STATE OF MICHIGAN

COURT OF APPEALS

STANLEY S. LESIAK,

Plaintiff-Appellant,

v

DETROIT BOILER COMPANY and SENTRY INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
November 5, 1999

No. 213435
WCAC
LC No. 95-000546

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. 458 Mich 867; 586 NW2d 400 (1998).[1] Plaintiff appeals from the opinion and order of the Worker's Compensation Appellate Commission (WCAC) affirming the magistrate's calculation of plaintiff's average weekly wage at $603.25. We affirm.

The facts in this case are not in dispute. Plaintiff worked for several years as a skilled boilermaker/welder. He received job assignments through a union hall on an as-needed basis. Plaintiff worked on a variety of jobs for different employers. He earned about $21 an hour, but worked sporadically on jobs that often lasted only one day or less. Plaintiff suffered his injury in November 1992, while working on a job with defendant Detroit Boiler Company.[2]

During the fifty-two-week period before his injury, plaintiff worked a total of 109 days, earning $31,338. He estimated that he worked a total of thirty weeks during that period. However, plaintiff calculated that he only worked for defendant for eighteen days during that period. From February 1991, his first job with defendant, through November 1992, the day of his injury, plaintiff worked for defendant for a total of 10.2 weeks, earning $6,153.17. The parties agree that plaintiff is entitled to benefits, and they only dispute the calculation of his average weekly wage. The magistrate calculated plaintiff's average weekly wage at $603.25 by dividing the total wages he earned from defendant by the total number of weeks he worked there. The WCAC affirmed this calculation, which resulted in a weekly benefit rate of $376.74. Plaintiff argues that this calculation of his average weekly wage and resultant benefits stems from an incorrect application of MCL 418.371; MSA 17.237(371).

Although the factual findings of the WCAC are generally conclusive on this Court, we may nonetheless review questions of law involved in final orders of the WCAC. MCL 418.861a(14); MSA 17.237(861a)(14); *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 512; 563 NW2d 214 (1997). Our review of questions of law is de novo; however, we accord great weight to the WCAC's statutory interpretation unless it is clearly wrong. *Tyler v Livonia Public Schools*, 459 Mich 382, 388; 590 NW2d 560 (1999). The WCAC's decision is subject to reversal if it operated within the wrong legal framework or its decision was based on erroneous legal reasoning. *Jones-Jennings v Hutzel Hospital (On Remand)*, 223 Mich App 94, 105; 565 NW2d 680 (1997).

The magistrate calculated plaintiff's average weekly wage pursuant to MCL 418.371(3); MSA 17.237(371)(3), which provides as follows:

> If the employee worked less than 39 weeks in the employment in which the employee was injured, the average weekly wage shall be based upon the total wages earned by the employee divided by the total number of weeks actually worked. For purposes of this subsection, only those weeks in which work is performed shall be considered in computing the total wages earned and the number of weeks actually worked.

The magistrate only included information relating to plaintiff's employment with defendant in its calculation of plaintiff's average weekly wage. As noted above, the magistrate divided plaintiff's wages by the weeks he worked for defendant. Specifically, the magistrate divided plaintiff's wages of $6,153.17 by 10.2 weeks, for an average weekly wage of $603.25. Plaintiff argues that his average weekly wage should have been calculated based on the total wages he earned from all employers while working as a boilermaker/welder. Plaintiff argues that the total wages should be divided by the total number of weeks he worked as a boilermaker/welder during the fifty-two-week period before his injury. Specifically, plaintiff seeks a calculation based on $31,338 divided by thirty weeks, for an average weekly wage of $1,044.60.

Subsection (3) applies where "the employee worked less than 39 weeks *in the employment in which the employee was injured* . . . ." (emphasis added). This subsection "applies only to employees who have not yet worked thirty-nine weeks for their employer at the time they are injured." *Montano v General Motors Corp*, 187 Mich App 230, 236; 466 NW2d 707 (1991). Here, plaintiff had only worked 10.2 weeks for defendant; therefore, subsection (3) clearly applied. Plaintiff argues that the wages he earned from other employers while working as a boilermaker/welder should be included in the calculation of his average weekly wage under subsection (3). Plaintiff interprets the phrase "in the employment in which the employee was injured" to refer not to a specific employer, but to a trade. We conclude that the WCAC's refusal to interpret the statute in such a manner was not clearly wrong, given the holding from *Montano* that subsection (3) only applies where the employee has not yet worked thirty-nine weeks for his or her *employer* at the time of the injury. *Id*. A further problem with plaintiff's interpretation is that he seeks to include only wages earned during the fifty-two-week period before his injury. However, this Court has specifically rejected the argument that the phrase "less than 39 weeks" means less than thirty-nine of the fifty-two weeks immediately preceding the injury. *Id*. at 235-236.

Plaintiff alternatively argues that MCL 418.371(6); MSA 17.237(371)(6) should apply instead of subsection (3) because the magistrate's calculation under subsection (3) was inequitable, given plaintiff's circumstances of employment. MCL 418.371(6); MSA 17.237(371)(6) provides as follows:

> If there are special circumstances under which the average weekly wage cannot justly be determined by applying subsections (2) to (5), an average weekly wage may be computed by dividing the aggregate earnings during the year before the injury by the number of days when work was performed and multiplying that daily wage by the number of working days customary in the employment, but not less than 5.

In this case, the WCAC concluded, as did the magistrate, that subsection (6) did not apply because subsection (3) was plainly applicable and the circumstances of plaintiff's employment resulted from plaintiff's choice to work out of a union hall as a skilled laborer assigned on an as-needed basis. We agree that subsection (6) was inapplicable because the average weekly wage was justly determined under the clearly applicable subsection (3). See *Montano, supra* at 236 (applying subsection (6) where no other subsections applied and because the average weekly wage could not be justly determined otherwise).

We accordingly find no error of law in the WCAC's decision to affirm the magistrate's calculation of plaintiff's average weekly wage.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] This Court had previously denied plaintiff's application for leave to appeal. *Lesiak v Detroit Boiler Co*, unpublished order of the Court of Appeals, entered August 18, 1997 (Docket No. 202613).

[2] For the sake of convenience, any references in this opinion to "defendant" refer only to defendant Detroit Boiler Company because it was plaintiff's employer at the time he was injured.