STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM R. BLEDSOE, CHRISTINA M. BLEDSOE, KAYLA BLEDSOE, and AUSTIN BLEDSOE, Plaintiffs-Appellees,	UNPUBLISHED April 24, 2003
v	No. 236735 Wayne Circuit Court
AUTO OWNERS INSURANCE COMPANY, Defendant-Appellant,	LC No. 99-926077-NO
and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, Defendant-Appellee.	

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this case involving a dispute about insurance coverage, defendant Auto Owners Insurance Company appeals by leave granted from the circuit court's order denying its motions for partial summary disposition. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff[1] drove a truck for his uncle, Mitchell Bledsoe, owner of Bledsoe Trucking, hauling freight for CTX, a freight broker, and was returning to Michigan from a delivery in Canada when he was stopped at customs. Plaintiff testified that after he stopped the truck, he exited the vehicle to retrieve some change out of his pants pockets in order to pay a toll, at which point a quarter rolled underneath the truck. He stated that as he knelt down to retrieve it, balancing himself with one hand on the step of the truck, a different truck ran over his right foot and pulled away. The identities of the second vehicle and its driver were never determined.

[1] "Plaintiff" in this opinion refers to plaintiff William Bledsoe.

Plaintiff suffered injuries to his foot, and he and his relatives therefore sued Auto Owners, the insurer of Bledsoe Trucking, to recover PIP (personal injury protection) benefits and uninsured motorist benefits. He and his relatives also sued National Union Fire Insurance Company of Pittsburgh, the insurer of CTX, to recover PIP benefits. National Union filed a motion for summary disposition and Auto Owners filed two motions for partial summary disposition, arguing that plaintiff was not an "occupant" of the parked truck at the time of the accident and was therefore not entitled to recover certain benefits. In addition, each insurance company argued that the other insurance company insured plaintiff's true employer at the time of the accident and thus was responsible for the payment of benefits. The trial court granted National Union's motion for summary disposition but denied Auto Owners' motions for partial summary disposition.

Auto Owners urges us to reverse the trial court's denial of its motions. We review rulings on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In this case, the trial court relied on MCR 2.116(C)(10) in denying the motions at issue. This court rule provides for summary disposition when "there is no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law." *Id.*

Auto Owners concedes that plaintiff is entitled to PIP benefits under *Kalin v DAIIE*, 112 Mich App 497, 500-501; 316 NW2d 467 (1982), but denies that it is responsible for paying those benefits. It contends that the party responsible for paying the benefits must be determined by reference to MCL 500.3115 – and not MCL 500.3114 – because plaintiff was not an "occupant" of the parked truck at the time of the accident. It further contends that under MCL 500.3115, it is not responsible for the payment of benefits because the vehicle it insured was not "involved in the accident." See MCL 500.3115(1)(a) and (1)(b). Indeed, in *Mack v Travelers Ins Co*, 192 Mich App 691, 694; 481 NW2d 825 (1992), this Court held that a parked vehicle is not "involved in [an] accident" unless one of the statutory exceptions to the parked-vehicle exclusion set forth in MCL 500.3106(1) applies. Auto Owners states that no exceptions to the parked-vehicle exclusion apply because plaintiff did not sustain his injuries "while occupying, entering into, or alighting from the vehicle." See MCL 500.3106(1)(c).

Auto Owners' arguments are viable if one looks solely to the provisions of the no-fault act and to the ordinary meaning of the terms employed in the act. Indeed, plaintiff was clearly not an "occupant" of the vehicle when he was reaching for his wayward quarter, nor was he "entering into" or "alighting from" the vehicle at that time. However, as noted in *Rednour v Hastings Mut Ins Co*, 245 Mich App 419, 422; 628 NW2d 116 (2001), a policy of insurance may provide broader coverage than that mandated under the no-fault act. In that circumstance, the insurance policy, rather than the statutory provisions of the no-fault act, governs coverage. *Id.*

Here, Auto-Owners' insurance policy excludes PIP benefits for "bodily injury arising out of the ownership, operation, maintenance, or use of a parked motor vehicle unless . . . the bodily injury was sustained by the injured person while occupying the motor vehicle." The no-fault endorsement defines "occupying" as "in or upon or entering into or alighting from a motor vehicle." Under these policy terms, plaintiff was an occupant of the vehicle according to his deposition testimony.

