STATE OF MICHIGAN

COURT OF APPEALS

BENJAMIN PARK, Plaintiff-Appellee,	UNPUBLISHED December 13, 2002
v	No. 231451 Sanilac Circuit Court
AMERICAN CASUALTY INSURANCE COMPANY, Defendant-Appellant.	LC No. 93-022228-NI 00-027464-CK

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's order confirming a $218,000 arbitration award in plaintiff's favor. This case arose out of injuries plaintiff suffered while driving a vehicle for his employer, defendant's insured, and returns after our reversal of an earlier arbitration award.[1] We affirm in part, reverse in part, and remand.

Defendant asserts the arbitration panel committed an error of law by improperly setting off plaintiff's worker's compensation and disability benefits against the uninsured motorist benefits he was entitled to receive under the insurance policy. We agree.

Judicial review of arbitration awards is limited. *DAIIE v Gavin*, 416 Mich 407, 441; 331 NW2d 418 (1982). This Court may vacate an award if

> (a) the award was procured by corruption, fraud, or other undue means;
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> (b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
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> (c) the arbitrator exceeded his or her powers; or
>
> (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise

[1] *Park v American Casualty Ins Co*, 219 Mich App 62; 555 NW2d 720 (1996).

> conducted the hearing to prejudice substantially a party's rights. [MCR 3.602(J)(1).]

Further,

> [where] 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, the award and decision will be set aside. [*DAIIE, supra* at 443, quoting *Howe v Patrons' Mut Fire Ins Co of Michigan*, 216 Mich 560, 570; 185 NW 864 (1921).]

The parties' insurance contract provided that any amount payable under the uninsured motorist coverage would be reduced by "[a]ll sums paid or payable under any workers' compensation, disability benefits or similar law . . . ." The arbitration panel offset only those amounts plaintiff had *actually received* as of the arbitration hearing date, thereby rendering the term "payable" a nullity. The parties attribute different meanings to the term "payable." Defendant contends "payable" refers to any amounts to which plaintiff will be entitled in the future, while plaintiff argues "payable" means only those amounts to which plaintiff has a current entitlement, or those amounts currently due and owing. We did not address the meaning of "payable" when this case was previously before us.

If an insurance policy provision is clear, its terms are to be taken and understood in their plain, ordinary, and popular sense. *Clevenger v Allstate Ins Co*, 443 Mich 646, 654; 505 NW2d 553 (1993). "An insurance contract is clear if it fairly admits of but one interpretation. An insurance contract is ambiguous if, after reading the entire contract, its language can be reasonably understood in differing ways." *Wilkie v Auto-Owners Ins Co*, 245 Mich App 521, 524; 629 NW2d 86 (2001) (citations omitted). If the language is unambiguous, we need not and indeed may not look outside the language to find a meaning. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich App 134, 139; 610 NW2d 272 (2000).

Although the parties offer different meanings for "payable," the term is unambiguous. In a related context, the courts have interpreted "payable" as referring to benefits that were or *will be* paid, which encompass all amounts a beneficiary is entitled to receive, not just those currently due and owing. *Specht v Citizens Ins Co of America*, 234 Mich App 292, 295; 593 NW2d 670 (1999); *Owens v Auto Club Ins Ass'n*, 444 Mich 314, 321 n 7; 506 NW2d 850 (1993). See also *Perez v State Farm Mut Auto Ins Co*, 418 Mich 634, 646-647 n 19; 344 NW2d 773 (1984).

Importantly, this interpretation of "payable" prevents double recovery for an injured party. *Great American Ins Co v Queen*, 410 Mich 73, 96; 300 NW2d 895 (1980) ("We are persuaded that the Legislature intended that persons injured in motor vehicle accidents in the course of their employment be entitled to the same compensation received by all other motor vehicle accident victims"). Under plaintiff's interpretation, only those amounts actually received or due and owing at the time an arbitration award is made – or whatever date the arbitration panel sets – would be deducted from the insurance benefits an insured receives. Thus, all benefits received after that date would constitute double recovery for the insured's injuries.

Therefore, the arbitration panel committed an error of law substantially affecting the award's amount by limiting the setoff to amounts plaintiff had actually received as of the hearing date. Accordingly, the trial court erred in affirming the arbitration award.

Defendant also contends the trial court erred in declining to impose sanctions against plaintiff for various alleged procedural errors related to plaintiff's attempt to confirm the arbitration award by filing a new cause of action. We disagree.

This Court reviews for an abuse of discretion a trial court's decision regarding whether to impose sanctions. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000). However, the court's prerequisite finding concerning whether a party's claim was frivolous is reviewed for clear error. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 268-269; 466 NW2d 287 (1991); see also MCR 2.613(C).

MCR 2.114(F) allows a court to impose sanctions for frivolous claims and defenses. A claim is frivolous when (1) the party's primary purpose in initiating the action or asserting a defense was to harass, embarrass, or injure the prevailing party, (2) the party had no reasonable basis to believe that the underlying facts were true, or (3) the party's position was devoid of arguable legal merit. *Meagher v Wayne State Univ*, 222 Mich App 700, 727; 565 NW2d 401 (1997), citing MCL 600.2591(3)(a).

Defendant appears to assert plaintiff's claim was without arguable legal merit because of four alleged procedural deficits. However, none of these alleged errors warranted sanctions. First, defendant claims plaintiff erred by filing a new action while a pre-existing action was pending. However, the trial court consolidated the two pending actions, thereby resolving any procedural difficulty.

Second, defendant asserts plaintiff erred by filing a "petition" rather than a complaint to commence the second action, as required by MCR 2.101(B) and MCR3.602(B)(1). However, the record reveals plaintiff filed a summons and complaint regarding the new action. Therefore, defendant's argument is without merit.

Third, defendant argues plaintiff erred by failing to provide the requisite time for defendant to respond to the new cause of action, either twenty-one or twenty-eight days pursuant to MCR 2.108(A). Although an initial hearing in the new cause of action was held only seven days after plaintiff served process, the trial court adjourned the hearing, providing defendant twenty-eight days between service and the second hearing. Accordingly, defendant suffered no prejudice.

Finally, defendant maintains plaintiff never properly served process on it regarding the second cause of action. The lower court record indicates plaintiff served the summons and complaint on defendant's attorney, contrary to the court rules governing service of process on a corporation. MCR 2.105(D), (F), and (G). However, defendant waived this challenge by submitting to the court's jurisdiction, and, therefore, may not maintain an argument regarding improper service of process. *Penny v ABA Pharmaceutical Co*, 203 Mich App 178, 181; 511 NW2d 896 (1993).

For these reasons, the trial court did not abuse its discretion in declining to sanction plaintiff.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens