

STATE OF MICHIGAN
COURT OF APPEALS

VICTOR T. BURTON,

Plaintiff-Appellant,

v

CAPITOL TRANSIT and ACCIDENT FUND
COMPANY,

Defendants-Appellees.

UNPUBLISHED

June 1, 1999

No. 208944

WCAC

LC No. 95-000971

Before: Jansen, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a December 12, 1997 decision of the Worker's Compensation Appellate Commission (WCAC) which modified a magistrate's open award of benefits by limiting plaintiff's benefits to differential benefits, based on the difference between the amount that plaintiff earned at his job when injured and the amount plaintiff earned at a subsequent job, calculating plaintiff's average weekly wage by not including fringe benefits, and by applying the one-year-back rule. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff began working for Capitol Transit, a steel hauling company, as a truck driver in 1979. Plaintiff's job duties included loading and unloading his truck. On January 2, 1987, plaintiff fell at work and suffered a herniated disc in his back. Plaintiff attempted to return to work in April 1987, but could not continue working. Plaintiff underwent surgery in June 1987, and then returned to work from April 1988 until February 1989. His last day of work with Capitol Transit was February 2, 1989, after which plaintiff participated in vocational rehabilitation. Plaintiff later obtained a job as a security guard on April 13, 1990, and continued to work as a security guard until he was laid off, for economic reasons, on April 16, 1993. When he began his job as a security guard, plaintiff was earning \$4 an hour, and when he was laid off, plaintiff was earning \$8.50 an hour. Plaintiff was working full-time (forty-five hours a week), had also been promoted several times, and received pay increases by the security company.

There is no dispute that plaintiff has remained disabled from performing his job for Capitol Transit as a truck driver. Capitol Transit voluntarily paid worker's compensation benefits after plaintiff was injured and paid differential benefits while plaintiff worked for the security company as required by

MCL 418.301(5)(b); MSA 17.237(301)(5)(b). Shortly after plaintiff was laid off by the security company, Capitol Transit stopped paying any benefits on April 22, 1993. Capitol Transit asserted that plaintiff had established a new wage-earning capacity with the security company and, therefore, plaintiff was not entitled to any benefits.

On June 18, 1993, plaintiff filed an application for mediation or hearing, which hearing was conducted before the worker's compensation magistrate on May 22, 1995. In an opinion mailed on November 13, 1995, the magistrate granted plaintiff an open award of benefits, finding that plaintiff's employment with the security company for more than 100 but less than 250 weeks had not established a new wage-earning capacity. Capitol Transit appealed to the WCAC. The WCAC modified the magistrate's decision. The WCAC found, contrary to the magistrate, that plaintiff had established a new wage-earning capacity when he worked for three years for the security company, but concluded that plaintiff was entitled to differential benefits under MCL 418.301(5)(d)(ii); MSA 17.237(301)(5)(d)(ii), rather than under MCL 418.301(5)(d)(i); MSA 17.237(301)(5)(d)(i), as found by the magistrate. The amount of the differential benefits depends in part upon how much more plaintiff was making as a truck driver than as a security guard. The WCAC did not consider plaintiff's truck driving wage to include lost fringe benefits, because, according to the WCAC, the parties agreed to plaintiff's average weekly wage at trial. The WCAC also found that the magistrate erred in not applying the one-year-back rule under MCL 418.833(1); MSA 17.237(833)(1), finding that the rule applied because plaintiff had previously received benefits and then sought further benefits.

The net result of the WCAC's decision was that plaintiff was entitled to differential benefits based on the agreed-to weekly wage, but plaintiff could recover only those benefits from the date one year before he filed his application. Because plaintiff had been receiving differential benefits for three years while he worked for the security company, he could not recover any underpaid benefits for more than one year before he filed his application. Plaintiff appeals from the WCAC's decision arguing that the WCAC erred in ruling that plaintiff had established a new wage-earning capacity, erred in not considering the discontinued fringe benefits in calculating plaintiff's differential benefits, and erred in ruling that the one-year-back rule was applicable.

Plaintiff first argues that the WCAC erred in ruling he had established a new wage-earning capacity. We find that the WCAC did not err in so ruling, thus, the WCAC properly modified the magistrate's ruling in this regard because the magistrate's decision was based on erroneous legal reasoning. *Haske v Transport Leasing, Inc*, 455 Mich 628, 664-665; 566 NW2d 896 (1997); *Demogola v Shellhouse Sawmill*, 226 Mich App 483, 488; 574 NW2d 688 (1997). Here, it is undisputed that plaintiff suffered from a work-related injury and that he was disabled as defined under MCL 418.301(4); MSA 17.237(301)(4). The question for the magistrate and WCAC was whether plaintiff was entitled to benefits under § 301(5)(d)(i) or (ii). The magistrate found that plaintiff did not establish a new wage-earning capacity, thus plaintiff was entitled to benefits based on his wage at the time of the injury, as provided for under § 301(5)(d)(i). The WCAC found that plaintiff was disabled, that plaintiff had established a new wage-earning capacity, and that plaintiff had worked for more than 100 weeks as a security guard, thus plaintiff was entitled to wage loss benefits based on the difference

between the normal and customary wages paid at the time of plaintiff's layoff and the wages paid at the time of injury, as provided for under § 301(5)(d)(ii).

The WCAC relied on *Wade v General Motors Corp*, 199 Mich App 267; 501 NW2d 248 (1993), in holding that once the magistrate found that plaintiff's security job was "recognized regular employment" which had "the ordinary conditions of permanency," a new wage-earning capacity should also have been found under § 301(d). Specifically, the WCAC accepted the magistrate's factual finding that plaintiff's employment as a security guard was "recognized regular employment without any modifications considering his disability," and that the position "had the ordinary conditions of permanency and was not a temporary or make shift position." We agree with the WCAC that having found that the security guard position was "regular employment" that had the "ordinary conditions of permanency," the magistrate erred as a matter of law in finding that plaintiff had not established a new wage-earning capacity. This Court in *Wade, supra*, p 272, applied the "regular employment" test to determine whether the plaintiff had established a new wage-earning capacity. Thus, the WCAC's reliance on *Wade* was proper and the WCAC correctly applied the facts as found by the magistrate to conclude that plaintiff had established a new wage-earning capacity.¹

This Court's decision in *Doom v Brunswick Corp*, 211 Mich App 189; 535 NW2d 244 (1995) does not compel as different result as argued by plaintiff and as determined by the magistrate. This Court in *Doom* held that the magistrate and WCAC did not err in relying on the criteria set forth in *Nairnie v General Motors Corp*, 1992 WCACO 66 to determine whether the plaintiff had established a new wage-earning capacity. Those criteria, however, do not establish a new or bright-line test to determine the establishment of wage-earning capacity. In fact, this Court specifically stated that the storekeeping department job that the plaintiff was in after her injury was not a *regular job with ordinary conditions of permanency*, while the other job that the plaintiff performed after the injury fit that description. *Doom, supra*, p 198. Accordingly, in both *Wade* and *Doom*, this Court applied the test of "regular job with ordinary conditions of permanency" to determine whether the plaintiff had established a new wage-earning capacity.

The WCAC, therefore, properly determined that plaintiff is entitled to differential benefits as set forth in § 301(5)(d)(ii) because, as found by the magistrate, plaintiff's security job is recognized regular employment without any modifications considering his disability and the job had the ordinary conditions of permanency.

Plaintiff next argues that the WCAC erred in refusing to include discontinued fringe benefits in calculating plaintiff's weekly wage with Capitol Transit. This is crucial to determining the actual rate of differential benefits because the differential benefits are the difference between the security guard job wages and the wages paid at the time of plaintiff's injury. Under MCL 418.371(2); MSA 17.237(371)(2), an employee's wages include the value of fringe benefits.

Here, the parties agreed to plaintiff's gross wages at the hearing before the magistrate. This amount did not include fringe benefits because, at the hearing before the magistrate, fringe benefits were irrelevant because plaintiff's gross wages alone exceeded two-thirds of the state average weekly wage and put plaintiff at the maximum benefit rate. However, contrary to the WCAC's conclusion, the

parties did not agree to a complete average weekly wage or the amount of fringe benefits. Rather, the stipulated amount was for gross wages excluding fringe benefits. Accordingly, the WCAC's conclusion that the parties agreed to or stipulated to the average weekly wage is incorrect. Since an employee's average weekly wage includes fringe and other benefits which are discontinued, § 371(2), and since the average weekly wage will directly affect the amount of differential benefits to which plaintiff is entitled, we remand to the magistrate for a determination of an average weekly wage including fringe and other benefits.

Lastly, plaintiff argues that the WCAC erred in applying the one-year-back rule as set forth in MCL 418.833(1); MSA 17.237(833)(1). In *Wozniak v General Motors Corp (After Remand)*, 212 Mich App 40, 43; 536 NW2d 841 (1995), this Court held that the one-year-back rule does not apply where the plaintiff sought to recover amounts that she should have been paid originally, that is, the difference between what the plaintiff was paid and what the plaintiff should have been paid. This Court further recognized that both the WCAC and WCAB had consistently held that the one-year-back rule does not apply to an employee's request for a rate change or correction.

The rule in *Wozniak* is applicable to this case. Capitol Transit stopped paying benefits to plaintiff shortly after he was laid off from his security guard job. Moreover, in its opinion, the WCAC stated that Capitol Transit acknowledged that it should not have terminated benefits when plaintiff was laid off by the security company and acknowledged that accrued differential benefits are due and owing and that such benefits must continue to be paid under § 301(5)(d)(ii). Under these circumstances, we agree with plaintiff that he was not seeking "further compensation," but was seeking a determination of the correct rate of benefits and the recovery of additional benefits that he was always entitled to.

Accordingly, the one-year-back rule does not apply to this case because plaintiff was seeking benefits that he should have been paid originally and Capitol Transit acknowledged that it should not have terminated benefits and that accrued differential benefits were owing. We reverse the WCAC's erroneous decision to apply the one-year-back rule to this case.

The WCAC's decision to award plaintiff benefits under § 301(5)(d)(ii) is affirmed. We reverse the WCAC's decision to apply the one-year-back rule, and we reverse the WCAC's decision to calculate plaintiff's average weekly wage without including fringe and other benefits. We remand to the magistrate to determine plaintiff's average weekly wage. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ David H. Sawyer

¹ No one disputes the magistrate's or WCAC's factual finding in this regard, that the security job was regular employment with any modifications considering plaintiff's disability and the position had the ordinary conditions of permanency, was supported by competent, material, and substantial evidence on the whole record, *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 511; 563 NW2d 214 (1997), therefore this finding of fact is conclusive. MCL 418.861a(14); MSA 17.237(861a)(14).