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SMALL SCHOOL.
BIG VALUE.

WORKERS' COMPENSATION— WORKERS' COMPENSATION INSURANCE CARRIER AS THIRD PARTY TORTFEASOR

Plaintiff injured his back at work and was referred to a physician by defendant workers' compensation insurer. Subsequently, plaintiff sued the doctor and the insurance carrier for damages for malpractice, alleging that the doctor was an agent of the insurer. The defendant insurance company filed a motion for summary judgment¹ asserting that as a matter of law plaintiff's complaint did not state a cause of action upon which relief could be granted. The trial court ruled for the insurance carrier,² stating that the insurer stood in the shoes of the employer and thus was entitled to the employer's immunity from suit under the Michigan Workers' Compensation Act.³ On appeal, *held*, reversed. Where an agency relationship is established between a workers' compensation insurer and the physician to whom it refers an injured worker, a cause of action exists against the carrier for damages caused by the malpractice of the physician. *Pankow v. Sables*, 79 Mich. App. 326, 261 N.W.2d 311 (1977).

The latter half of the nineteenth century witnessed an enormous growth in industrial activity throughout the world. In the United States, as cities and factories grew, many laborers were subjected to oppressive working conditions.⁴ There resulted a marked increase in the incidence of work-related injuries and deaths.⁵ Disabled workers, often unable to find employment and thus unable to support themselves and their families, looked to the courts to provide a remedy for their situation. Under the common law, it was necessary for the injured employee to prove negligence on the part of the employer before receiving a damage award.⁶ The new and often complex factory setting coupled with fellow workers' reluctance to testify against the employer often prevented the disabled worker from proving his claim.⁷

1. MICH. GEN. CT. R. 117.2(1).

2. Although the trial court awarded summary judgment pursuant to MICH. GEN. CT. R. 117.2(3) (absence of any issue of material fact), the court of appeals stated this was an obvious error and treated the summary judgment as granted by the trial court under MICH. GEN. CT. R. 117.2(1). *Pankow v. Sables*, 79 Mich. App. 326, 330, 261 N.W.2d 311, 313 (1977).

3. Workers' Disability Compensation Act of 1969, MICH. COMP. LAWS ANN. §§418.101-.941 (Supp. 1978-79).

4. A. J. MILLUS & W. J. GENTILE, *WORKERS' COMPENSATION LAW & INS.* 5 (1976).

5. *Id.* See generally *Developments in Workers' Compensation Law*, 53 J. URBAN L. 755 (1976).

6. At common law, the employer owed to his employees the duty to provide a reasonably safe place to work. Breach of this duty subjected the employer to a negligence suit. A. J. MILLUS, *supra* note 4, at 8-9. See *Developments in Workers' Compensation Law*, *supra* note 5.

7. NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, REPORTS ON STATE COMPENSATION LAWS, 34 (1972) [hereinafter NATIONAL COMM'N REPORT].

Additionally, the employer could raise common law defenses that frequently precluded any recovery for the injured employee.⁸ Furthermore, the political climate of the time favored industrial growth and thus the courts were reluctant to burden industry with the care of disabled workers.⁹

As a result of the inability of an injured employee to obtain an adequate remedy in the courts, many states passed employer's liability acts during the late 1800's. These acts limited the employer's available defenses. It was still necessary, however, for the employee to prove fault on the part of the employer before damages would be awarded in a negligence action. Thus, the difficulties faced by the employee in meeting his burden of proof were not remedied by these acts.¹⁰ It was often months before the injured worker received his compensation if he was, in fact, able to prove his claim.¹¹

By the turn of the century, it was apparent that the common law was not adequate to deal with industrial accidents, and that an alternative system of remedies was required. The various states began enacting workers' compensation statutes.¹² These statutes were essentially a compromise between the interests of employers and employees.¹³ In order to assure a speedy remedy for the injured worker, the employer was held strictly liable for injuries to the employee arising out of his employment. In return, the employee's rights against the employer were restricted to those provided for within the statutes.¹⁴ The acts generally included a schedule which specified the amount to be paid to a disabled worker according to the amount of his wages and the type of injury incurred.¹⁵ By 1920, all but six of the then forty-eight states had enacted workers' compensation legislation.¹⁶

Currently, every state has a workers' compensation act which pro-

8. Defenses available to the employer included contributory negligence, the fellow-servant doctrine (employee could not recover if the injury was due to the negligence of a fellow worker), and assumption of risk. A. J. MILLUS, *supra* note 4, at 9. See NATIONAL COMM'N REPORT, *supra* note 7, at 34. See also Wegner, *Michigan Workmen's Compensation Law: A Time for Careful Reevaluation*, 52 J. URBAN LAW 339, 340 (1974).

9. NATIONAL COMM'N REPORT, *supra* note 7, at 33.

10. A. J. MILLUS, *supra* note 4, at 12-13; see NATIONAL COMM'N REPORT, *supra* note 7, at 34; *Developments in Workers' Compensation Law*, *supra* note 5, at 757.

11. See A. J. MILLUS, *supra* note 4, at 6-12.

12. *Id.* 19. See *Symposium on Workmen's Compensation*, 59 KY. L. J. 35, 39 (1970).

13. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 80, at 531 (4th ed. 1971).

14. *Id.* See *Developments in Workers' Compensation Law*, *supra* note 5; Payne, *Workmen's Compensation: Toward a Stricter Liability for Enterprise*, 6 J. OF L. REFORM 190, 192-93 (1972).

15. NATIONAL COMM'N REPORT, *supra* note 7, at 34.

16. A. J. MILLUS, *supra* note 4, at 31. See also NATIONAL COMM'N REPORT, *supra* note 7, at 34.

vides cash benefits and medical care for injured workers.¹⁷ The primary purpose of the benefits is to furnish a specified portion of lost wages.¹⁸ Under the various acts, the employer must pay for the compensation benefits. In most instances this is accomplished by the employer contracting with a private insurance company to meet its statutory obligations. Most states additionally allow an employer to be self-insured if it can meet certain state-imposed standards which demonstrate financial responsibility.¹⁹

At the time workers' compensation was conceived, the theory of liability without fault was a new concept. The original acts were, therefore, drafted cautiously. The statutes had either a limited application or were noncompulsory in nature.²⁰ Although a common law action against an employer was eliminated, the statutes generally preserved some form of action against a third party tortfeasor under the common law.²¹

Currently, all but two workers' compensation statutes preserve the right of common law action against a third party whose tortious conduct resulted in the compensable injury.²² In order to prevent a double recovery by the employee, the statutes provide some procedure whereby the employer or its insurance carrier is reimbursed out of the damage award against the third party for any compensation paid to the employee.²³

Generally, the term "third person" under the statutes includes all persons other than the employer.²⁴ Thus, in several jurisdictions, suits have arisen in which an injured employee has attempted to recover in a third party action against the employer's compensation insurer for negligence in conducting safety inspections or in providing medical services. A common defense to these actions has been that the insurer, because of its integral connection with the employer under the acts, shared the employer's immunity to third party suit.²⁵ The decisions as to the insurer's vulnerability to such actions are, however, in conflict amongst the jurisdictions.²⁶ In some states the medical malpractice cases are distinguished in that the malpractice merely aggravated the

17. NATIONAL COMM'N REPORT, *supra* note 7, at 32.

18. *Id.* 33 (the lost wages may be actual or potential).

19. *Id.*

20. A. J. MILLUS, *supra* note 4, at 31.

21. *Developments in Workers' Compensation Law*, 53 J. URBAN L. 755, 763 (1976).

22. 2A LARSON, WORKMEN'S COMPENSATION LAW § 71.00, at 14-1 (1974).

23. *Id.*

24. *Id.* §72.00, at 14-29. In approximately one-third of the jurisdictions, immunity to common lawsuit is expressly limited to the employer. *Id.* § 72.10, at 14-29.

25. *Id.* § 72.90, at 14-133-145.

26. *Id.* §72.00, at 14-29; see 93 A.L.R. 2d 598 and the cases cited therein. There appears to be no majority position; comparison between jurisdictions is not meaningful because of the wide variance in the statutory backgrounds behind the cases. 2A LARSON, *supra* note 22, §72.90 at 14-123-1932.

injury whereas a negligent safety inspection was often a contributing cause to the original injury.²⁷ Notwithstanding this distinction in regard to insurers, all jurisdictions recognize some form of action against a doctor who allegedly aggravated a compensable injury through his malpractice.²⁸

Michigan first enacted a workers' compensation statute in 1912.²⁹ The purpose of the Michigan act was to provide for the welfare of the people of the state by placing the burden of compensation caused by industrial injury upon the industry. Common law remedies against the employer for work-related accidents were abrogated in return for speedy compensation to the disabled worker.³⁰

The 1912 Act provided that when an employee's injury was caused under circumstances creating a legal liability in a third person, the employee had an election of remedies. He could either proceed against the employer or against the third party, but not against both.³¹ Further, the employer could enforce the liability of the third party for the employer's own benefit or for the benefit of its insurance company.³²

The Act was revised in 1952³³ to eliminate the required election of remedies. Rather, the employee could proceed against a third party, other than the employer or a co-employee, in addition to receiving compensation benefits.³⁴ The employer or its insurance carrier was then subrogated to the rights of the employee to the extent of any compensation it had paid.³⁵

The current Michigan Act retains the provision allowing for the enforcement of third party tortfeasor liability against persons other than a co-employee or the employer.³⁶ The purpose of this provision is

27. See 93 A.L.R. 2d 598. The reasoning of these cases is generally that the aggravation of the original injury is a part of the compensation claim and as such, the employer is exclusively liable. *Id.*

28. 2A LARSON, *supra* note 22, § 72.61, at 14-96.

29. No. 10, [1st Ex Sess. 1912] Mich. Pub. Acts (repealed 1969).

30. *Id.* See *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F. Supp. 547 (E. D. Mich. 1965), *aff'd*, 372 F.2d 95 (6th Cir. 1967); Wegner, *Michigan Workmen's Compensation Law: A Time for Careful Reevaluation*, 52 J. URBAN LAW 339, 342-3 (1974).

31. No. 10, Part III §15 [1st Ex Sess. 1912] Mich. Pub. Acts (repealed 1969).

32. *Id.*

33. No. 155, [1952] Mich. Pub. Acts (repealed 1969).

34. The purpose of the employer immunity stems from the original compromise of workers' compensation. Michigan, along with a minority of other jurisdictions, including California and New York, has extended this immunity to the co-employee. It has been suggested that the co-employee immunity is an extension of the reasoning behind the employer immunity. The tortfeasor co-employee gives up his common law rights under the workers' compensation statute; in return, he receives freedom from a common lawsuit by a fellow employee based on an industrial accident in which the tortfeasor co-employee is at fault. 2A LARSON, *supra* note 22, §72.20, at 14-39.

