STATE OF MICHIGAN

COURT OF APPEALS

VICTOR T. BURTON,

Plaintiff-Appellant,

v

CAPITOL TRANSIT and ACCIDENT FUND COMPANT,

Defendants-Appellees.

UNPUBLISHED
June 1, 1999

No. 208944
WCAC
LC No. 95-000971

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

MARKMAN, J. (concurring in part and dissenting in part).

I concur in the conclusion of the majority opinion that the WCAC correctly modified the magistrate's award based upon plaintiff's establishment of a new wage-earning capacity in post-injury employment as a security guard, and I also agree with the majority that the WCAC's decision to apply the one-year-back rule was erroneous. However, I respectfully dissent from the reversal of the WCAC's decision to calculate plaintiff's average weekly wage at Capitol Transit without including the value of plaintiff's discontinued fringe benefits.

While it is true that MCL 418.371(2); MSA 17.230(371)(2) provides for the calculation of an employee's average weekly wage to include of the value of fringe benefits which do not continue during the disability, the statute only permits this "to the extent that the inclusion . . . will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of injury." As noted in *Karczewski v General Motors Corp*, 1994 Mich ACO 2777, this statutory restriction on the inclusion of fringe benefits reflects the Legislature's intent that fringe benefits should only be included to increase the weekly benefit amount available to employees whose other earnings, exclusive of fringe benefits, are alone too low to yield a weekly benefit amount that is equal or above two-thirds of the applicable state average weekly wage. The magistrate's opinion, which is quoted in the text of the WCAC's opinion in *Karczewski*, provides as follows:

> Defendant asserts that discontinued fringe benefits are includable in the calculation of average weekly wage only to the extent necessary to bring the full rate up to two-thirds of the state average weekly wage. I agree.

Section 418.371 (2) of the Act provides that discontinued fringe benefits are includable in the computation of the average weekly wage only to the extent necessary to yield a rate up to two-thirds of the state average weekly wage for the year of injury. If the cash wage yields a rate that meets or exceeds two-thirds of the state average weekly wage, discontinued fringes are not includable. The prior section of the Act provided for inclusion of discontinued fringe benefits in the average weekly wage computation under all circumstances. Obviously, a change was intended.

The present version was part of a large package of reforms that became effective in 1982. The whole thrust of the reform package was to tighten up eligibility requirements and, at the same time, improve the level of benefits for those who do qualify. Subject to maximum rates, the prior rate provisions were based on two-thirds of an employee's gross earnings. At the higher income levels, claimants are better off at the 80 % after tax rate. At certain income levels, employees were better off with a rate based on two-thirds of their gross income, inclusive of fringe benefits. In permitting addition of discontinued fringes up to the point necessary to reach a rate equal to two-thirds of the state average weekly wage, I believe the Legislature intended to reduce the overall economic loss for claimants at that income level. It was not intended that eligible claimants be 'worse off' under the new of schedule benefits.

Traditionally, average weekly wage is established, once and for all, as of the date of injury. The circumstances arising subsequent to that date (with the exception of later ending includable fringes) may affect the rate of compensation, but not the average weekly wage. Post-injury earnings, during periods of partial disability, operate as a credit, and in mitigation of, and employer's wage indemnity liability. The differential is created by the difference between the pre-injury and reduced post-injury earnings. Traditionally, and in the present statutory scheme, there is no indication that the Legislature intended to increase the differential by adding discontinued fringe benefits to the cash wage average weekly wage merely because the differential payment falls below two-thirds of the state average weekly wage. That concept runs counter to the entire mitigation/favored work doctrine.

Since plaintiff's pre-injury cash wage yields a full rate in excess of two-thirds of the state average weekly wage, he is not entitled to add fringe benefits to the wage calculation. Therefore, plaintiff's claim for a rate adjustment has been denied. [Emphasis added.]

On appeal, the WCAC affirmed the magistrate's decision, stating:

We agree with the magistrate that a plaintiff's average weekly wage is to be calculated as the date of injury and is not subject to recalculation based upon subsequent employment and/or based on subsequent changes in disability. Whether any or all of plaintiff's discontinued fringe benefits are included in a plaintiff's compensation is determined once and for all as of the date of plaintiff's injury. Here, because plaintiff's average weekly cash wage produced a benefit rate exceeding two-thirds of the state

> average weekly wage, his fringe benefits could not be considered in the calculation of the average weekly wage at the time of injury. Likewise, his fringe benefits may not be utilized at a later date to modify the average weekly wage so as to provide plaintiff with a higher compensation rate.
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> Finally, contrary to plaintiff's assertion, Magistrate Wheaton's discussion about the intent of the legislature during the 1982 reform is accurately stated. Magistrate Wheaton contrasted claimants having a higher income level with those having a lower income which the inclusion of fringe benefits was designed to protect. Plaintiff fails to recognize that he falls in the higher income level and is therefore outside of the intent of the legislature.

Notably, both this Court and the Michigan Supreme Court denied the worker's application for leave to appeal in *Karczsewski.*

The calculation of a worker's average weekly wage at the time of injury usually involves a two-step process: first, the worker's gross weekly wages in "cash" alone are applied to the annual benefit rate tables published pursuant to MCL 418.313(2); MSA 17.237(313)(2), and, second, if the resulting "full" benefit rate indicated on the tables based on cash wages alone does not meet or exceed two-thirds of the state average weekly wage, the next step is to add in the value of the worker's discontinued fringe benefits, up to the point where the resulting "full" benefit rate indicated in the tables equals two-thirds of the state average weekly wage. It is only after this two-step process is completed that the resulting average weekly wage figure is used to determine the weekly benefit amount that worker is actually entitled to receive. According to *Karczsewski*, it is the "full" weekly benefit amount indicated in the benefit rate tables based upon the worker's earnings at the time of injury, without any offsets for post-injury wages, continued wage-earning capacity or any other type of benefit rate reductions and limitations, that is the focus of the two-thirds limitation on the inclusion of fringe benefits in the calculation of average weekly wage under MCL 418.371(2); MSA 17.237(371)(2).

In my judgment, the magistrate's reasoning in *Karczsewski* is sound and should be followed by this Court in the instant case. I would only add the caveat that it is not necessarily the claimant's original weekly benefit rate that is important, but the "full" benefit rate indicated by the annual benefit rate tables based upon the wages earned at the time of injury. A situation could occur where a worker's original weekly benefit rate is less than the "full" rate, yet the worker's pre-injury income is far in excess of the low income levels the legislature intended to protect. For example, consider the case of an injured worker who switches from full-time to part-time work because of the injury (and therefore only suffers partial wage loss from the outset), and loses certain fringe benefits available only to full-time workers. In such a situation, the worker's original weekly benefit rate would be a "differential" rate, based upon the injury-related reduction in weekly earnings, yet the two-thirds limitation on using the value of the worker's discontinued fringe benefits in the average weekly wage calculation should still be based on the "full" benefit rate indicated in the tables. This is necessary to ensure that the two-thirds limitation operates to eliminate those higher income workers whose weekly cash wages are already high enough to yield a "full" rate in excess of two-thirds of the state average weekly wage. So, if the worker's original full-time cash wages at the time of injury were high enough to yield a "full" rate in excess of two-

thirds of the state average weekly wage, then the worker's discontinued fringe benefits should not be included in the calculation of average weekly wage, even though the worker may ultimately receive, from the outset, only a "differential" weekly benefit rate which is less than two-thirds of the state average weekly wage.

Here, plaintiff's earnings at Capitol Transit were well above the kind of low income levels that the inclusion of fringe benefits in MCL 418.371(2); MSA 17.237(371)(2) was designed to address, since his gross weekly wages, exclusive of fringe benefits, were alone more than sufficient to result in a full weekly benefit amount under the applicable rate tables that would exceed two-thirds of the applicable state average weekly wage. As in *Karczewski, supra*, the mere fact that plaintiff is presently entitled only to receive a "differential" weekly benefit amount that is less than the full weekly amount set forth in the tables, and less than two-thirds of the state average weekly wage for the applicable year of injury, does not provide an occasion for including the value of discontinued fringe benefits in the determination of his average weekly wage at Capitol Transit. Therefore, I would affirm the WCAC's conclusion that plaintiff is not entitled to a redetermination of his **"**average weekly wage**"** so as to include the value of discontinued fringe benefits that were previously excluded from the original average weekly wage computation.

I am concerned that the majority opinion suggests that the WCAC refused to consider plaintiff's discontinued fringe benefits simply because the parties had already stipulated to an average weekly wage amount, with the implication that the WCAC's analysis reflects a failure to realize that the parties' stipulation was exclusive of fringe benefits. Indeed, this is how plaintiff has attempted to characterize the WCAC's analysis, but such characterization does not seem entirely accurate. Although the WCAC did refer to the parties' average weekly wage stipulation, most of the WCAC's analysis on the fringe benefits issue in this case focuses upon the intent of the applicable statute, § 371(2):

> Plaintiff suggests, without corroborating case citation, that, if a differential calculation is the appropriate legal solution, the average weekly wage at Capitol Transit should then be re-determined to include discontinued fringe benefits. Plaintiff argues that his differential rate, using this inclusion, would not exceed the 2/3 of the average weekly wage benefit limit established in Section 371(2). We are not persuaded that such a provisional post-new wage earning capacity inclusion was contemplated by the statute. Section 371(2) addresses the original establishment of the average weekly wage. That wage was agreed to by the parties in this case at $561.87. We do not find support in the statute for the proposition that this wage can then be altered at a later point in time after subsequent employee actions have brought offsets and/or new wage earning capacity calculations into play.

While the WCAC's opinion is not without ambiguity, it seems to me that the WCAC is not simply saying that the parties are bound by their prior stipulation regarding the applicable average weekly wage, but also saying that the plaintiff's pre-injury average weekly wage figure always remains subject to those limitations that obtained at the time the original calculation was made, without regard to the effects of any subsequent offsets resulting in a reduction in plaintiff's weekly benefit rate. That is, the limitation that caused the parties to base their original average weekly wage stipulation on plaintiff's

gross "cash" wages alone (i.e., the fact that the resulting "full" rate exceeded the 2/3 limit) still obtains today, despite the fact that plaintiff now qualifies only for a "differential" benefit rate that is less than the two-thirds limitation.

There is another confusing feature to this case, resulting from the fact that there are actually two different "differential" benefit statutes involve. First, there is the statute that sets plaintiff's reduced weekly benefit rate during the time that he was still earning wages at his post-injury job as a security guard. These differential benefits are governed by § 301(5)(b), which provides:

> If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employees after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under the section 355. [MCL 418.301(5)(b); MSA 17.237(301)(5)(b).]

This statute is very nearly identical to the language of § 361(1) interpreted in *Karczewski, supra*. It should also be noted that § 301(5)(b) is the *only* differential benefit rate statute cited in plaintiff's appeal brief, yet that statute is not addressed in the WCAC's opinion, presumably because the WCAC's apparently concluded that the one-year back rule rendered moot any claim for accrued benefits owing for periods prior to plaintiff's lay-off from his security guard job.

Second, there are the statutory provisions that govern plaintiff's benefit rate after leaving his post-injury job as a security guard, which provisions are set forth at § 301(5)(d) of the WDCA as follows:

> (d) If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:
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> (i) If after exhaustion of unemployment benefit eligibility of an employee, a worker's compensation magistrate or hearing referee, as applicable, determines for any employee covered under this subdivision, that the employments since the time of injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a presumption of wage earning capacity established for employments totalling 250 weeks or more.
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> (ii) The employee must still be disabled as determined pursuant to subsection (4). If the employee is still disabled, he or she shall be entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of

termination of the employment of the employee, and the wages paid at the time of the injury.

(iii) If the employee becomes reemployed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).

Here, the WCAC awarded "differential" benefits under § 301(5)(d)(ii), based upon its determination that plaintiff established a new wage earning capacity in security guard work. Note that unlike the differential benefit provisions of § 301(5)(b) and § 361(1), § 301(5)(d)(ii) makes no reference to pre-injury "after-tax weekly wage." Rather, § 301(5)(d)(ii) simply refers to the "wages paid" at the time of injury. This means that differential benefits under § 301(5)(d)(ii) are not calculated the same way that one calculates the differential benefits payable under § 301(5)(b) and § 361(1), according to the difference between the "full" weekly benefit rates indicated in the rate tables based upon the employee's pre-injury and post-injury earnings. Rather, the differential is between gross, pre-tax "wages paid" before injury and the "normal and customary wages paid" in the post-injury employment. More importantly, this means that the definition of "average weekly wage" used in § 371(2), and in the two-thirds limitation on the inclusion of fringe benefits in that statute, technically has no application to the determination of differential benefits under § 301(5)(d)(ii). That is, calculating "average weekly wage" as defined by § 371(2) is a necessary step in determining "after-tax average weekly wage" component of the differential payable under § 301(5)(b) or § 361(1), because § 313(1) of the act specifically incorporates the definition of "average weekly wage" in § 371(2) as part of the definition of "after-tax average weekly wage." In contrast, because § 301(5)(d)(ii) simply refers to "wages paid," not "after-tax weekly wage" or "average weekly wage," § 371(2) is not necessarily implicated in the calculation of differential benefits under § 301(5)(d)(ii).

The reasoning of the majority opinion appears to be that because § 371(2) recognizes that fringe benefits are included in the general concept of "wages," discontinued fringe benefits should be recognized as a component of "wages paid" under § 301(5)(d)(ii) as well. I agree with that reasoning, but I think that it is worth noting that the Court may rely upon § 371(2) for guidance as to the meaning of the concept of "wages" without necessarily engrafting the definition of "average weekly wage" under § 371(2) into the definition of "wages paid" in § 301(5)(d)(ii). That is, one could argue that while § 371(2), by virtue of setting limitations on the inclusion of fringe benefits in the "wages" that are included in the definition of "average weekly wage," implicitly recognizes that the term "wages" includes "fringe benefits," it does not necessarily follow that the calculation of average weekly "wages paid" for purposes of § 301(5)(d)(ii) is restricted to the "average weekly wage" as defined by § 371(2). However, because no party has argued that the definition of "average weekly wage" in § 371(2) does not also control the computation of average weekly "wages paid" under § 301(5)(d)(ii), that issue is not before this Court in this appeal.

Although I would not remand this case for a recalculation of plaintiff's average weekly wage by the magistrate, I would still remand this case to the WCAC, for further consideration in light of our determination that the one-year-back rule does not apply. According to defendants, the one-year-back issue becomes moot if the WCAC's refusal to include plaintiff's fringe benefits in the computation of his

average weekly wage at Capitol Transit is upheld. However, I would prefer that any determination of mootness be made by the WCAC itself.

/s/ Stephen J. Markman