

STATE OF MICHIGAN  
COURT OF APPEALS

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RAJAN K. GEORGE,

Plaintiff-Appellant,

v

BURLINGTON COAT FACTORY, PLANET  
INSURANCE COMPANY and HOME  
INSURANCE COMPANY,

Defendants-Appellees.

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UNPUBLISHED  
March 21, 2000

No. 212968  
WCAC  
LC No. 95-000993

Before: Wilder, P.J., and Bandstra and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the Worker's Compensation Appellate Commission (WCAC) modifying the decision of the magistrate to reflect a weekly benefit rate of zero. We reverse in part, vacate in part, and remand for further proceedings.

Review of the WCAC's decision is limited to questions of law. *Taylor v Second Injury Fund*, 234 Mich App 1, 13; 592 NW2d 103 (1999). Legal issues are reviewed de novo, although great weight is accorded to the administrative interpretation of a statute by the WCAC unless that interpretation is clearly wrong. *Tyler v Livonia Public Schools*, 459 Mich 382, 388; 590 NW2d 560 (1999). Findings of fact made or adopted by the WCAC within the scope of its powers are conclusive on appeal if there is any competent evidence on the record to support them, but a decision of the WCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework. *Taylor, supra* at 13. As to the WCAC's review of a magistrate's decision, if the magistrate's decision is reasonably supported in the record by any competent, material, and substantial evidence, then it is conclusive and the WCAC must affirm. *Angel v Jahm, Inc*, 232 Mich App 340, 343; 591 NW2d 64 (1998).

This Court vacated the WCAC's first decision in this matter and remanded for further consideration in light of *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628; 566 NW2d 896 (1997), which had been decided after the magistrate's decision and shortly before the WCAC's decision. On remand, the WCAC reached the same result that it had in its previous decision.

Pursuant to *Haske*, in order to be eligible for worker's compensation benefits, an employee must prove (1) that a disability exists, and (2) that the disability resulted in a wage loss. *Id.* at 642-643. The magistrate found that plaintiff is partially disabled, and the WCAC affirmed that finding. However, the WCAC determined that plaintiff had failed to carry his burden of proving a compensable disability under *Haske* because plaintiff "has not established a link between his injury and his wage loss." We conclude that the WCAC has misinterpreted *Haske*. In order to prove a wage loss, an employee must establish a reduction in earning capacity. *Id.* at 654. In the present case, by establishing that he is no longer being paid by defendant because of his work-related injury, plaintiff has demonstrated that his disability resulted in a wage loss.

Plaintiff argues that the WCAC erred in affirming the magistrate's finding that his wage loss benefit should be reduced. The magistrate found that plaintiff's subsequent earnings from various temporary employment companies created an average weekly wage which had to be subtracted from plaintiff's average weekly wage from defendant in order to determine the portion of lost wages attributable to plaintiff's work-related injury. The magistrate used the difference between plaintiff's average weekly wage from Burlington and plaintiff's average weekly wage from one of the temporary employment firms to determine that plaintiff was entitled to benefits at the rate of \$22.91 per week. The WCAC affirmed this finding, but concluded that plaintiff was entitled to zero benefits after the earnings from plaintiff's life insurance business were taken into account.

We again conclude that the WCAC misinterpreted *Haske*. In *Haske*, the Supreme Court unequivocally "rejected the principle that the employer of a partially disabled employee should be credited with a wage-earning capacity in the absence of post-injury employment." *Id.* at 661. It is completely contrary to *Haske* to find that plaintiff has an annualized average weekly wage based upon his sporadic, temporary earnings. The evidence shows that plaintiff does not have an actual job for most of the year. During the weeks when plaintiff earns wages at temporary employment, defendant is entitled to a credit for the wages earned. Defendant is not entitled, however, to an assumption that those temporary wages are paid for the entire year.

The magistrate also concluded that plaintiff failed to establish that he left his various short-term jobs for physical reasons.<sup>1</sup> However, under *Haske*, plaintiff did not have the burden of establishing that his disability was the cause of his continuing unemployment. See *id.* at 661. Plaintiff met his burden of proving an impairment of wage-earning capacity by establishing that a work injury prevented him from earning wages working for defendant. See *id.* at 662. At that point, defendant could have refuted, but did not, the causal connection between plaintiff's disability and his unemployment by presenting evidence that some other factor or factors were the cause of the unemployment. See *id.* at 662, n 38.

Plaintiff next argues that the WCAC erred in considering the gross income from his life insurance business as earnings. Plaintiff's benefits as a partially disabled employee are based in part upon what he is "able to earn" after his injury. See MCL 418.361(1); MSA 17.237(381)(1). Plaintiff's 1994 federal income tax return indicates "gross receipts or sales" from the life insurance business of \$15,378 and "gross income" in the same amount. However, expenses (including

about \$8,700 for vehicle expenses, \$800 for insurance, and \$2,500 for office expenses) consumed virtually the entire gross income. The income tax return shows a profit of only \$144. The WCAC found that the earnings from the life insurance business were established by plaintiff's income tax return to be \$15,378.

What plaintiff is "able to earn" from that business is an issue of fact. See *Lawrence v Toys R Us*, 453 Mich 112, 125; 551 NW2d 155 (1996) (Levin, J.); *Pulley v Detroit Engineering & Machine Co*, 378 Mich 418, 423; 145 NW2d 40 (1966). The magistrate did not render a finding on this question. We conclude that the WCAC erred in making its own finding with regard to plaintiff's earnings from the life insurance business. Where necessary findings or issues are overlooked by a magistrate, the matter must be remanded to the magistrate for appropriate findings. It is inappropriate for the WCAC to make its own findings in the first instance. *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494, 509; 581 NW2d 244 (1998). We therefore vacate the portion of the WCAC's decision with regard to plaintiff's life insurance business and remand to the magistrate for additional factfinding regarding what plaintiff is able to earn in that business.

Finally, we note that the WCAC's conclusion that plaintiff is "able to earn" the entirety of the gross earnings from his life insurance business appears to produce an absurd and unjust result. See *Gilbert v Second Injury Fund*, 237 Mich App 101, 106; 603 NW2d 104 (1999) ("Literal construction of a statute that would produce an absurd or unjust result which is clearly inconsistent with the purposes and policies of the statute should be avoided."). While all plaintiff's federal tax deductions may not be recognizable for worker's compensation purposes, it does not seem reasonable to conclude that plaintiff is "able to earn" every penny of his gross revenues, without *any* consideration of his legitimate expenses. However, we leave it to the magistrate to make the appropriate findings concerning plaintiff's earnings.

Reversed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ Richard A. Bandstra  
/s/ Mark J. Cavanagh

<sup>1</sup> The reason plaintiff left his various short-term jobs was not clearly developed in the record. At the trial before the magistrate, the specifics of these jobs were not discussed beyond establishing the amounts plaintiff earned at each position. However, from our review of the record, it appears that the parties assumed that the jobs were temporary in nature. When defense counsel was questioning plaintiff, the following exchange occurred:

Q. All right, it's my understanding – all right, why – when you left Account Temps in December, why did you leave?

A. I was a short-term assignment and –

Q. So you were a temporary employee, you did the assignment, you completed it and then you left; is that correct?

A. Not only that, I couldn't continue working there because of my health situation again.