended, being sections 333.21001 to 333.21099 of the Michigan Compiled Laws; or a medical care and hospital service corporation organized or consolidated under former Act No. 108 or 109 of the Public Acts of 1939, or any successor organization making an advance or payment to an employee under a group disability or group hospitalization insurance policy which provides that benefits shall not be payable under the policy for a period of disability or hospitalization resulting from accidental bodily injury or sickness arising out of or in the course of employment."

The Court may dismiss the plea from the Auto "No-Fault" Carrier that payment by the Employer by the terms of Rule 2102 is "contrary both to concepts of basic fairness and to a free market economic theory." *Brief on Appeal - Appellant*, Argument IV, 24. The Court is not authorized to substitute what it or others may think *basic fairness* for what the Legislature has established by law in the WDCA. *Hesse, supra*, 30,

> ". . . our empathy . . . does not justify . . . ignoring . . . plain language . . . It could be argued, as undoubtedly it has been before the Legislature, that the law should allow a cause of action under circumstances like those in this case. Yet, as Justices SMITH and O'HARA and the many others on this Court who have written or signed opinions to a similar effect have understood, this is a policy matter—which is to say, it is not this Court's choice to make. Rather, we, as judges, must apply the legislation as it is written."

Free market economic theory is not law.

RELIEF

Wherefore defendant-appellee Amoco Production Company prays that the Supreme Court affirm the opinion of the Court of Appeals.

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