In *Rednour, supra*, 424, we considered a policy that defined "occupying" as "in, upon, getting in, on, out or off."[2] The *Rednour* Court, citing *Rohlman v Hawkeye-Security Ins Co (On Remand),* 207 Mich App 344, 357; 526 NW2d 183 (1994) (*Rohlman II*), stated that the term "upon" does not require that an object or person be positioned so that the object or person is totally and completely in contact with or supported by the underlying object or person. Rather, "the term 'upon' in the definition of 'occupying' means, at a minimum, some physical contact with the covered auto." *Id*. The facts of this case, viewed in the light most favorable to plaintiff, demonstrate that plaintiff qualifies for the recovery of PIP benefits, because, according to his testimony, he was resting his hand on the truck in question and thus "occupying" it at the time of the accident. Accordingly, the trial court properly denied Auto Owners' motion for partial summary disposition based on the argument that plaintiff was not occupying the vehicle at the time of the accident.

Auto Owners contends that even if plaintiff was injured while an occupant of the truck in question, the trial court nonetheless erred in denying it summary disposition because Bledsoe Trucking, Auto Owners' insured, was not plaintiff's employer nor the owner of the truck for purposes of MCL 500.3114. MCL 500.3101(2)(g) states that "owner" means any of the following:

> (i) A person renting a motor vehicle or having use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (ii) A person who holds the legal title to the vehicle other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days. . . .

Mitchell Bledsoe testified that he was the owner and registrant of the truck that plaintiff was driving on the day of the accident, and the lease agreement between CTX (carrier) and Bledsoe Trucking (contractor) specifically states that "contractor is the owner of certain motor vehicle equipment." However, the truck had been leased to CTX for more than thirty days, therefore making CTX the statutory owner under MCL 500.3101(2)(g)(i) and (ii).

However, the complete phrase "owned or registered by the employer" in MCL 500.3114(3) indicates that the identity of the statutory owner is not dispositive on the issue of priority of payment of PIP benefits but rather that the inquiry should center on the identity of the employer.

The economic reality test is generally used to determine the existence of an employment relationship for purposes of the no-fault act. *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624; 355 NW2d 106 (1983). The economic reality test looks to the totality of the circumstances surrounding the work performed and considers the following factors: "(1) control

[2] Our Supreme Court has observed that the terminology "in or upon or entering into or alighting from" is materially indistinguishable from the terminology "in, upon, getting in, on, out or off." See *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 528, n 8; 501 NW2d 310 (1993) (*Rohlman I*).

of a worker's duties, (2) payment of wages, (3) right to hire, fire, and discipline, and (4) performance of the duties as an integral part of the employer's business toward accomplishment of a common goal." *Howard v Dundee Mfg Co*, 196 Mich App 38, 41; 492 NW2d 478 (1992). Under this test, all of the factors are viewed as a whole, and no single factor is controlling. *Farrell v Dearborn Mfg Co*, 416 Mich 267, 276; 330 NW2d 397 (1982).

Regarding the first factor of the economic reality test, the evidence presented indicates that to some degree, both Mitchell Bledsoe/Bledsoe Trucking and CTX had some control over plaintiff's duties.[3] Plaintiff testified that he worked for his uncle at Bledsoe Trucking, hauling freight for CTX. Plaintiff received his dispatch instructions from CTX and turned his log records over to CTX. CTX safety manager Jeff Braden testified that CTX had no power to set the hours that the drivers worked and that if a driver had another job, or was driving for a different company, CTX would have no power to control the activities of the driver. At the time of the accident, plaintiff was "off dispatch," and once a driver is off dispatch, he is apparently free to do whatever he wants. The truck is then in "available" status for CTX, but if the driver receives a call, he can refuse another dispatch.

