

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BRUCE E. ADRINE,

Plaintiff-Appellee,

v

EVENT STAFFING, INC., and ACCIDENT  
FUND INSURANCE COMPANY OF AMERICA,

Defendants-Appellants.

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UNPUBLISHED

February 3, 2009

No. 281360

WCAC

LC No. 07-000022

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

I. Introduction

This matter returns to this Court on remand from our Supreme Court for consideration as on leave granted. Defendant employer and its insurer appeal a September 24, 2007 order of the Worker's Compensation Appellate Commission dismissing their appeal for failure to pay 70% benefits to plaintiff during the pendency of their appeal to the WCAC. We reverse and remand to the WCAC for reinstatement of defendants' appeal and a decision on the merits. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

II. Facts and Proceedings

Defendant Event Staffing employed plaintiff as a lineman on the Grand Rapids Rampage Arena Football team. In February of 2006, plaintiff filed for worker's compensation wage loss and medical benefits for a January 18, 2006, left arm injury that occurred during a training camp scrimmage when he was rushing the opposing team's quarterback and was hit by an offensive lineman. The magistrate granted plaintiff an open award of wage loss and medical benefits and ordered defendant or its insurance carrier to "pay compensation at the rate of \$637.84 per week, until further order."

Defendants filed a claim for review with the WCAC on January 31, 2007. On August 20, 2007, plaintiff moved to dismiss defendants' appeal on the ground that, pursuant to MCL 418.862(1), although defendants were obligated to pay him 70% of his wage loss benefits pending appeal, in April of 2007 defendants unilaterally, and without filing a petition to stop,

ceased paying those benefits. Defendants admitted they had ceased paying benefits on April 15, 2007, acknowledged their error in doing so, and informed the WCAC that

[a] check for the accrued 70% payments were issued on August 17, 2007, which is the same date that defense counsel received plaintiff's motion. Payments of appropriate 70% benefits will continue during the pendency of the appeal.

Despite defendants' bringing themselves into compliance with MCL 418.862(1), the WCAC summarily granted the motion to dismiss by order entered on September 24, 2007 "for failure to pay 70% benefits . . . ." The WCAC denied defendants' motion for reconsideration.

### III. Analysis

#### A. Standard of Review

The first issue to be resolved is a procedural one. Defendants assert that this Court reviews a WCAC decision dismissing an appeal under MCL 418.862(1) for an abuse of discretion. They cite this Court's decision in *Dean v Great Lakes Casting Co*, 78 Mich App 664, 668-669; 261 NW2d 34 (1977), in support of their assertion. See also *Morin v DSS*, 134 Mich App 834; 352 NW2d 325 (1984). Plaintiff counters that MCL 418.861a(14) confers no authority on this Court to review any decision of the WCAC for an abuse of discretion and, therefore, the discretionary decisions of the WCAC are beyond appellate review. We hold that this Court has original jurisdiction to review a decision of the WCAC dismissing an appeal pursuant to MCL 418.862(1) and reviews the ultimate decision to dismiss for an abuse of discretion.

This Court's review of a decision of the WCAC is limited by constitution and the Legislature, with the former conferring upon the latter the authority to adopt different standards of review. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698, 700; 614 NW2d 607 (2000); *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003), reh den 469 Mich 1224 (2003); *Holden v Ford Motor Co*, 439 Mich 257, 268; 484 NW2d 227 (1992), reh den 439 Mich 1241 (1992).

Const 1963, art 6, § 28, confers original jurisdiction on this Court to review "[a]ll final decisions, findings, rulings and orders" of the WCAC "as provided by law." See also *Owens v Active Metal Co*, 38 Mich App 234, 235; 196 NW2d 8 (1972) (The Court of Appeals has exclusive original jurisdiction to review final orders of the Workmen's Compensation Appeal Board pursuant to Const 1963, art 6, § 28.). The September 24, 2007 order dismissing defendants' appeal is a final order of the WCAC. Pursuant to Const 1963, art 6, § 28, this Court has jurisdiction to review that order of dismissal. *Owens, supra*.

The question then becomes what standard of judicial review is "provided by law." It is well established through the decisions of this Court and our Supreme Court that the abuse of discretion standard of review applies to the appellate review of the decisions of the WCAC to dismiss appeals on procedural grounds. *Vidaurre v Mexican Industries in Michigan, Inc*, 458 Mich 851; 587 NW2d 636 (1998); *Tomblin v MNP Corp*, 456 Mich 871; 569 NW2d 167 (1997); *Garcia v McCord Gasket Corp*, 449 Mich 16, 31-32; 534 NW2d 473 (1995); *Kocher v Department of Transportation*, 448 Mich 881; 533 NW2d 307 (1995); *Laudenslager v Pendell Printing, Inc*, 215 Mich App 167, 171; 544 NW2d 721 (1996); *Rodriguez v General Motors Corp (On Remand)*, 204 Mich App 509, 513; 516 NW2d 105 (1994), lv den 447 Mich 1000

(1994). This Court is bound by the rule of stare decisis to follow these decisions. *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007).

