

STATE OF MICHIGAN
COURT OF APPEALS

MARK BROWN,

Plaintiff-Appellee,

v

DETROIT LIONS, INC., and LIBERTY
MUTUAL INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED

July 11, 1997

No. 191780

WCAC

LC No. 94-000320

Before: Cavanagh, P.J., and Gage and D.A. Burrell*, JJ.

PER CURIAM.

Defendants appeal by leave granted a decision of the Worker's Compensation Appellate Commission (WCAC) that affirmed a magistrate's open award of benefits. We affirm.

Plaintiff played football for most of his adult life. He played for three years in college before being drafted by a professional team. After about six years of playing as a starting linebacker for the Miami Dolphins, plaintiff was hired as a linebacker by the Lions in 1989. The Lions rehired plaintiff for the 1991 season under a contract that included a wage increase. Plaintiff testified that his left knee was injured when he was tackled during a play on September 1, 1991. Plaintiff finished the game and reported his injury. On September 8, 1991, plaintiff started as a defensive linebacker, but his performance was not noteworthy. Plaintiff received additional medical attention after the September 8 game. However, plaintiff experienced difficulty with his knee during team practices. His coach inquired about plaintiff's ability to play and told plaintiff that he was needed by the team. The Lions nonetheless released plaintiff on October 8, 1991.

Plaintiff testified that but for his knee injury he would have been a starting player for the entire 1991 season and that, in plaintiff's opinion, he was playing the best football of his career before his injury. After surgery performed by the team physician and a period of rehabilitation, plaintiff returned to California where he continues to live, caring for his mother and living off his investments. Plaintiff has not

* Circuit judge, sitting on the Court of Appeals by assignment.

worked since being released by the Lions. Plaintiff testified that he wished to continue playing football, but his knee condition prevented him from moving with the necessary quickness and agility.

The magistrate found that plaintiff had established a permanent work-related knee injury that disabled him from returning to professional football and was therefore entitled to benefits. The WCAC affirmed the magistrate's finding of a continuing disability, concluding that it was supported by competent, material and substantial evidence, as required by MCL 418.861a(3); MSA 17.237(861a)(3). *Holden v Ford Motor Co*, 439 Mich 257, 261; 484 NW2d 227 (1992). This Court reviews the factual findings of the WCAC, *York v Wayne County Sheriff's Department*, 219 Mich App 370, 378-381; 556 NW2d 882 (1996), and must sustain the factual findings if they are supported by any competent evidence on the record. *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 511; ___ NW2d ___ (1997); *Holden, supra* at 262-263.

On appeal, defendants raise three arguments. First, they argue that plaintiff's wage loss is not because of his knee injury but because of his fading natural talent. They contend that plaintiff no longer had the skills to play professional football. However, the magistrate made the factual finding that at age 30 plaintiff was able to play, and he played well enough to be a starting linebacker. The WCAC did not err in affirming the magistrate on this basis. Plaintiff testified about the difficulty of returning to the Lions' lineup after his knee injury. The expert testimony of two doctors supported the finding of work-related disability. Dr. Jack Belen testified that plaintiff was disabled from playing football, while Dr. Eleby Washington thought that plaintiff's ability to play was diminished. The magistrate's findings of fact were thus supported by competent, material, and substantial evidence on the record. The WCAC, which called the plaintiff's testimony regarding his knee injury "specific, direct, and detailed," was correct to consider the magistrate's findings conclusive. MCL 418.861a(3); MSA 17.237(861a)(3); *Kovach v Henry Ford Hospital*, 207 Mich App 107, 111; 523 NW2d 800 (1994).¹

Next, defendants argue that plaintiff's injury does not interfere with his ability to earn wages in work within his qualifications and training. The worker's compensation statute defines disability as "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease." MCL 418.301(4); MSA 27A.237(301)(4). In a 1995 order, our Supreme Court indicated that to establish disability a claimant must demonstrate a physical limitation affecting his wage earning capacity in work suitable to his qualifications and training. *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201; 536 NW2d 542 (1995). Plaintiff met this requirement. He established to the satisfaction of the factfinder that his work-related injury prevented him from continuing to work as a linebacker, the job for which plaintiff was particularly qualified and trained.

Defendants argue that plaintiff's ability to perform other types of work was not addressed by the magistrate or the WCAC. We acknowledge that there may well be many other jobs plaintiff could perform. However, plaintiff's showing of an absence of wages and a work-related injury permitted an award of maximum benefits. *McKissack v Comprehensive Health Services of Detroit*, 447 Mich 57, 71; 523 NW2d 444 (1994). It was defendants' burden to adduce any proofs concerning plaintiff's actual employability. See *Sobotka v Chrysler Corp*, 447 Mich 1, 25-28; 523 NW2d 454 (1994).

The factfinder was free to accept or reject evidence of actual wages earned, avoided, or refused, or other factors affecting plaintiff's actual, as opposed to theoretical, employability. *McKissack*, *supra* at 71. The *Sobotka* and *McKissack* decisions were entered several months after defendants filed their brief with the WCAC but well before the WCAC decided the case, thus giving defendants ample time to raise their issues before the WCAC in a supplemental brief. Defendant Detroit Lions certainly has experienced other of their players applying for worker's compensation benefits. Nonetheless, the Lions failed to present any evidence to the WCAC or the magistrate concerning plaintiff's actual employability to counter plaintiff's testimony regarding his work-related injury and subsequent wage loss. Therefore, the magistrate had no evidence to accept or reject concerning plaintiff's actual, rather than theoretical, employability and the WCAC did not err in affirming the magistrate's findings.

Finally, defendants argue that plaintiff at age 30 was most likely near the end of his football career when he was injured, plaintiff's wages as a football player were inflated to compensate him for a short career, and therefore plaintiff should not be entitled to worker's compensation benefits. Defendants present no authority linking worker's compensation benefits to the length of a career. As the WCAC noted in its opinion, the worker's compensation statutes, MCL 418.301 *et. seq.*; MSA 17.237(101) *et. seq.*, do not permit foreclosing or reducing benefits merely as a factor of age, except upon a disabled employee reaching the age of 65. Moreover, the Legislature has specifically provided that professional athletes who have suffered a work-related injury may collect benefits so long as their current wages are less than 200% of the state's average wage. MCL 418.360; MSA 17.237(361). Plaintiff has earned no wages since his injury and is accordingly entitled to worker's compensation benefits. Any relief on this issue properly lies with the Legislature and not with the courts.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Daniel A. Burress

¹ Contrary to defendants' contention, a review of the magistrate's opinion indicates that she relied upon the testimony of both doctors. The WCAC, whose decision we review, specifically referred to the testimony of both Dr. Belen and Dr. Washington.