Regarding the second factor of the economic reality test, plaintiff received his wages exclusively from Mitchell Bledsoe/Bledsoe Trucking. Mitchell Bledsoe testified that he received $1250 per week from CTX under the lease agreement and that he paid plaintiff $100 a day for each day that he worked. The pay rate of $100 a day was set by Mitchell Bledsoe, not CTX.

Regarding the third factor of the economic reality test, the evidence presented indicates that Mitchell Bledsoe/Bledsoe Trucking had the ultimate authority to hire, fire, and discipline plaintiff. Contrary to Mitchell Bledsoe's assertion that CTX had "fired every driver he ever had," Braden testified that CTX had no power to hire, fire, control, or discipline drivers, and that the only thing CTX could do was refuse to accept a driver from Bledsoe Trucking if the driver was unqualified. This did not equate to CTX firing Bledsoe Trucking's drivers, because Mitchell Bledsoe could use those drivers for businesses other than CTX if he chose to do so. Further, the terms of the lease agreement between CTX and Bledsoe Trucking make it clear that Bledsoe Trucking was to retain all responsibility for hiring, firing, and disciplining its drivers. The agreement states that "[a]ll individuals hired by Contractor to assist in Contractor's performance hereunder shall be considered to be the employees of Contractor and not employees of Carrier."

Regarding the fourth factor of the economic reality test, the evidence presented indicates that plaintiff's performance of his duties was an integral part of Bledsoe Trucking but not an integral part of CTX. Mitchell Bledsoe testified that when his equipment was not on the road, he was not making any money, and it would not be satisfactory if plaintiff declined to work on certain days, because his truck would not be out making money for him. To the contrary, Braden's testimony suggested that if plaintiff declined to take a load from CTX, the CTX dispatcher could proceed down a list until he found another driver to take the load. Bledsoe

---

[3] We note that the parties have attached certain deposition transcript pages to their appellate briefs that were not filed in the lower court. No party has objected to the attachment of these additional pages.

Trucking's business would be affected if plaintiff did not perform his duties; CTX's business would not be affected to the same degree.

Considering all of the factors of the economic reality test as a whole, the trial court correctly rejected Auto Owners' argument that it was entitled to summary disposition because it did not insure plaintiff's employer at the time of the accident.

Finally, Auto Owners contends that the trial court erred by denying its motion for partial summary disposition with respect to the claim for uninsured motorist benefits. We agree. This Court has held that

> the policy dictates the circumstances under which uninsured motorist benefits will be awarded because the no-fault act does not require an insured to provide these benefits. Consequently, our duty is to determine, from the policy language used, the apparent intention of the contracting parties. Doubtful or ambiguous terms must be construed in favor of the insured and against the insurer, the drafter of the contract. [*Rohlman II, supra* at 350 (citations omitted).]

Because the term "occupying" is not defined in defendant-appellant's uninsured motorist endorsement,[4] we will assign it its primary and generally understood meaning. See, generally, *Rohlman II, supra* at 349. Our Supreme Court has held that by giving the term "occupant" its primary and generally-understood meaning and by looking to the statutory reference in MCL 500.3106(1)(c), someone is not an occupant unless he is "physically inside" the vehicle at the time of the accident. *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 531-532; 501 NW2d 310 (1993) (*Rohlman I*). Because it is clear that plaintiff was not physically inside the vehicle at the time of the accident, he is precluded from recovering uninsured motorist benefits from Auto-Owners.[5] The trial court incorrectly denied Auto Owners' motion for partial summary disposition with respect to the claim for uninsured motorist benefits.

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

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

---

[4] The definition of "occupying" discussed earlier for purposes of PIP benefits was applicable only to that particular section of the policy.

[5] The trial court's reliance on *Rohlman II* and *Auto Owners Ins Co v Harvey*, 219 Mich App 466; 556 NW2d 517 (1996), is misplaced because the uninsured motorist policies at issue in both of those cases defined "occupying" using a broad definition including the term "upon." The absence of the word "upon" in Auto Owners' uninsured motorist endorsement is fatal to plaintiff's claim.