STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE TOPIK

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION, a Michigan corporation,

Defendant-Appellant.

UNPUBLISHED
November 8, 1996

No. 186000
LC No. 91-104141-CK

Before: Markman, P.J. and Smolenski and G. S. Buth,* JJ.

PER CURIAM.

Defendant, appeals by right a circuit court order confirming an arbitration award in favor of plaintiff and denying defendant's motion to vacate the award. We reverse.

The case at bar arises out of a February 16, 1990, automobile accident. Plaintiff was driving his car and his ex-wife was in the front passenger seat. A large sign over the freeway fell onto the roof of the car and tragically killed plaintiff's ex-wife. Defendant paid funeral benefits and survivor's loss benefits to plaintiff's children and paid for the property damage to defendant's car.

At the time of the accident, plaintiff was employed but on medical disability leave. He was eventually terminated in July 1990 because he was absent without leave. He was hospitalized for psychiatric problems for two weeks in August 1990 and from September 1991 through February 1992.

In May 1990, plaintiff applied for social security benefits. On the application he listed his "disabling condition" as "irritable bowel syndrome, prescription drug addiction [and] ruptured umbilical cord." While the application was submitted after the accident at issue, in it plaintiff indicated that he was first disabled from working on January 2, 1990 -- six weeks before the accident. In the application, plaintiff made no mention of the accident at issue or of any post-traumatic stress disorder. In October 1990, the Social Security Administration determined, on the basis of an independent medical examination, that plaintiff suffered from affective disorder and substance addiction disorder and that he

* Circuit judge, sitting on the Court of Appeals by assignment.

was disabled from work as of January 2, 1990. It subsequently awarded him benefits based on these determinations.

In September 1990, plaintiff submitted an application for no-fault work loss benefits to defendant, listing an "emotional injury." "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1); MSA 24.13105(1). Defendant denied plaintiff's claim on the basis of its determination that his pre- and post- accident medical records indicated that his mental disability did not arise out of the accident.

On February 15, 1991, plaintiff filed suit seeking no-fault benefits for wage loss and unpaid medical expenses. The parties agreed to submit the matter to arbitration pursuant to the arbitration clause in the insurance policy. At arbitration, plaintiff acknowledged a substantial pre-accident history of psychological problems. However, he claimed that he suffered from post-traumatic stress disorder arising out of witnessing his ex-wife's violent death and that this was a separate and disabling "bodily injury." The arbitrators found that plaintiff sustained "bodily injury arising out of the use of a motor vehicle as a motor vehicle on February 16, 1990"; that he sustained wage loss; and that he was "totally disabled from his employment from and including February 16, 1990, for the full three-year period for which statutory benefits are payable." They awarded a total arbitration award of $172,854.50. Plaintiff moved the circuit court to convert the arbitration award to a judgment and defendant moved to vacate the arbitration award. The circuit court confirmed the arbitration award and denied defendant's motion to vacate the arbitration award.

On appeal, defendant contends that plaintiff's no-fault claim should have failed as a matter of law. An appellate court has the authority to set aside an arbitration award because an arbitrator exceeds his power only "[w]here it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made." *Detroit Automobile Inter-Insurance Exchange v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982).

In supporting its position that plaintiff's claim here fails as a matter of law, defendant makes several arguments. First, it argues that plaintiff's psychological/psychiatric injury did not arise of the use of a motor vehicle, rather it resulted from witnessing the death of his ex-wife. See *Keller v Citizens Ins Co*, 199 Mich App 714, 715-716; 502 NW2d 329 (1993). Second, defendant argues that plaintiff's psychological/psychiatric injuries did not constitute a "bodily injury." "[A]bsent physical manifestations, the phrase "bodily injury" does not include a claim for psychiatric damage." *State Farm Fire & Casualty Co v Basham*, 206 Mich App 240, 243; 520 NW2d 713 (1994). Third, defendant argues that no-fault work loss benefits were unavailable to plaintiff because he was totally disabled from working prior to the accident at issue. Finally, in connection with the third argument, defendant argues that plaintiff's representations on his social security application estop him from claiming that his total work disability began on the date of the accident.

We begin with plaintiff's third argument. MCL 500.3107(1)(b); MSA 24.13107(1)(b) states in pertinent part that work loss benefits are limited to:

> Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured.

In *MacDonald v State Farm Mutual Ins Co*, 419 Mich 146, 152; 350 NW2d 233 (1984), the Court held:

> [W]ork-loss benefits are available to compensate only for that amount that the injured person would have received had his automobile accident not occurred. Stated otherwise, work-loss benefits compensate the injured person for income he would have received but for the accident.

Work loss benefits are unavailable to persons unable to work because of disabilities unrelated to an automobile accident because "they have no income from work or its equivalent to lose." *MacDonald*, *supra* at 154. See also *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 645; 513 NW2d 799 (1994). Here, plaintiff's medical records and work records indicated that he had missed work on numerous occasions prior to this accident due to various psychological, personal and physical problems. In his application for social security benefits, plaintiff alleged that he was disabled from working on January 2, 1990. The Social Security Administration's award of benefits to plaintiff was explicitly based on a determination, resulting from an independent medical examination, that he was disabled from working on January 2, 1990 -- six weeks before the accident. This evidence demonstrated that plaintiff was disabled from work for reasons pre-existing and unrelated to the automobile accident at issue. Accordingly, the accident could not have resulted in the loss of income plaintiff would have otherwise received. Therefore, the arbitrators erred as a matter of law in concluding that plaintiff was entitled to work-loss benefits here and the circuit court erred in denying defendant's motion to vacate the arbitration award.

Our resolution of this issue is dispositive of this appeal. Accordingly, we not address defendant's other claims.

We reverse the order confirming the arbitration award and denying defendant's motion to vacate the award and remand this matter to the circuit court. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth