

STATE OF MICHIGAN
COURT OF APPEALS

DAVID SMITH,

Plaintiff-Appellee,

v

EXEMPLAR MANUFACTURING COMPANY,

Defendant-Appellant.

UNPUBLISHED

January 31, 2008

No. 272749

WCAC

LC No. 04-000162

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by leave granted from the decision of the Workers' Compensation Appellate Commission (WCAC) that affirmed the magistrate's open award of benefits to plaintiff. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff suffered a lower back injury while working as a laborer for defendant. He stopped working and received treatment, including therapy and surgery, for his injury and eventually returned to work with restrictions. No restricted work was available, however, and defendant's facility closed shortly thereafter. Plaintiff has not worked in any capacity for any employer since that time. He continues to suffer constant low back pain and takes medication. He believes the pain would preclude him from performing any of the work he previously performed for defendant.

Plaintiff sought worker's compensation benefits. The magistrate found that he had established by a preponderance of the evidence a continuing work-related disability, and so she granted his petition for benefits.

The WCAC affirmed in a split decision. In this appeal, defendant complains that the WCAC did not issue a true majority opinion and that its decision must be vacated and the matter remanded for reconsideration. We disagree.

This issue is one of law. We may review questions of law and reverse the WCAC's decision if it operated within the wrong legal framework or based its decision on erroneous legal reasoning. MCL 418.861a(14); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000).

Defendant notes that MCL 418.274(8) states: “The decision reached by a majority of the assigned 3 members of a panel shall be the final decision of the commission.” Defendant refers to *Aquilina v General Motors Corp*, 403 Mich 206; 267 NW2d 923 (1978), in support of its position that the decision in this case was not a “majority” and therefore deficient.

In *Aquilina*, a five-member appeal board considered the plaintiff’s claim for benefits, which had been rejected by the hearing referee. The referee determined that the plaintiff proved she incurred a work-related disability after termination of her employment on August 3, 1972, but that she failed to satisfy her burden of proving a disability beyond November 13, 1973 by a preponderance of the evidence. *Id.* at 208.

One member of the appeal board wrote an opinion, stating that the referee imposed upon the plaintiff a greater than normal burden of proof and determining that she was disabled beyond November 13, 1973. Two additional members of the board concurred in this result but did not issue opinions. *Id.* at 209.

One of the two remaining members dissented. Although he agreed that the referee imposed an improper burden of proof on the plaintiff, he found that the plaintiff did not satisfy the lower burden of proof. The fifth board member concurred in this dissent. *Id.*

The issue raised before the Supreme Court was: “Does the board fulfill its responsibility to find facts with finality when the controlling opinion is signed by less than a majority of the appeal board members assigned to decide the case, with the other members comprising the majority concurring only in the result?” *Id.* The Court ultimately concluded that the board had not fulfilled its duty in this respect. It instructed:

A decision is not properly reviewable when some of the majority concur only in the result and do not state the facts upon which that result is based. We must ask the board members to make a finding regarding all critical or crucial facts as well as the result when they choose not to sign the controlling opinion.

We would also encourage concurring board members to articulate whether or not they agree with the legal standard and the rationale employed in reaching the decision. While we are mindful that this process of articulation may prove burdensome at times, it will most certainly assist the appellate courts of this state in effectively discharging their responsibility in these matters. [*Aquilina, supra* at 214.]

In the instant case, one commissioner concurred with another’s decision, addressing only the application of *Stokes v DaimlerChrysler Corp*, 2006 ACO 24. This concurrence addressed the dissenting commissioner’s opinion. It is apparent from a reading of the concurring commissioner that, in all other respects, she agreed with the commissioner who authored the lead decision. Two commissioners signed the order. Defendant’s argument that there was no majority opinion is without merit as there clearly was a two-member majority.

Next, defendant complains that the commissioners erroneously applied the WCAC’s decision in *Stokes v DaimlerChrysler Corp*, 2006 ACO 24, a decision which the Supreme Court had held in abeyance in June 2006. *Stokes v DaimlerChrysler Corp*, 475 Mich 875; 714 NW2d

347 (2006).¹ However, the WCAC's ultimate decision in this case was not based on *Stokes*. Although the concurring commissioner discussed the case, she did so only in response to the dissent and her opinion was not joined by the author of the lead opinion. Thus, the WCAC's two-member majority opinion was not based on *Stokes*.

Moreover, defendant has not persuaded us that there is any reason to remand this matter to the WCAC for reconsideration. Defendant has not demonstrated that, based on the applicable law, the WCAC's decision is erroneous. It simply requests that this Court remand the matter for reconsideration. In light of its failure to demonstrate that the WCAC's ruling regarding plaintiff's disability is incorrect, we decline the request for remand.

Affirmed.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

¹ The Supreme Court remanded *Stokes* to this Court for consideration as though on leave granted. This Court's opinion is published at 272 Mich App 571, 589; 727 NW2d 637 (2006), lv pending.