35. No. 155, [1952] Mich. Pub. Acts (repealed 1969).

36. MICH. COMP. LAWS ANN. §418.827(1) (Supp. 1978-79). *Cf.* MICH. COMP. LAWS ANN. §418.131 (Supp. 1978-79) (the benefits provided in the act are the employee's exclusive remedy against the employer). See also *Workmen's Compensation, 1969 Ann. Survey of Mich. Law*, 16 WAYNE L. REV. 933 (1969).

to allow the employee additional recovery beyond that which he may receive in workers' compensation benefits.³⁷ The third party provision also retains the subrogation rights of the employer or its insurance carrier for any compensation benefits paid.³⁸

The Michigan Workers' Compensation Act allows an employer to secure the payment of compensation benefits by one of several methods. It may insure with an authorized workers' compensation insurance company;³⁹ it may insure with the accident fund;⁴⁰ or, upon proper authorization from the director, the employer may self insure.⁴¹ Currently, there are 747 employers in Michigan who are self-insured.⁴²

The question of an insurer's vulnerability to suit under the Michigan Workers' Compensation Act was first addressed by the federal courts. *Kotarski v. Aetna Casualty and Surety Company*⁴³ faced the issue whether, under the Michigan Act, an insurer could be held liable for alleged negligence in conducting a safety inspection. The federal district court held that, under Michigan law, the insurer shared the employer's immunity. The court first found that the insurer had assumed the employer's obligation of conducting safety inspections. It then reasoned that because the insurer is so essential to the effectiveness of the workers' compensation scheme in Michigan, the insurer should not be held liable in a third party suit unless such liability is expressly authorized by the legislature.⁴⁴

When the Michigan court spoke to this issue in *Ray v. Transamerican Insurance Company*,⁴⁵ it chose to interpret the words of the

37. *E.g.*, *Hix v. Besser Co.*, 19 Mich. App. 468, 473, 172 N.W.2d 821, 824 (1969).

38. MICH. COMP. LAWS ANN. §418.827(5) (Supp. 1978-79).

39. *Id.* §418.611(1)(b).

40. *Id.* §418.611(1)(c).

41. *Id.* §418.611(1)(a). This provision states:

The director may grant that authorization upon a reasonable showing by the employer of his solvency and financial ability to pay the compensation and benefits provided for in the act and to make payments directly to his employees as they may become entitled to receive the same under the terms of this act. *Id.*

Additionally, two or more employers in the same industry whose combined assets are \$1,000,000.00 may band together to qualify for self-insured status. *Id.* §418.611(1)(d).

42. Telephone interview with Bruno Czyrska, Administrator of Ins. Programs, Lansing, Mich. (Oct. 1978).

43. *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F. Supp. 547 (E. D. Mich. 1965), *aff'd*, 372 F.2d 95 (6th Cir. 1967).

44. 244 F. Supp. at 557. Although the insurer is not expressly excluded from liability under the Act, the court reasoned that "[i]t is not clear, however, that this failure to provide a specific exclusion means that the legislature intended to include [a workmen's compensation insurer] among those amenable to suit as a third-party tortfeasor." *Id.* at 553.

45. *Ray v. Transamerica Ins. Co.*, 10 Mich. App. 55, 158 N.W.2d 786, *appeal denied*, 381 Mich. 766 (1968).

Act more literally.⁴⁶ Since the Act did not specifically deny the employee his right of common law action against the insurance carrier, the *Ray* court held that the compensation insurer could be a third party within the meaning of the Act.⁴⁷

In 1972, the Michigan legislature, in effect, reversed the holding of *Ray*. The Michigan Workers' Compensation Act was amended to specifically grant immunity to a compensation insurer for conducting or failing to conduct safety inspections.⁴⁸ In addition to adding the subsection granting this immunity, the amendment provided that the definition of "employer," as used in the exclusive remedy and third party sections of the Act, includes the insurer insofar as it furnishes or fails to furnish safety inspections.⁴⁹ The amendment, as introduced in the Senate,⁵⁰ broadly equated the "insurer" with the "employer."⁵¹ Prior to passage, the definition of "employer" was narrowed to include the insurer only in relation to its furnishing of safety inspections and advice.⁵²

The principal case held that there is a cause of action against a workers' compensation insurer for the alleged malpractice of its agent physician in treating an injured worker.⁵³ The result is a literal and limited interpretation of the revised third party provision of the Act. The instant court drew an analogy between the case at bar and the safety inspection cases. By narrowly construing the 1972 amendment to the Act, the court determined that the legislature intended to grant immunity to an insurer only in regard to the conducting of safety inspections. Although the instant court's narrow analysis of legislative intent may be correct in regard to the amendment alone, when the Act is viewed in its entirety, it becomes apparent that the court's decision conflicts with the overall purpose and operation of the Act.

The instant court relied heavily on the reasoning of the *Ray* court, finding that in spite of the 1972 amendment, the analysis of the statute in *Ray* retained its vitality and was even strengthened by the fact that the legislature, when given the opportunity, declined to equate

46. "Nowhere in the act has the legislature indicated any intention to identify the employer with the compensation carrier." *Id.* at 59, 158 N.W.2d at 788. See generally *Torts, 1968 Ann. Survey of Mich. Law*, 15 WAYNE L. REV. 493, 502-506 (1968).

47. 10 Mich. App. at 59, 159 N.W.2d at 787.

48. MICH. COMP. LAWS ANN. §418.827(8) (Supp. 1978-79).

49. *Id.* § 418.131.

50. Mich. Senate Bill 1102 (1971).

51. The proposed amendment to section 131 of the Act read in pertinent part, "[a]s used in this section and section 827 . . . 'employer' includes his insurer and the accident fund." *Id.*

52. See MICH. SENATE J. 2423 (1972) (history of bill); MICH. SENATE J. 1066 (1972) (amendment proposed in Senate); MICH. SENATE J. 1964 (1972) (amendments of House of Representatives).

53. *Pankow v. Sables*, 79 Mich. App. 326, 261 N.W.2d 311 (1977).

the insurer with the employer for all purposes.⁵⁴ Here the court's analysis, in light of the legislative history of the amendment, is correct. Not only did the legislature decline to equate the insurer with the employer for all purposes, it actively took steps to amend the bill as introduced to limit the insurer's identification with the employer.⁵⁵

The instant court, in attempting to follow the general principle that any statute cutting off common law tort rights should be narrowly construed,⁵⁶ failed to follow an equally valid principle that statutory interpretation of a specific provision of an act requires a reading of the act as a whole.⁵⁷ The Michigan Workers' Compensation Act is not a series of isolated provisions, but a comprehensive plan. Necessary to the overall functioning of the Michigan workers' compensation scheme is the workers' compensation insurance carrier. Unless authorized to be a self-insurer, every employer subject to the Workers' Compensation Act⁵⁸ must insure against workers' compensation liability with an authorized insurer or the accident fund.⁵⁹ The workers' compensation carrier⁶⁰ has certain obligations imposed on it by the statute. It must promptly pay compensation claims for which it becomes liable and must make reports of claims to the director.⁶¹ Additionally, the insurer⁶² must assume the employer's obligations for the payment of compensation and the furnishing of medical services.⁶³

54. *Id.* at 335, 261 N.W.2d at 315.

55. *See* Legislative history cited at note 54, *supra*. However, the reasons for the legislature's amendment to the bill as introduced are, in fact, unknown. The Michigan House and Senate Journals merely record the history of a bill; there is no floor debate or legislative intent recorded. *See* Kotarski v. Aetna Cas. & Sur. Co., 244 F. Supp. 547 (E.D. Mich. 1965) ("Legislative intent is always difficult to ascertain, especially where, as in Michigan, records of committee proceedings and floor debates are unavailable" *Id.* 553). Whether the legislature intended to limit the insurer's immunity exclusively to safety inspection cases is merely an assumption, concededly supported, but not proven by the legislative history of the act.

56. *E.g.*, Markham v. Pittsburg Plate Glass Co., 299 F. Supp. 240 (W. D. Mich. 1969).

57. *E.g.*, Kotarski v. Aetna Cas. & Sur. Co., 244 F. Supp. 547 (E.D. Mich. 1965); Mills v. Detroit Tuberculosis Sanitarium, 323 Mich. 200, 35 N.W.2d 329 (1948).

58. The Act is compulsory as to all private employers, other than agricultural employers, who regularly employ three or more employees at one time. MICH. COMP. LAWS ANN. §418.115(a) (Supp. 1978-79). The Act applies to all public employers, regardless of the number of persons employed. *Id.* §418.115(c).

59. MICH. COMP. LAWS ANN. §418.611(a), (b) (Supp. 1978-79).

60. A "carrier" includes a self-insurer, an insurer and the accident fund. *Id.* §418.601(c).

61. *Id.* §418.631.

62. "Insurer" is defined as a private insurance company. *Id.* §418.601(a).

63. *E.g.*, MICH. COMP. LAWS ANN. § 418.621(2) (Supp. 1978-79) (An insurance policy issued by the insurer must contain provisions that the insurer "will furnish or cause to be furnished to all employees of the employer, all reasonable medical, surgical, and hospital services and medicines . . . which the employer may be obligated to furnish" and that the insurer "assumes all obligations imposed upon the employer . . . as far as the payment of compensation, death benefits, medical surgical, hospital care of medicine and rehabilitation services is concerned"); *Cf.* MICH. COMP. LAWS ANN.

Failure of the carrier to perform its obligations under the Act may result in the revocation of the insurer's license to transact the business of worker's compensation insurance within the state⁶⁴ or in denial of an employer's authorization to self insure.⁶⁵ For all practical purposes, as far as these statutory obligations are concerned, the insurer is indistinguishable from the employer.⁶⁶ The extension of the burdens of the employer to the insurer would suggest that the benefits should be extended as well by granting immunity from third party suit to the insurer for its performance of statutorily imposed duties.

In addition to its obligatory functions under the Act, a workers' compensation insurer often voluntarily assumes other duties. It is a basic tort principle that one who undertakes to act when he is under no obligation to do so will be held to a standard of due care.⁶⁷ Thus, action may create a liability where none would have existed had the actor not voluntarily assumed the duty. The most common voluntary act of the workers' compensation insurer is the conducting of safety inspections of the employer's premises by the insurer. The purpose in providing these inspections is generally to reduce compensable injuries and thus reduce compensation claims against the insurer.⁶⁸ Clearly, there are public policy arguments for granting the insurer immunity from third party tortfeasor liability in the safety inspection cases. The inspections should eliminate hazards thus reducing employee injuries. If the insurer might be held liable for negligence in performing safety inspections, it is possible it would choose not to assume this risk. Thus, the legislative grant of immunity to the insurer for performing such inspections serves the underlying purpose of the Workers' Compensation Act of providing for the welfare of the employees.

That safety inspections are a voluntary undertaking of the insurer casts doubt on the instant court's heavy reliance on *Ray*. In that case the workers' compensation carrier was first required to take some affirmative action before a legal duty could be found.⁶⁹ Having undertaken to inspect for safety hazards, the insurer was held to a standard of due care.⁷⁰

§418.315 (Supp. 1978-79) (an employee wishing to treat with his own physician must notify his employer of his intention and the employer or his compensation carrier may file an objection to the named physician).

64. MICH. COMP. LAWS ANN. §418.631(1) (Supp. 1978-79).

65. *Id.* §418.631(2).

66. *Banner v. Travelers Ins. Co.*, 31 Mich. App. 608, 612, 188 N.W.2d 51, 52 (1971) (concurring opinion).

67. See W. PROSSER, *supra* note 13, §56.

68. See 2A LARSON, WORKMEN'S COMPENSATION LAW §72.90, at 14-146 (1974).

69. *Ray v. Transamerica Ins. Co.*, 46 Mich. App. 647, 654, 208 N.W.2d 610, 614; *Andrews v. Ins. Co. of N. America*, 60 Mich. App. 190, 197, 230 N.W.2d 371, 375, *rev'd on other grounds*, 394 Mich. 464, 231 N.W.2d 645 (1975).

70. *Ray v. Transamerica Ins. Co.*, 46 Mich. App. 647, 654, 208 N.W.2d 610, 614.

This reasoning might easily be extended to other voluntary acts of the insurer to find a cause of action against the insurer for third party tortfeasor liability.⁷¹ In such cases a narrow reading of the 1972 amendment would be more appropriate. It is conceivable that in amending the Act, the legislature was concerned only with the insurer's voluntary undertakings. The legislature may have felt that insofar as statutorily imposed duties were concerned, such as the furnishing of medical care, the insurer was already so sufficiently equated with the employer that immunity need not be specifically granted.⁷²

Insofar as the insurer's performance of obligatory functions is concerned, it seems that the reasoning of the *Kotarshi* court is equally valid. The insurer, under the Act, is not merely responsible for monetary payments relating to compensation benefits. Rather, the insurer has a primary and invariable responsibility to furnish medical care.⁷³ It can be argued that this "militates against holding the insurer liable to suit as a third-party without the express authorization of the legislature."⁷⁴

The word "furnish" is not defined in the Act.⁷⁵ In actual practice, insurers normally have a medical panel that recommends industrial clinics to an employer for the referral of injured employees. The doctors generally clear any surgery or other serious treatment with the insurer before such medical services are performed. Additionally, many insurers employ a rehabilitation nurse whose function is to act as a liason between the injured worker and his treating physician.⁷⁶ Although after 10 days an injured worker may seek a physician of his own choosing,⁷⁷ upon proper notice to and lack of objection from the insurer, when lengthy or serious treatment is indicated, the insurer will often recommend a specialist to the disabled employee.⁷⁸

71. For example, if an insurer undertook to train employees in the operation of new equipment, it could be argued that the insurer was liable for negligent instruction leading to an industrial accident. In such a case the insurer would be voluntarily undertaking a duty and thus could be held to a standard of due care.

72. *But see* Ray v. Transamerica Ins. Co., 10 Mich. App. at 59-60, 158 N.W.2d at 788 (1968) (by using "employer" and "insurer" in the disjunctive throughout the Act, the legislature indicated rights granted separately to each).

73. 244 F. Supp. at 557.

74. *Id.*

75. Section 418.621 of the statute states that an insurer must "*furnish or cause to be furnished . . . all reasonable medical . . . services.*" MICH. COMP. LAWS ANN. §418.621(2)(b) (Supp. 1978-79) (emphasis added); that it must *pay* workers' compensation benefits, *id.* §418.621(2)(a); and that it must assume the employer's obligations for "the *payment* of compensation [and] medical . . . care" *id.* §418.621(2)(f) (emphasis added). The use of both the terms "furnish" and "pay" within the same section of the Act offers some support for the proposition that the term "furnish" is not synonymous with "payment."

76. Telephone interview with P. Abbo, Mich. Mut. Liab. Co. (Nov. 1978).

77. MICH. COMP. LAWS ANN. §418.315 (Supp. 1978-79).

78. Telephone interview with P. Abbo, *supra* note 76.

The selection of physicians that deal primarily in industrial accidents should mean, in most instances, that an injured worker will be referred to a doctor especially capable of handling such injuries. This should benefit the employee in that he will receive more efficient and accurate treatment than if he were to go to a doctor unfamiliar with work-related injuries. The insurer should benefit by not having to bear the costs of needless or inefficient treatment. Additionally, industrial clinics are generally less expensive than private doctors.

If the word "furnish" is interpreted to mean more than mere payment for medical services, then the above acts of an insurer may be viewed as the performance of its statutorily imposed obligations. Depending on the interaction between the insurer and physician, it is possible that an agency relationship could be established between the doctor or clinic and the insurer,⁷⁹ and thus, under the holding of the principal case, a cause of action would arise against the insurer for the malpractice of the agent-doctor. Under the instant court's ruling, there is a cause of action against the insurer for doing what it must do under the Act, and the insurer faces sanctions including loss of its license if it does not perform these duties.

If "furnish" is viewed to be synonymous with "payment," the actions of the insurer would be a voluntary assumption of a duty. Although under the reasoning of *Ray* this would indicate the imposition of liability on the insurer for negligence in performance of the duty, there is a policy argument against holding the insurer liable. The controls exercised by the insurer further the ultimate goal of the Act to provide for the welfare of workers. If the insurer may be held liable for negligence by "furnishing" this medical care, it is possible it would choose not to assume this risk.⁸⁰

Notwithstanding the insurer's vulnerability to third party suit, the Act specifically states that compensation benefits are the employee's exclusive remedy against the employer.⁸¹ Similarly, if both the employer and a third party may be shown to have caused the injury,

79. Michigan has abandoned a control test as the exclusive criterion for determining an employer-employee relationship and has adopted the economic reality test. *Goodchild v. Erickson*, 375 Mich. 289, 134 N.W.2d 191, 194 (1965). Among the relevant factors considered are the control exercised over a worker's duties, the payment of wages, the ability to hire and fire, and the relationship between the performance of duties and the accomplishment of the employer's business goals. *Askew v. Macomber*, 398 Mich. 212, 247 N.W.2d 288 (1976). If the tests for an agency relation are not clearly met, liability may still be found on the theory of agency by estoppel. This principle is well recognized in Michigan. *Howard v. Park*, 37 Mich. App. 496, 195 N.W.2d 39 (1972); See 1 CALLAGHANS MICH. CIVIL JURISPRUDENCE, *Agency*, §27 (Supp. 1978).

80. This situation is analogous to the safety inspection area where the legislature statutorily conferred immunity to the insurer so as not to deter the insurer's voluntary performance of a socially useful task. See note 48 & accompanying text *supra*.

81. MICH. COMP. LAWS ANN. §418.131 (Supp. 1978-79).

the third party may not seek contribution against the employer as a joint tortfeasor because the employer's liability is exclusively within the Act.⁸² The instant court's decision allows the employee additional remedies beyond those recoverable in workers' compensation benefits. This is apparently in keeping with the purpose of the third party provision of the Act. When medical services are furnished by a self-insured employer, however, the employee has no remedy beyond the workers' compensation benefits.⁸³ This seems to give an unfair advantage to a self-insured employer while creating a disadvantage for an employee who happens to work for such an employer.⁸⁴ Although

82. *Minister Mach. Co. v. Diamond Stamping Co.*, 72 Mich. App. 58, 64-65 248 N.W.2d 676, 680 (1976) (action against an employer for contribution between joint tortfeasors is, "of course, precluded by the exclusive remedy provision of the Workmen's Compensation Act." *Accord*, *Prosky v. National Acme Co.*, 404 F. Supp. 852 (E.D. Mich. 1975).

83. MICH. COMP. LAWS ANN. §418.131 (Supp. 1978-79) (the Act specifically states that the employee's exclusive remedy against the employer are the benefits provided within the Act); *accord*, *Solakis v. Roberts*, 395 Mich. 13, 20, 233 N.W. 2d 1,4 (1975) ("when an employee's injury is within the scope of the act, workmen's compensation benefits are the exclusion remedy against the employer"); *Totten v. Detroit Aluminum & Brass Corp.*, 344 Mich. 414, 73 N.W. 2d 882 (1955) (Although this case was decided before the Act was rewritten in 1969, the decision that an employer's liability is restricted to such compensation as is provided for within the Act is based on a reading of the statute in its entirety. The rewriting of the Act was a consolidation of the workers' compensation laws; the underlying policies of the Workers' Compensation Act did not change). *See Swain v. J. L. Hudson Co.*, 60 Mich. App. 361, 363, 230 N.W.2d 433, 434 (1975) (suit by employee against self-insured employer for damages resulting from alleged negligence in performance of safety inspection by employer in the role of insurer. The court held that the right to recover workmen's compensation benefits was an injured employee's exclusive remedy against his employer. "We fail to see why the assumption of an employer's own insurance risk should alter the clear meaning of this statute. A self-insured employer cannot be a 'third party' against whom an employee may institute suit"); *see Workmen's Compensation, 1969 Ann. Survey of Mich. Law*, 16 WAYNE L. REV. 933 (1969).

84. An analogous situation has arisen in connection with the Automobile No Fault Act, MICH. COMP. LAWS ANN. §§500.3101-.3179 (Supp. 1978-79), which allows an employer to self insure for no fault coverage. In *Mathis v. Interstate Motor Freight Sys.*, 73 Mich. App. 602, 252 N.W.2d 842 (1977), the employer was a no fault self insurer. The plaintiff was injured while unloading freight from his employer's truck. The plaintiff's application for no fault benefits was denied; workers' compensation benefits were held to be his exclusive remedy against his employer.

Hawkins v. Auto-Owners Ins. Co., 83 Mich. App. 225, 268 N.W.2d 534 (1978) was a case factually similar to *Mathis* except that the employer was not self insured. The court held that the plaintiff could collect both workers' compensation benefits and no fault benefits from a private insurer.

Ottenwess v. Hawkeye Security Ins. Co., 84 Mich. App. 292, 269 N.W.2d 570 (1978) viewed both the *Mathis* and *Hawkins* decisions in light of the no fault provision that a self-insurer has the "obligations and rights of an insurer." MICH. COMP. LAWS ANN. § 500.3101(4) (Supp. 1978-79). The *Ottenwess* court did not agree with the distinction drawn between the private insurer and the self-insurer by the two prior cases. The court stated: "The liabilities of self-insurers and insurers must be coextensive. Under *Hawkins*, the liability of insurers is greater than that of self-insurers. . . . [A]n employer's no-fault insurer must be considered the alter ego of the employer." *Id.* at 296, 269 N.W.2d at 572-73.

The court held that the exclusivity provisions of the Workers' Compensation Act restricted recovery of benefits from an employer for work-related injuries to

there are no statistics available as to the percentage of the Michigan work force employed by self-insured employers,⁸⁵ during 1977 approximately one-third of the lost-time injury cases reported came from self-insured employers.⁸⁶ Furthermore, over one third of the reported medical and lost-time compensation dollars paid were paid by self-insured employers.⁸⁷ Thus, in one third of these cases the injured employee was summarily precluded from asserting any claims against his employer as insurer which he might have asserted under the *Pankow* holding had the employer not been self-insured.⁸⁸ It seems highly inconsistent to allow an employee to sue an insurance carrier for negligence when under the same circumstances he could not sue his employer for similar negligence.⁸⁹ This conflicts with the goal of workers' compensation to provide a uniform and predictable remedy for all injured workers.

This inconsistency is underscored by the determination of when a physician may be sued. Generally, an injured employee may sue a doctor for malpractice in a third party suit assuming a doctor-patient relationship is established.⁹⁰ If the doctor is a co-employee of the disabled worker, however, the doctor is immune from suit.⁹¹ When a private insurance company stands in a similar relationship to a physician, regardless that both the insurer and the self-insured employer are referring the injured worker to a doctor because of a statutory

workers' compensation. It further held that because an injured employee could not collect additional no fault benefits from his self-insured employer he could not collect such benefits from his employer's private no fault insurer.

The above reasoning is applicable to the principal case. In order to prevent a discrepancy in remedies available to an employee of a self-insured employer and an employee of an employer insured with a private insurance company, the insurer must be considered the "alter ego" of the employer. Since the self-insured employer is immune from suit, the private insurer should also be immune when it is performing the *obligations of the employer*.

85. Telephone interview with Bruno Czyska, Administrator of Ins. Programs, *supra* note 42.

86. Of a total of 66,861 lost-time cases reported in Michigan in 1977, 22,148 came from self-insured employers. Statistics from Workers' Disability Compensation Bureau's 1977 Time Lag Study.

87. *Id.* Out of a total of \$382,258,360.00, \$146,854,544.00 was paid by self-insureds. It should be noted that lost-time cases are generally more serious than cases in which an employee loses no time from work, and thus it would seem that the potential for aggravation by malpractice would be greater.

88. Obviously, every one of these cases would not have involved a fact situation presenting an opportunity for suit. Nevertheless, even if such a fact situation were present, the employee could not sue.

89. NATIONAL COMM'N REPORT, *supra* note 7, at 52.

90. See *Rogers v. Horvath*, 65 Mich. App. 644, 327 N.W.2d 595 (1976) (No cause of action for malpractice can exist in the absence of a physician-patient relationship).

91. MICH. COMP. LAWS ANN. §418.827(1) (Supp. 1978-79) (co-employee immunity); *accord*, *Fidelity & Cas. Co. of N.Y. v. DeShone*, 384 Mich. 686, 187 N.W.2d 215 (1971); *Jones v. Bouza*, 7 Mich. App. 561, 152 N.W.2d 393 (1967), *aff'd*, 381 Mich. 299, 160 N.W.2d 881 (1968).

obligation to do so, under the instant court's holding the agent doctor is not immune. Thus, the employee of a self-insured employer again faces limited remedies in relation to those individuals who work for an employer insured with a private insurance company.⁹²

The constitutionality of the co-employee's immunity was upheld by the Michigan Supreme Court in spite of the limitation of remedies available to an injured employee who works for an employer large enough to employ its own staff physicians.⁹³ Although it is possible that the distinction between remedies available to employees of self-insured and privately-insured employers would also be upheld, this is not a certainty. That decision was based upon the distinction between employees and outside contractors. The reasoning might be applied to distinguish a suit against an agent-doctor of an insurer from a suit against a non-agent doctor to whom the insurer referred an injured worker. It does not necessarily follow that an insurer standing in the shoes of an employer should be treated distinctly.

Michigan was reluctant to extend the circle of immunity beyond the employer to include the co-employee. This immunity has been interpreted broadly to include any person carrying on the employer's work, regardless of the type of work being performed.⁹⁴ The insurer is essential to the workers' compensation scheme, and that scheme is a mandatory burden imposed on the employer. Without the insurer, the employer would not be allowed to carry on its work in Michigan. Thus, it seems reasonable that the insurer should be granted immunity from common law suit under the Act.

Generally, third party suits are instituted against a person who has no liability under the Act.⁹⁵ A common example is a products liability suit against the manufacturer of a machine which causes injury to an employee.⁹⁶ An insurer conducting safety inspections has no duty to do so and therefore no liability under the Act. This would seem to be the type of action contemplated by the language of the Michigan statute.

Nevertheless, unlike the employer who subjects itself to the workers' compensation statute because it must, the insurer chooses to subject itself in order to earn a profit. The original compromise of the

92. *But see* 2A LARSON, *supra* note 22, §72.90, at 14-153 (if third party liability is destroyed, the employee has no one to sue). Since Michigan has chosen to destroy this action in the case of an employee of a self-insured employer, it seems only just that the action also be eliminated when a private insurer is involved. Further, it must be recalled that the original compromise of workers' compensation granted assured but limited remedies to the employee.

93. *Jones v. Bouza*, 381 Mich. 299, 160 N.W.2d 881 (1968).

94. *Pettaway v. McConaghy*, 367 Mich. 651, 116 N.W.2d 789 (1962).

95. 2A LARSON, *supra* note 22, §71.00, at 14-1 (the compensation system was not intended to grant immunity to strangers).

96. *See Payne, Workmen's Compensation: Toward a Stricter Liability for Enterprise*, 6 J. L. REFORM 190 (1972).

Workers' Compensation Act was a limitation of the employee's common law remedies in return for the employer's duty to compensate the employee. The operation of Michigan workers' compensation is premised on the notion that many employers will assume compensation burdens through their insurers.⁹⁷ The insurer, under the Michigan Act, is required to stand in the shoes of the employer insofar as it is obligated to furnish medical care. However, in return for assuming this obligation, the insurer receives insurance premiums, a benefit the employer does not receive.⁹⁸ The self-insured employer, however, receives cost benefits by not having to pay insurance premiums. Any such cost savings are not within the original compromise of workers' compensation. Although the self-insured employer in receiving additional benefits which are analogous to the collection of insurance premiums, the self-insured employer is immune under the Act. The collection of premiums may distinguish the insurer from the employer but if this distinction is sufficient to create a cause of action against the insurer, then it should also create a cause of action against a self-insured employer acting in the role of insurer.⁹⁹

Under the third party provision of the Act, prior to the commencement of a third party action, the employer and the carrier must be notified.¹⁰⁰ The insurer is subrogated to the rights of the employee for any amounts paid by it under the Act.¹⁰¹ Further, if the employee chooses not to bring an action against the third party, the employer or its insurer may, after one year, commence an action against the third party.¹⁰² The Act does not seem to be written in contemplation that a compensation insurer might also be a defendant in a third party action. The insurer's vulnerability to suit presents the anomalous situation of a defendant insurer being subrogated to the rights of its own plaintiff.¹⁰³ The *Ray* court addressed this result but dismissed it as "not overly incongruous."¹⁰⁴ The court found that it was not such an impossible situation that the legislature could not have intended this result.¹⁰⁵

97. *Cf.* *Kotarski v. Aetna Cas. & Sur. Co.*, 244 F. Supp. 547, 559 (The Michigan Act was passed to provide for strict liability of the employer, financed by the insurer.)

98. 2A LARSON, *supra* note 22, §72.90, at 14-147.

99. Although the argument might be raised that the insurer is acting as an independent contractor of the employer and thus vulnerable to suit, this argument may be countered by an assertion that the insurer is acting as the employer's agent in performing the employer's duties and is thus immune under the co-employee rule.

100. MICH. COMP. LAWS ANN. §418.827(1) (Supp. 1978-79).

101. *Id.* §418.827(5).

102. *Id.*

103. *Megge v. Lumberman's Mut. Cas. Co.*, 45 Mich. App. 119, 125, 206 N.W.2d 245, 249 (1973).

104. 10 Mich. App. at 63, 158 N.W.2d at 789.

105. *Id.*

Neither the *Ray* court nor the instant court provides answers for questions this result creates. Primarily, one can question how many resources will be expended by a silent plaintiff insurer when it is suing itself. Additionally, one can question how the insurer's dual role will affect settlement negotiations between the injured employee and the defendant insurer.

In an analogous situation in which an employer's workers' compensation insurer attempted to intervene as plaintiff against itself as insurer of a negligent third party, the Michigan Supreme Court held that one may not sue himself.¹⁰⁶ The reasoning of the supreme court, that the insurer's dual role could have detrimental effects on our adversary system of justice,¹⁰⁷ is equally applicable to the results created by the principal case. Surely the instant court's decision can easily lead to protracted litigation and a clogging of the court dockets while the insurer merely shifts money from one pocket to another.¹⁰⁸

The insurer is statutorily required to stand in the shoes of the employer in performing certain duties of the employer, including the providing of medical services. Under the instant court's holding the insurer does not, however, stand in the shoes of the employer insofar as the employer's immunity to common law suit is concerned. The instant court reached this result by reading the third party provision of the Workers' Compensation Act literally and out of context of the entire Act. Based on this narrow reading of the statute, the decision of the instant court is permissible. However, when viewed against the background of the history and goals of the workers' compensation system, the incongruity of the decision becomes apparent. Obviously, it would be most desirable for the legislature to speak by revising the Act and explicitly defining the insurer's relationship to the employer insofar as immunity is concerned. Until this is done, however, in order to sustain the overall purpose of workers' compensation as it operates in Michigan, the Act must be interpreted to grant the insurer the immunity of the employer when it is performing the duties of the employer as it is obligated to do under the Act.

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106. *Harrison v. Ford Motor Co.*, 370 Mich. 683, 122 N.W.2d 680 (1963).

107. *Id.*

108. *Id.*