STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM ZELLNER,

Plaintiff-Appellant,

v

BAY VALLEY RESORTS and SECOND INJURY FUND (TOTAL AND PERMANENT DISABILITY PROVISIONS and TWO YEARS CONTINUOUS DISABILITY PROVISIONS),

Defendants-Appellees,

and

HOTELS INVESTORS CORPORATION and WAUSAU INSURANCE COMPANY,

Defendants.

UNPUBLISHED
March 2, 1999

No. 201346
WCAC
LC No. 94-000160

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Plaintiff William Zellner appeals by leave granted a decision of the Worker's Compensation Appellate Commission (WCAC) affirming a magistrate's denial of his petition for increased benefits. We remand for reconsideration of one factor relevant to increased benefits.

Plaintiff was employed by defendant Bay Valley Resorts on a part-time basis as a general maintenance worker beginning in April 1989. On November 2, 1989 he injured his back and legs during the course of his employment. Plaintiff did not return to work for defendant. Defendant voluntarily paid worker's compensation benefits of $77.33 per week based on a gross wage of $116 per week.

Plaintiff filed a petition seeking a one-time increase in benefits as permitted by MCL 418.356(1); MSA 17.237(356)(1), which provides that the Second Injury Fund (SIF) shall be liable for payment of any increase ordered. At the February 24, 1993 hearing, plaintiff testified that at the

time he was injured, he was 28 years old and single. He remained single at the time of the hearing. He indicated that he had dropped out of high school in 1978, but earned a high school equivalency diploma in 1982. Plaintiff testified that he had held a number of jobs. He had worked as a linesman, a fork lift driver, a nurse's aide, a car washer/cleaner, a stockman, and as an assistant to his now-deceased grandfather, who did plumbing and furnace work. Plaintiff testified that these jobs were full-time, but only one job had paid more than minimum wage and none of the jobs provided medical benefits. When plaintiff began working for defendant, he received minimum wage, but received a small raise during the course of that employment. Plaintiff stated that he always intended to better himself, and that he wanted to find a full-time job that paid medical and other benefits. Plaintiff testified that he thought that he would like to be an automobile mechanic because he had an aptitude for that type of work. Laurie Miles, a vocational specialist, testified by deposition for the SIF. She stated that plaintiff had a wage-earning capacity of $4.25 to $5.20 per hour, and that his qualifications made him a likely candidate for a job such as nurse's aide or other entry-level minimum wage type jobs. Miles indicated that had plaintiff been able to continue working for defendant, he would have been earning approximately $4.49 per hour.

The magistrate denied plaintiff's petition for an increase in benefits. The magistrate found that the record did not show that plaintiff had "enhanced his position to warrant an increase in benefits." Nothing indicated that plaintiff had made a serious effort to advance his education; moreover, plaintiff appeared to be a person who had aspirations from time to time but never took action to realize his ambitions. The WCAC affirmed the decision of the magistrate, finding that the magistrate's finding was supported by the requisite evidence. The WCAC noted that plaintiff had never obtained a high school diploma or its equivalent, and the jobs he had held had been entry-level positions. The WCAC stated that plaintiff's burden required him to show that "by virtue of his age, education, training, or experience that his earning capacity would have been expected to increase." The evidence did not show as much because it indicated that plaintiff would qualify for only the same type of minimum wage jobs he had held prior to his injury.

This Court's review in a worker's compensation case "does not include an independent review of the magistrate's decision or a substantial evidence review of the facts." *York v Wayne Co Sheriff's Dept*, 219 Mich App 370, 375; 556 NW2d 882 (1996). The limited scope of judicial review is established in Const 1963, art 6, § 28, which provides:

> Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

Similarly, MCL 418.861a(14); MSA 17.237(861a)(14), which provides for review of WCAC decision, states:

> The findings of fact made by the commission acting within its powers, in the absence of fraud, shall be conclusive. The court of appeals and the supreme court shall have the power to review questions of law involved with any final order of the commission.

In other words, this Court reviews de novo questions of law involved with any final order of the WCAC, *DiBenedetto v Second Injury Fund,* 229 Mich App 223, 228; 581 NW2d 766 (1998), while findings of fact made by the WCAC are conclusive if there is any competent evidence in the record to support them, *Holden v Ford Motor Co,* 439 Mich 257, 263; 484 NW2d 227 (1992).

Plaintiff argues that the WCAC improperly affirmed the magistrate's denial of an increase in benefits pursuant to MCL 418.356(1); MSA 17.237(356)(1), because the magistrate and WCAC ignored or overlooked certain facts relevant to the benefits increase. Section 356(1) provides for a one-time increase in weekly wage-loss benefits after two years of continuous compensable disability, as follows, in pertinent part:

> (1) An injured employee who, at the time of the personal injury, is entitled to a rate of compensation less than 50% of the then applicable state average weekly wage as determined for the year in which the injury occurred pursuant to section 355, may be entitled to an increase in benefits after 2 years of continuous disability. *After 2 years of continuous disability, the employee may petition for a hearing at which the employee may present evidence, that by virtue of the employee's age, education, training, experience, or other documented evidence which would fairly reflect the employee's earning capacity, the employee's earnings would have been expected to increase.* Upon presentation of this evidence, a worker's compensation magistrate may order an adjustment of the compensation rate up to 50% of the state average weekly wage for the year in which the employee's injury occurred. [MCL 418.356(1); MSA 17.237(356)(1) (emphasis added).]

Although this Court held in *Matney v Southfield Bowl,* 218 Mich App 475, 485; 554 NW2d 356 (1996), that evidence of adjustments for inflation, cost of living increases and changes in the labor market may provide sufficient evidence to support an increase under section 356(1), the Supreme Court affirmed in part and reversed in part this Court's decision in a peremptory order. *Matney v Southfield Bowl,* 458 Mich 851; __ NW2d __ (1998). The Court stated in pertinent part:

> The Supreme Court affirms the decision of the Court of Appeals on the question of the plaintiff's right to an increase in weekly wage-loss benefits pursuant to MCL 418.356(1); MSA 17.237(356)(1), because there was competent evidence in the record to justify the conclusion reached by the WCAC. This action should not be construed as indicating agreement with the reasoning set forth in the Court of Appeals opinion. To the extent that the Court of Appeals concluded that extrinsic economic forces are alone sufficient to justify a wage-loss benefits increase under the statute, that conclusion is expressly disavowed. [*Id.*; see also *Grigg v Uphohn Healthcare Services,* __ Mich __; __ NW2d __ (Docket No. 111832, issued 11/24/98).]

Thus, the magistrate must rely on the plaintiff's own age, education, training, experience or other documented evidence, rather than on any evidence of extrinsic economic forces, in order to determine whether the plaintiff is entitled to an increase in benefits under the statute.

Looking specifically to plaintiff's case, we address plaintiff's claim that the WCAC ignored the fact that plaintiff only worked part-time when he was disabled, but intended to work full-time; and that the WCAC found that plaintiff "never obtained a high school diploma," when it was undisputed that plaintiff had indeed obtained his diploma. This Court has determined that the fact that a plaintiff worked part-time, but expected to work full-time and thus receive greater compensation, is a relevant factor in the determination under section 356(1) of entitlement to increased benefits. *DiBenedetto, supra* at 228. Consistent with *DiBenedetto*, the WCAC here stated that there was nothing in the record to suggest that the magistrate ignored plaintiff's part-time employment status, and that it was clear that the magistrate was well aware of plaintiff's past work history. Thus, the WCAC was aware that plaintiff worked part-time at the time that he was disabled, and determined that the magistrate was also aware but did not believe that such fact entitled plaintiff to increased benefits in this case. Acknowledging that this Court's review of the WCAC's factual findings is very limited, we find no reason to dispute the WCAC's finding on this matter, since plaintiff did not introduce evidence at the hearing that would lead us to expect that he would imminently move into a full-time position that paid more.

However, we believe that the WCAC did err in its consideration of plaintiff's high school education. The WCAC stated in its opinion:

> Based upon our review of the record, we conclude that the magistrate's finding that plaintiff has not "enhanced his position to warrant an increase in benefits" is supported by the requisite evidence and thus conclusive upon us. For example, as the magistrate pointed out, plaintiff has never obtained a high school diploma, its equivalent, . . .

To the contrary, while plaintiff did originally leave high school in 1978, he returned to adult education and earned his high school diploma in 1982. Indeed, he stated that he finished the equivalent of three and one-half years of high school in two years. Plaintiff and defendant's vocational specialist testified to this information at the hearing, and neither party disputed its accuracy. As noted in *White v Revere Copper & Brass, Inc*, 383 Mich 457, 462; 175 NW2d 774 (1970), although the WCAC could have expressly rejected plaintiff's testimony, it could not properly deduce from the evidence in the record that he had no high school education where there was no evidence to contradict plaintiff's testimony. We find no competent evidence to show that plaintiff did not have a high school education. *Holden, supra* at 263. While we make no determination whether the correct information would have satisfied plaintiff's burden of proof pursuant to section 356(1), entitling plaintiff to an increase in benefits, we believe that the WCAC must have the opportunity to correctly consider plaintiff's factual evidence regarding his attainment of a high school diploma. This is a relevant factor in the determination of plaintiff's entitlement to increased benefits under section 356(1) and the WCAC expressly relied upon it in its findings. Thus, we remand to the WCAC for reconsideration of plaintiff's high school education.

We note that plaintiff also argues on appeal that the WCAC erroneously affirmed the magistrate, who improperly placed a higher burden on plaintiff to show that he took some affirmative action to increase his earning capacity rather than properly relying upon his age, education, training, experience and other documented evidence as required by the statute. However, since we remand for reconsideration of this case in light of plaintiff's correct status as a high school graduate, we need not

address such issue. Upon remand, the WCAC should take such steps as are necessary to ensure that this case is resolved properly and expeditiously.

Remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Stephen J. Markman
/s/ Michael R. Smolenski