STATE OF MICHIGAN

COURT OF APPEALS

ROBERT J. SMITTER, Plaintiff, v THORNAPPLE TOWNSHIP OF BARRY COUNTY and MICHIGAN MUNICIPAL LEAGUE WORKERS COMPENSATION FUND, Defendants-Appellees, and SECOND INJURY FUND, Defendant-Appellant.	UNPUBLISHED November 22, 2011 No. 294768 WCAC LC No. 09-000037

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant Second Injury Fund (SIF) appeals the decision of the Worker's Compensation Appellate Commission (WCAC), which affirmed a magistrate's decision holding that the SIF may not reduce its reimbursement to the township-employer to reflect the township's unexercised right to coordinate benefits. This Court originally denied the SIF's application for leave to appeal, but our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *Smitter v Thornapple Twp*, 488 Mich 917; 789 NW2d 493 (2010). We affirm.

Plaintiff was employed full-time by General Motors and part-time as a Thornapple Township firefighter. He was injured while working as a firefighter for the township and temporarily unable to work at either job. The township paid weekly wage-loss benefits to plaintiff at the maximum rate. Plaintiff also received benefits from a "sickness and accident" policy purchased by the township. The township did not reduce its payment of worker's compensation benefits to plaintiff pursuant to MCL 418.354(1). The township deliberately chose not to coordinate the benefits for its own policy reasons. After making the weekly wage-loss benefits to plaintiff, the township sought reimbursement from the SIF pursuant to the procedure in MCL 418.372(1)(b). The SIF agreed to pay an amount it contended it would have owed if the

township had coordinated the sickness and accident benefits and thereby reduced the weekly benefit that was apportioned between the township and the SIF.

The township filed a petition to recoup the benefits it claimed the SIF owed. Relying on *Rahman v Detroit Bd of Ed*, 245 Mich App 103; 627 NW2d 41 (2001), the magistrate rejected the SIF's argument concerning coordination and granted the township's petition. The WCAC unanimously affirmed the magistrate's decision.

The SIF argues on appeal that the WCAC erred in directing the SIF to reimburse the township on the basis of the uncoordinated amount that the township voluntarily paid.

This Court reviews de novo questions of law involved in a final order of the WCAC. *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 4; 760 NW2d 586 (2008). The decision may be reversed if the WCAC "operated within the wrong legal framework or based its decision on erroneous legal reasoning." *Id*. "[T]he WCAC's interpretation and application of a provision of the WDCA [Worker's Disability Compensation Act, MCL 418.101 *et seq*.] is entitled to 'considerable deference' from this Court where that interpretation is not 'clearly incorrect.'" *McCaul v Modern Tile & Carpet*, 248 Mich App 610, 619; 640 NW2d 589 (2001), quoting *Rahman*, 245 Mich App at 117.[1]

This case concerns coordination of benefits pursuant to MCL 418.354(1) and reimbursement by the SIF under the dual employment provision in MCL 418.372(1)(b). The "dual employment" provision of the WDCA governs the payment of weekly wage-loss benefits to an employee with dual employers. MCL 418.372(1) provides, in pertinent part:

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

[1] At oral argument, the Attorney General asserted that *Rahman* was no longer good law because its statement of the standard of review had been overruled by *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90; 754 NW2d 259 (2008). We disagree. In *Rovas*, our Supreme Court clarified long-standing Michigan law. The proper standard of appellate review of an agency's construction of a statute "requires 'respectful consideration' and 'cogent reasons' for overruling an agency's interpretation. . . . However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *In re Complaint of Rovas*, 482 Mich at 103, quoting *Boyer-Campbell v Fry*, 271 Mich 282, 296; 260 NW 165 (1935). Because the *Rahman* Court recognized the primacy of the Legislature's intent as expressed in the plain language of a statute, *Rahman*, 245 Mich App at 116-117, we find only an insignificant difference in semantics between it and *Rovas*. Consequently, the Attorney General's argument based on *Rovas* does not overcome MCR 7.215(J)(1) which requires that this Court follow *Rahman* until the Supreme Court or a special panel of this Court either reverses or modifies it.

* * *

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

Thus, when the employee is injured while performing a job that pays 80 percent or less of his total average weekly wage, § 372(1)(b) provides a formula and procedure for the payment of the weekly wage benefits. The first sentence of § 372(1)(b) defines the liability of the insurer for the injury-employer (here the township) for the "weekly benefits." Its liability is based on the proportion of its wages to the employee's total wages. The second sentence defines the liability of the SIF, which is liable "for the remainder of the weekly benefits." The third and fourth sentences address the procedure for the payment of the benefits. The insurer of the employer whose work resulted in the injury pays the employee at the full rate of compensation. The SIF then reimburses the insurer for the SIF's portion of the benefits due.

The WDCA's provision governing the coordination of benefits is implicated in this case because of the benefits that plaintiff received from a "sickness and accident" policy the township purchased. MCL 418.354(1) states in pertinent part:

> Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts:
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> * * *
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> (b) The after-tax amount of the payments received or being received under a self-insurance plan, a wage continuation plan, or under a disability insurance policy provided by the same employer from whom benefits under section 351, 361, or 835 are received if the employee did not contribute directly to the plan or to the payment of premiums regarding the disability insurance policy. . . .

The SIF maintains that the apportionment of liability in § 372(1)(b) should occur *after* the employee's weekly benefit amount is reduced through the coordination of benefits pursuant to § 354(1). That position is not consistent with *Rahman* in which the SIF argued "that the amount it is required to reimburse the board [the injury-employer] should be calculated after plaintiff's pension is deducted from the total amount of weekly benefits due to the plaintiff on the basis of

his employment with the board and the city." *Rahman*, 245 Mich App at 119-120. In rejecting that argument, this Court focused on the plain language of § 354(1), which states:

> Except as otherwise provided in this section, the employer's *obligation to pay* or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts . . . . [Emphasis added.]

The Court explained:

> Section 354 provides for a reduction in an employer's obligation to pay benefits if *that employer* provides the employee a pension. This reduction is clearly premised on the fact that the employer is providing another wage benefit to the employee; the statute allows the employer to coordinate that benefit with its obligation to pay worker's compensation wage-loss benefits to the employee. It is apparent from the language of the statute that the Legislature intended that the employer whose employment caused an injury alone may take advantage of the coordination provisions. There is no suggestion that the SIF, in a dual employment situation, may take advantage of the injury-employer's entitlement to coordination. Therefore, the SIF's argument is rejected. [*Rahman*, 245 Mich App at 120-121.]

Although the SIF argues that *Rahman* was wrongly decided, this Court is bound to follow that decision. MCR 7.215(J)(1). In any event, we believe that *Rahman* is consistent with the statutory language, whereas the SIF's position is not.

The SIF argues that *Rahman* is distinguishable because it concerned coordination of a different type of benefit, i.e., pension benefits rather than benefits from a disability insurance policy. But, both types of benefits are governed by § 354(1), and the statute does not provide any reason to treat these benefits differently.

The SIF further attempts to distinguish *Rahman* on the basis that it did not involve an employee's receiving benefits beyond those legally required to be paid. This proposed distinction does not favor the SIF's position. *Rahman* states that the plaintiff was receiving a pension from the injury-employer; the opinion does not state whether that employer was coordinating benefits under § 354(1)(d). If the employer was not exercising that right, then there is no distinction as the SIF suggests. Even if the employer were exercising that right, this Court nevertheless rejected the SIF's attempt to reduce its liability in reliance on the coordination. If the weekly benefits subject to apportionment do not reflect coordination when the employer exercises its right to coordinate, as the SIF suggests occurred in *Rahman*, then there is no basis for concluding that the weekly benefits subject to apportionment should reflect an unexercised right to coordinate benefits, as in the present case.

The SIF emphasizes its view that the WDCA mandates an employer to coordinate benefits. Regardless of whether coordination of benefits under § 354(1) is mandatory, the SIF has not shown that the pertinent statutes provide a basis for the SIF to reduce its reimbursement or to force an employer to coordinate benefits.

Finally, the SIF emphasizes the phrase "benefits due" in the last sentence of § 372(1)(b). The SIF asserts that the phrase indicates that its obligation to reimburse extends only to its portion of the amount that the employer is legally required to pay. We disagree. As previously stated, the second sentence of § 354(1)(b) defines the liability of the SIF. The third and fourth sentences explain the procedure for payment. The phrase "the second injury fund's portion of the benefits due" refers to the benefits due as calculated in the second sentence; it does not provide a basis for a different calculation of apportioned liability.

In summary, the WCAC correctly affirmed the magistrate's order that granted the township's petition to recoup even though the township did not unexercise its right to coordinate benefits. *Rahman* supports the WCAC's conclusion, and there is no principled reason for distinguishing it.

We affirm.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey