STATE OF MICHIGAN

COURT OF APPEALS

JERRY SIMMONS,

Plaintiff-Appellee,

v

TRI-COUNTY ELECTRIC CO, and CINCINNATI INS CO,

Defendants-Appellants.

UNPUBLISHED
February 3, 2004

No. 245930
WCAC
LC No. 01-000242

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

This worker's compensation case is before us on remand from the Supreme Court for consideration as on leave granted. *Simmons v Tri-County Electric Co*, 467 Mich 937 (2003). In addition to the issues raised in defendants' application, the Supreme Court's order directs this Court "to consider the question whether the applicability of MCL 418.371(6) is a question of fact, of law, or a mixed question of law and fact." Defendants appeal the magistrate's and Workers' Compensation Appellate Commission's [WCAC's] determination of the proper method for calculating plaintiff's average weekly wage under MCL 418.371. Defendants also argue that there was insufficient evidence to support the magistrate's finding that plaintiff's wife was a dependent. We affirm.

I. FACTS

Although defendants have not admitted liability, they have been voluntarily paying plaintiff weekly wage loss benefits. The question presented in this case is whether the WCAC properly affirmed the magistrate's decision regarding the amount of benefits.

Plaintiff is a journeyman electrician. He testified that he was employed by various independent contractors, and that he was assigned to employers and placed in different jobs through his union hall. He testified that at the time in question he was earning $27.40 per hour, and that between January 1998 and January 1999 he worked during 35 weeks and earned a total of $43,676.75. Almost all of these earnings were from employers other than defendant Tri-County.

Plaintiff was allegedly injured while working for defendant on January 21, 1999, a Thursday. His last five weeks of employment were for defendant. It appears that plaintiff started working for defendant on December 21, 1998, a Monday.

Plaintiff claimed that he was hired to work 40 hours per week. However, he did not actually work that many hours due to holidays and inclement weather. During his first and second week, he only worked four days each because of the Christmas and New Year holidays. During the third week he missed one day and during the fourth week he missed two days because of inclement weather. However, in the fourth week he was able to receive overtime pay for working on a Saturday, which resulted in higher wages for that week. Finally, he only worked four days during the fifth and last week because he was injured on Thursday. The amounts plaintiff earned each week were $899.60, $806.20, $889.60, $917.40 and $889.60, for a total of $4,392.40.

Plaintiff filed a petition claiming that he was being paid compensation at an incorrect rate. Defendants voluntarily paid plaintiff compensation based on an average weekly wage computed under MCL 418.371(3), by dividing the total compensation plaintiff received during his five weeks of work by five, which resulted in an average weekly wage of $878.48 per week. Plaintiff filed a petition arguing that this was an inappropriate way of calculating his wages under the circumstances, inasmuch as he was only paid for days actually worked, and lost five days of work due to inclement weather and holidays through no fault of his own. Plaintiff contended that because most five-week periods of employment would not include so many lost days, utilizing subsection (3) penalized him by failing fairly to represent his real loss of earning capacity. Plaintiff argued that his average weekly wage should be determined by adding all wages earned in the year of employment immediately preceding his injury and dividing by the number of weeks actually worked, which results in a weekly wage of $1,247.90. Alternatively, he contended that his hourly rate should be multiplied by forty hours, the number of hours he "contracted" to work, which according to the magistrate results in an average weekly wage of $1,112. Defendants responded that this would in effect require them to compensate plaintiff based on wages earned from other employers. Defendants also argued that plaintiff had failed to show that his wife was a factual dependent, which if true would entitle him to a higher weekly wage loss benefit rate than if he had no dependents.

The magistrate found that under the circumstances, plaintiff's average weekly wage should not be computed under MCL 418.371(3), but rather under MCL 418.371(6). Because subsection (6) requires a calculation somewhat different than that used by plaintiff, the magistrate directed the parties to work out the average weekly wage under that subsection themselves. The magistrate rejected defendants' argument that plaintiff failed to establish the dependency of his wife. Because plaintiff testified that his wife was not employed at the time of his injury and has not been employed since, the magistrate found it reasonable to infer that plaintiff provided more than one-half of her support.

Defendants appealed. The Commission's majority opinion and order agreed with the magistrate that the "unique" facts in this case required application of MCL 418.3781(6) in order to produce an accurate average weekly wage. Likewise, the majority agreed with the magistrate that plaintiff's testimony that his wife has not worked and that he has claimed her as a dependent on income tax returns was sufficient evidence to support an inference that she is a factual dependent.

II. STANDARD OF REVIEW

We consider three issues on appeal: (1) whether the applicability of MCL 418.371(6) is a question of fact, of law, or a mixed question of law and fact; (2) whether the Commission erred in affirming the magistrate's decisions regarding the proper method of calculating plaintiff's average weekly wage; and (3) whether the Commission erred by affirming the magistrate's finding that plaintiff's wife was a dependent.

In *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 703; 614 NW2d 607 (2000) our Supreme Court explained that judicial review of WCAC decisions should be very limited, citing the following language from *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992):

> If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal ….

Under *Holden*, "[a]s long as there exists in the record any evidence supporting the WCAC's decision, and as long as the WCAC did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law), then the judiciary must treat the WCAC's factual decisions as conclusive." *Mudel*, 462 Mich 703-704. While the Commission reviews the magistrate's findings for compliance with the substantial evidence standard in accordance with MCL 418.861a(3), the judiciary's review of the Commission's findings is more limited and solely designed to ensure the integrity of the administrative process. *Mudel*, 462 Mich 699, 701.

Despite this Court's limited review of the WCAC's findings, it may still reverse the Commission's decision where it is based on erroneous legal reasoning or the wrong legal framework. *Maier v General Telephone* Co, 247 Mich App 655, 660; 637 NW2d 263 (2001), lv den 466 Mich 879 (2002). Issues of law involved in a final order of the WCAC are reviewed de novo for legal error. *Mudel*, 462 Mich 697 n 3.

III. APPLICABILITY OF MCL 418.371(6)

Both defendants and plaintiff argue that the applicability of MCL 418.371(6) is a question of fact. We agree that the applicability of §371(6) presents a question of fact dependent upon the specific circumstances of each case.

Issues of statutory construction present questions of law subject to review de novo. *Maier*, *supra*, 247 Mich App 659. In the past, this Court has treated the applicability of a particular section of the WDCA as a question of law or mixed question of law and fact subject to review de novo. *See Maier*, *supra*, 247 Mich App 659-660; *Toth v Autoalliance International Inc*, 246 Mich App 732, 739; 635 NW2d 632 (2001), lv den 465 Mich 951 (2002); *Taylor v Second Injury Fund*, 234 Mich App 1, 13; 592 NW2d 103 (1999). However, none of those cases

directly addressed the issue of whether the applicability of the subsection presented an issue of fact, of law, or of fact and law.

The ultimate goal of statutory construction is to ascertain and give effect to the intent of the Legislature. *Rowell v Security Steel Co*, 445 Mich 347, 353; 518 NW2d 409 (1994). Individual provisions must be considered in conjunction with the entire act to determine this intent. *Id*., at 354. Both this Court and our Supreme Court have concluded that the Legislature drafted the provisions of §371 with the intent to provide statutory formulas which would give the fact-finder the flexibility necessary to compute an accurate average weekly wage. *Rowell*, 445 Mich 356-358; *Toth*, 246 Mich App 739. In *Rowell*, the Court wrote:

> Read together, the provisions of § 371 illustrate that the Legislature attempted to draft a statute that would be sensitive to accuracy as the basis for the determination of weekly wage loss in a variety of employment situations. [445 Mich 358].

With regard to §371(6), our Supreme Court explained:

> Where there are special circumstances, the Legislature provided that the average weekly wage could be computed by dividing the aggregate earnings by the number of days worked and then multiplying by the number of days customarily worked, "not less than 5." This provision demonstrates that the Legislature was willing to depart from the traditional definition of a work week if necessary to justly determine the basis for compensation. [*Rowell*, 445 Mich 347].

Section 371 of the Worker's Disability Compensation Act, MCL 418.371, states in relevant part:

> (1) The weekly loss in wages referred to in this act shall consist of the percentage of the average weekly earnings of the injured employee computed according to this section as fairly represents the proportionate extent of the impairment of the employee's earning capacity in the employments covered by this act in which the employee was working at the time of the personal injury. . . .
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> (2) As used in this act, "average weekly wage" means the weekly wage earned by the employee at the time of the employee's injury in all employment. . . The average weekly wage shall be determined by computing the total wages paid in the highest paid 39 weeks of the 52 weeks immediately preceding the date of injury, and dividing by 39.
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> (3) 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.

(4) If an employee sustains a compensable injury before completing his or her first work week, the average weekly wage shall be calculated by determining the number of hours of work per week contracted for by that employee multiplied by the employee's hourly rate, or the weekly salary contracted for by the employee.

(5) If the hourly earning of the employee cannot be ascertained, or if the pay has not been designated for the work required, the wage, for the purpose of calculating compensation, shall be taken to be the usual wage for similar services if the services are rendered by paid employees.

(6) 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 five.

Review of §371(6) along with the provisions of subsections (2) through (5) reveals that the applicability of these provisions depends upon a fact-based analysis of the individual circumstances of each case. The use of the terms "special circumstances" and "justly" in subsection (6) show that its application is not limited to situations where subsections (2) through (5) cannot be used to calculate an average wage, but instead may be used in any situation where the application of subsections (2) through (5) would result in an average weekly wage which did not accurately reflect the plaintiff's true weekly earnings. Simply put, whether the method set forth in §371(6) should be used to calculate the average weekly wage depends on the specific circumstances presented in each case, and is a question of fact which should be determined by the magistrate or WCAC rather than a question of law to be decided by the courts. This interpretation is consistent with our Supreme Court's opinion in *Mudel, supra*, which emphasizes the WCAC's role as an administrative factfinder and this Court's limited review of the WCAC's findings of fact.

IV. SPECIAL CIRCUMSTANCES

As discussed above, whether special circumstances exist under §371(6) to make application of the other subsections unjust is a question of fact for the magistrate. Under *Mudel, supra*, this issue can only be reviewed by the WCAC for abuse of discretion, or for whether the factual predicates upon which the magistrate's discretion is exercised are supported by substantial evidence. This Court's review of the WCAC's decision is limited to whether the Commission "carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, and did not 'misapprehend or grossly misapply' the substantial evidence standard." *Mudel*, 462 Mich 703, *Holden*, 439 Mich 269.

The basic facts are not at issue; defendants merely argue that the magistrate erred in calculating plaintiff's average weekly wage. This Court does not review the magistrate's findings. Review of the WCAC's decision indicates that the Commission properly examined the record, accorded due deference to the magistrate's findings, and did not misapprehend or misapply its standard of review.

V. EVIDENCE OF WIFE'S DEPENDENCY

Defendants' argument that there was no evidence supporting the conclusion that plaintiff's wife was a dependent also poses a direct challenge to the magistrate's findings of fact. This Court does not review the magistrate's findings. Review of the Commission's opinion shows that it properly reviewed the magistrate's finding under the applicable standard.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello