

STATE OF MICHIGAN  
COURT OF APPEALS

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CHARLES E. HESSEL,

Plaintiff-Appellee,

v

CHIPPEWA REGIONAL CORRECTIONAL  
FACILITY,

Defendant-Appellant.

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UNPUBLISHED

June 12, 2008

No. 272179

WCAC

LC No. 03-000436

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant appeals by leave granted a decision of the Worker's Compensation Appellate Commission (WCAC), modifying the magistrate's decision regarding plaintiff's entitlement to benefits pursuant to the Worker's Disability Compensation Act, MCL 418.301 *et seq.* We vacate and remand.

I. Basic Facts and Proceedings

Plaintiff suffered an ankle injury in 1997 while working for defendant. He successfully filed a complaint for worker's compensation benefits. Plaintiff returned to light duty work for a period of time, but stopped working for defendant in March 2002, when he had a second surgery on his ankle. Plaintiff filed a petition for benefits in January 2003, alleging a new injury date of March 22, 2002.

After stopping work for defendant, plaintiff worked as a high school coach and as a golf professional in Drummond Island, Michigan. At Drummond Island Resort, plaintiff worked as a "director", where he managed, promoted, and taught golf lessons. He earned approximately \$1,000 a season as a coach and about \$1,000 a week in his job as a golf professional. The golf course is generally open May 1 through October 12.

The magistrate found that plaintiff had established an injury to his ankle on March 22, 2002, but plaintiff had not established a compensable disability. He noted that plaintiff demonstrated that he is an accomplished golfer and teaches golf, earning about \$1,000 a week in his employment with Drummond Island Resort. The magistrate also found that plaintiff "unreasonably refused to return to reasonable employment as offered by defendant on two occasions."

Plaintiff appealed the magistrate's decision to the WCAC. The WCAC remanded the matter to the magistrate to make a determination regarding whether plaintiff was entitled to benefits under *Sington v DaimlerChrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). *Hessel v Chippewa Regional Correctional Facility*, 2005 ACO 37, at 10. On remand, the magistrate found that plaintiff was unable to perform the regular duties of his former position with defendant and was entitled to benefits. The magistrate concluded that plaintiff's position at Drummond Island Resort was within his qualifications and training but paid less than the maximum wage on an annual basis. Therefore, the magistrate ruled that plaintiff was disabled under *Sington, supra*.

After remand, defendant appealed to the WCAC, questioning whether plaintiff had satisfied his burden of proof that he suffered a compensable disability under *Sington*. The parties essentially disputed whether, in working as a golf professional, plaintiff made more or less than the maximum wage he earned based on his qualifications and training, that is, the amount he made while working for defendant. Defendant argued that plaintiff's average weekly wage of about \$1,000 as a golf professional was more than the average weekly wage he earned working for defendant. Defendant asserted that the fact that plaintiff's job was seasonal was irrelevant because the wages are calculated on a weekly rather than annual basis. Plaintiff argued, on the other hand, that because his work as a golf professional is seasonal, his wage-earning capacity is less than it was when he was working for defendant before his injury.

The parties referred to a recent WCAC decision, *Stokes v DaimlerChrysler Corp*, 2006 Mich ACO 24. *Hessel v Chippewa Regional Correctional Facility (After Remand)*, 2006 ACO 128, at 6-9. Considering the arguments in light of *Sington* and *Stokes*, the WCAC found plaintiff disabled under *Sington*. *Id.* at 10. However, it also found that he had "unreasonably refused reasonable employment" and declared that he is not entitled to wage loss benefits until he ends this refusal. *Id.* In a July 6, 2006, order, the WCAC modified the initial magistrate's decision. *Id.* at 10-11. This Court granted defendant's application for leave to appeal. *Hessel v Chippewa Regional Correctional Facility*, unpublished order of the Court of Appeals, entered March 9, 2007 (Docket No. 272179).

## II. Analysis

Defendant argues in part that the WCAC's decision must be vacated because it does not reflect a true majority of the WCAC panel. We agree.

This Court may review questions of law involved with any final order of the WCAC. MCL 418.861a(14); *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992). The WCAC's decision may be reversed 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).

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." In *Aquilina v Gen Motors Corp*, 403 Mich 206, 208-209, 212; 267 NW2d 923 (1978), our Supreme Court reviewed a decision of the Worker's Compensation Appeal Board, in which one member authored the "controlling opinion", two members concurred with the result, one member dissented, and the fifth member concurred with the dissent. Notably, the two concurring members did not issue opinions. *Id.* at

209. The relevant statute, MCL 418.261(2),<sup>1</sup> which was identical to § 274(8) in all relevant respects, provided in relevant part that “The decision reached by a majority of the assigned 5 members shall be the final decision of the board.” *Id.* at 212. The Court instructed:

[W]e cannot discharge our reviewing responsibilities unless a true majority reaches a decision based on stated facts. 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 responsibilities in these matters. [*Aquilina*, *supra* at 214.]

After remand, the WCAC in the instant case determined that the work plaintiff performed as a golf professional after his injury:

was not a part of plaintiff’s fully developed qualifications and training as of plaintiff’s date of injury. Under these circumstances, it does not matter whether plaintiff’s maximum earnings were with defendant or Drummond Island Resort.

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Even if the golf professional position was within plaintiff’s qualifications and training on the date of injury, it was not reasonably available as a maximum paying job because of its seasonal nature.

Under these circumstances, it becomes obvious that plaintiff has a disability pursuant to the *Sington* standards because his maximum earnings within his qualifications and training as of March 2002, were his earnings with defendant. [*Hessel (After Remand)*, *supra* at 9-10.]

The WCAC issued an opinion signed by one member of the three-member panel. A second panel member concurred only in the result, and the third member concurred in the result “but only because he believe[d] that the law of the case doctrine mandate[d] this result.” To the extent the WCAC reviewed the magistrate’s findings of fact and made its own factual determinations, by failing to issue a true majority decision, it did not properly make findings regarding the facts. *Aquilina*, *supra* at 212-214. Pursuant to *Aquilina*, the decision must be

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<sup>1</sup> MCL 418.261 was repealed by 1989 PA 115, effective June 30, 1991.

vacated and the matter must be remanded to the WCAC to make proper findings of fact. *Id.* at 214.

Given our resolution of this issue, it is not necessary to address the other issues raised in defendant's appeal.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly