STATE OF MICHIGAN

COURT OF APPEALS

SCOTT M. CAIN,

Plaintiff-Appellee,

v

WASTE MANAGEMENT INC. and TRANSPORTATION INSURANCE CO.,

Defendants-Appellants,

and

SECOND INJURY FUND,

Defendant-Appellee.

FOR PUBLICATION
November 6, 2003
9:10 a.m.

No. 242104
WCAC
LC No. 98-000390

SCOTT M. CAIN,

Plaintiff-Appellee,

v

WASTE MANAGEMENT INC. and TRANSPORTATION INSURANCE CO.,

Defendants-Appellees,

and

SECOND INJURY FUND,

Defendant-Appellant.

No. 242123
WCAC
LC No. 98-000390

Updated Copy
January 16, 2004

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

KELLY, J. (*concurring in part and dissenting in part*).

Although I concur in part II (A) of the majority opinion, I respectfully disagree with the statutory analysis proffered in part II (B). In lieu of remanding to the Worker's Compensation Appellate Commission (WCAC) to allow it to provide its statutory authority and construction for awarding plaintiff total and permanent disability benefits, I would reverse the WCAC's apparent conclusion that the industrial loss of plaintiff's leg in its uncorrected state could constitute one of the two required losses for awarding plaintiff total and permanent disability benefits under MCL 418.361(3)(b).

On remand, the WCAC's analysis focused on a discussion of MCL 418.361(2)(k) and whether plaintiff had suffered the specific (industrial) loss of his left leg in addition to the specific (anatomical) loss of his right leg. However, the last sentence of the WCAC's opinion was its conclusion that "[h]aving shown specific loss of each leg, plaintiff is entitled to total and permanent disability benefits." The WCAC did not cite a subsection of MCL 418.361(3), the total and permanent disability provision, for this conclusion. The order effectuating its opinion was similarly imprecise, providing only that "specific loss benefits for plaintiff's left leg are granted in accordance with the attached opinion."

In *Cain v Waste Mgt, Inc*, 465 Mich 509; 638 NW2d 98 (2002), our Supreme Court eliminated the possibility of awarding plaintiff benefits under subsection 361(3)(g) of the Worker's Disability Compensation Act (WDCA) for the "[p]ermanent and total loss of industrial use of both legs . . . ." MCL 418.361(3)(g). Our Supreme Court held that plaintiff had not demonstrated total and permanent disability of his left leg because his left leg, when braced, was functional and could support industrial use. *Cain, supra* at 524. We can therefore only presume that the WCAC, having found that plaintiff suffered two specific losses, awarded plaintiff total and permanent disability benefits under MCL 418.361(3)(b) for the "[l]oss of both legs . . . ." The WCAC presumably concluded that two specific losses from subsection 361(2) entitled plaintiff to an award of total and permanent disability benefits under WDCA subsection 361(3).

Whether the WCAC's award of total and permanent disability benefits was proper is an issue of first impression. Although the issue of first impression concerns a question of law, which is appropriately reviewed de novo, *McCaul v Modern Tile & Carpet, Inc*, 248 Mich App 610, 619; 640 NW2d 589 (2001), the WCAC's one-sentence decision to award total and permanent disability benefits is an unsatisfactory basis for this Court's review, especially in light of the fact that the award presents a statutory construction on an issue of first impression and this Court is to give "considerable deference" to the WCAC's interpretation and application of a provision of the WDCA. See *McCaul, supra.* I would therefore favor remanding this case to the WCAC for the WCAC to supply its statutory basis and construction for awarding plaintiff total and permanent disability benefits. However, in light of the lengthy appellate history of this case and because the majority has decided this issue, I proffer my alternative statutory construction and conclusion in dissent.

This issue requires analysis of subsections 361(2) and (3), which provide:

> (2) In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation

paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:

(a) Thumb, 65 weeks.

(b) First finger, 38 weeks.

(c) Second finger, 33 weeks.

(d) Third finger, 22 weeks.

(e) Fourth finger, 16 weeks.

The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of 1/2 of that thumb or finger, and compensation shall be 1/2 of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.

(f) Great toe, 33 weeks.

(g) A toe other than the great toe, 11 weeks.

The loss of the first phalange of any toe shall be considered to be equal to the loss of 1/2 of that toe, and compensation shall be 1/2 of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire toe.

(h) Hand, 215 weeks.

(i) Arm, 269 weeks.

An amputation between the elbow and wrist that is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.

(j) Foot, 162 weeks.

(k) Leg, 215 weeks.

An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

(*l*) Eye, 162 weeks.

Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye.

(3) Total and permanent disability, compensation for which is provided in section 351 means:

(a) Total and permanent loss of sight of both eyes.

(b) Loss of both legs or both feet at or above the ankle.

(c) Loss of both arms or both hands at or above the wrist.

(d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).

(e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.

(f) Incurable insanity or imbecility.

(g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury.

Plaintiff opines that our Supreme Court's remand order encompasses an award of total and permanent disability benefits under MCL 418.361(3)(b) for the "[l]oss of both legs" because this result is the "logical and legal consequence" of the WCAC's finding that plaintiff suffered two specific losses under MCL 418.361(2)(k). According to plaintiff, it is "as simple as adding one plus one to get the two qualifying losses."

In contrast, the Second Injury Fund (SIF) complains that plaintiff "bootstrapped" the specific (anatomical) loss of his right leg with the specific (industrial) loss of the left leg, two inquires decided under the "uncorrected" test, in order to receive total and permanent disability benefits, which are awarded on the basis of the corrected test. The SIF argues that the WCAC's award therefore contravenes our Supreme Court's opinion in *Cain* that plaintiff was not entitled to total and permanent disability benefits under the "corrected" test.

Plaintiff concedes the seeming inconsistency in finding that a claimant who cannot qualify for total and permanent disability benefits for the loss of industrial use of both legs under the "corrected" test may qualify for total and permanent disability benefits by adding together two specific losses found by application of the "uncorrected" test. However, plaintiff attributes

the alleged inconsistency not to the WCAC's erroneous statutory construction, but to the alleged error of our Supreme Court's holding in *Cain* that the corrected test applies to subsection 361(3)(g) in the total and permanent context.[1]

I agree with the SIF that awarding an employee total and permanent disability benefits under MCL 418.361(3)(b) ("Loss of both legs") on the basis of the employee's specific (anatomical) loss of one leg and the specific (industrial) loss of the other leg requires an unreasonable construction of MCL 418.361 that does not accomplish the twin purposes of the statute. As our Supreme Court stated in *Cain, supra* at 521, benefits for specific losses and benefits for total and permanent disabilities are "unique categories with substantial differences."

"Loss of industrial use" is a special category of total and permanent disability benefits that was added to the total and permanent disability definition after its original formulation. *Cain, supra* at 512. This special category, found in subsection 361(3)(g) quoted above, allows recovery for total and permanent disability where there is no anatomical loss but where there is a loss of industrial use. *Id.* Hence, even if an employee does not suffer actual amputation of one or both legs so as to qualify for specific loss benefits, the employee may nevertheless be entitled to scheduled benefits for injury to both legs if the employee has lost the industrial use of his legs. *Id.*

The word "[l]oss" in the phrase "[l]oss of both legs" in MCL 418.361(3)(b), the statute upon which the WCAC's award was presumably based, does not indicate on its face whether the provision refers to anatomical loss or industrial loss or a combination thereof. If reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. *McCaul, supra* at 619-620. The court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. *Rowell v Security Steel Processing Co,* 445 Mich 347, 354; 518 NW2d 409 (1994).

When read in conjunction with subsection (g) of MCL 418.361(3), it becomes clear that "[l]oss" in subsection 361(3)(b) does not refer to *industrial* "loss of both legs." The Legislature expressly included "loss of industrial use of both legs" in subsection 361(3)(g). Therefore, "[l]oss of both legs" in subsection 361(3)(b) excludes the category of "loss of industrial use of both legs." Under principles of statutory construction, this Court is required to give effect to every statutory clause and to consider the statutory context holistically. *Eversman v Concrete Cutting & Breaking,* 463 Mich 86, 99; 614 NW2d 862 (2000) (Cavanagh, J., concurring in the result).

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[1] Plaintiff's assertion notwithstanding, whether our Supreme Court correctly held in *Cain* that prosthetics should not be considered in a total and permanent disability claim is not an issue properly before this Court. A decision of the majority of the justices of our Supreme Court is binding on lower courts. See *Negri v Slotkin,* 397 Mich 105, 107; 244 NW2d 98 (1976).

The Legislature's inclusion of "loss of industrial use of both legs" in subsection 361(3)(g) also reflects the Legislature's judgment that only the industrial loss of *both* limbs constitutes a total and permanent disability. The Legislature has made the policy decision that loss of industrial use rises only to the level of a total and permanent disability when the industrial use of *both* legs, or both hands, or both arms, or one leg and one arm have been lost. MCL 418.361(3)(g).

Accordingly, I do not find that the word "[l]oss" in the phrase "[l]oss of both legs" in MCL 418.361(3)(b) refers to a combination of anatomical loss and industrial loss, which is the result reached by the majority. My construction comports with the object of the total and permanent disability provision and the unique harm it is designed to remedy.

Total and permanent disability benefits is a category of benefits that substantially differs from the specific loss benefits category. *Cain, supra* at 521. As a threshold matter, the two categories have different statutory bases. Subsection 361(2) of the WDCA delineates the specific losses for which benefits will be paid, whereas subsection 361(3) of the WDCA delineates the total and permanent disabilities for which benefits will be paid. Moreover, benefits for a specific loss predicated on a loss of industrial use are awarded for the claimant's loss, not for the claimant's disability; benefits for a total and permanent disability premised on a loss of industrial use of two limbs are awarded for the claimant's disability. *Cain, supra* at 523-524 (adopting the WCAC's opinion). Accordingly, the test for total and permanent disability is a corrected test, whereas a specific loss is viewed in its uncorrected state, with an emphasis on the actual anatomical loss. *Id.*

Therefore, to import a specific loss from MCL 418.361(2) that is based on the loss of industrial use of a limb in its uncorrected state as the predicate for an award of total and permanent disability benefits under MCL 418.361(3) undermines the purposes of the separate statutory provisions and misses the policy distinctions between awarding benefits under MCL 418.361(2) and (3).

Our Supreme Court found that plaintiff had not demonstrated the loss of industrial use of his left leg because his left leg, when braced, was functional and could support industrial use. *Cain, supra* at 524. Therefore, within the total and permanent disability setting, plaintiff has suffered only the anatomical loss of his right leg and not the industrial loss of his left leg. Consequently, he cannot claim an award of total and permanent disability benefits under MCL 418.361(3)(b) for the "[l]oss of both legs . . . ." I would reverse the WCAC's apparent conclusion that the industrial loss of plaintiff's left leg in its uncorrected state could constitute one of the two required losses for awarding plaintiff total and permanent disability benefits under MCL 418.361(3)(b).

/s/ Kirsten Frank Kelly