Moreover, Const 1963, art 6, § 28 provides that “direct review by the courts . . . shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law.” The sanction of dismissal is necessarily implied from MCL 418.862(1). *McAvoy v H B Sherman Co*, 401 Mich 419, 461; 258 NW2d 414 (1977), reh den 402 Mich 953-954 (1977). The power to impose the sanction of dismissal conferred upon the WCAC by implication is a discretionary power. *Vidaurri, supra* at 851; *Tomblin, supra* at 871; *Garcia, supra* at 31-32; *Kocher, supra* at 881; *Laudenslager, supra* at 171; *Rodriguez, supra* at 513. If the decision whether to dismiss an appeal lies in the discretion of the WCAC, then in order to determine whether the order was authorized by law, as provided for in Const 1963, art 6, § 28, it logically follows that an appellate court must determine whether the order is a product of an abuse of the discretionary authority conferred upon the WCAC.

Nevertheless, if plaintiff is correct that the Legislature did not confer upon the appellate courts any authority to review a decision of the WCAC for an abuse of discretion, such a conclusion does not support plaintiff’s assertion that this Court lacks authority to review the WCAC’s decision in this case. As noted above, this Court has original jurisdiction to review “[a]ll final decisions, findings, rulings and orders” of the WCAC “as provided by law”, which includes the order entered in this action. Const 1963, art 6, § 28 (emphasis added); see also *Owens, supra* at 235. Unquestionably, review standards “provided by law” may be found in MCL 418.861a(14). Our Supreme Court clarified those standards in *Mudel*. A decision to dismiss an appeal for failure to comply with procedural rules can be reviewed to determine whether the decision is supported by an adequate reason grounded in the record. *Mudel, supra* at 703.

Finally, to the extent that defendants’ challenge to the decision to dismiss their appeal raises questions of law, this Court continues to exercise de novo review of questions of law involved in any final order of the WCAC, which includes questions involving the construction of the provisions of the Workers’ Disability Compensation Act and associated administrative rules. *Id.* at 697 n 3; *Rakestraw, supra* at 224.

## B. The Merits

We now turn to defendants challenge to the WCAC’s decision dismissing their appeal for failure to comply with MCL 418.862(1).

MCL 418.862(1) provides that the filing of a claim for review does not “operate as a stay of payment to the claimant of 70% of weekly benefit required by the terms of the award of the worker’s compensation magistrate or arbitrator.” Accordingly, “[p]ayment shall commence as of the date of the worker’s compensation magistrate’s or arbitrator’s award, and shall continue until final determination of the appeal or for a shorter period if specified in the award.” MCL 418.862(1).

The WCAC possesses the authority to dismiss an appeal for noncompliance with MCL 418.862(1), *McAvoy v H B Sherman Co*, 401 Mich 419, 460-462; 258 NW2d 414 (1977), but the WCAC need not dismiss an appeal where circumstances present in the record justify a denial of a

motion to dismiss, see e.g., *Morin v DSS*, 134 Mich App 834, 839; 352 NW2d 325 (1984) (holding the WCAB is not required to dismiss an appeal “where there is substantial compliance with the 70% rule and good cause can be shown for partial noncompliance” or where “payment was initially made but then inadvertently terminated”). Further, reinstatement of appeals should be freely allowed where the appellant has substantially complied with the 70% rule because the “[r]einstatement of an appeal merely revives the opportunity for review and does not prejudice either party on the merits or defense.” *Dean v Great Lakes Casting Co*, 78 Mich App 664, 668-669; 261 NW2d 34 (1977).<sup>1</sup>

Defendants initially complied with MCL 418.862(1) by paying the required 70% of benefits. They stopped payment on April 15, 2007 and did not reinstate payment of benefits until August 17, 2007, after plaintiff moved for dismissal of their appeal. Concurrent with the recommencing of payment, defendants paid past-due benefits owed between April 15<sup>th</sup> and August 17<sup>th</sup> and promised to continue paying those benefits under the 70% rule during the pendency of the appeal. In other words, defendants had brought themselves into compliance with MCL 418.862(1) before the WCAC entertained plaintiff’s motion to dismiss and, consequently, plaintiff’s rights under the 70% rule had been restored and vindicated. Under such circumstances, the dismissal of the appeal served no purpose and neither party will be prejudiced on the merits or defense if the appeal is reinstated. *Dean, supra* at 668-669.

In light of our disposition of this issue, we need not address defendants’ remaining arguments.

The decision of the WCAC dismissing defendants’ appeal is reversed and this matter is remanded to the WCAC for reinstatement of defendants’ appeal and for a decision on the merits. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Kurtis T. Wilder

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<sup>1</sup> Neither party has questioned the “substantial compliance” rule.