STATE OF MICHIGAN

COURT OF APPEALS

ALAN L. SANGER,

Plaintiff-Appellant,

v

ACTION CUSTOM ROOFING, INC., and TRANSCONTINENTAL INSURANCE COMPANY,

Defendants,

and

SECOND INJURY FUND,

Defendant-Appellee.

UNPUBLISHED
March 26, 2009

No. 284593
WCAC
LC No. 07-000115

Before: Zahra, P.J., and O'Connell, and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the Worker's Compensation Appellate Commission ["WCAC"] that affirmed a decision of the magistrate to deny plaintiff a rate increase in his weekly wage-loss benefit under § 356(1) of the Worker's Disability Compensation Act, MCL 418.356(1). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sustained injuries that rendered him a paraplegic when he fell from a roof while in the course of his employment with defendant Action Custom Roofing, Inc ("Action"). The parties stipulated that plaintiff is permanently and totally disabled as a result of his injury. The only issue before the magistrate for determination was whether plaintiff was entitled to a rate increase to his weekly wage-loss benefit from the Second Injury Fund[1] under § 356(1). Plaintiff

[1] The Second Injury Fund is a party to this action because MCL 418.356(1) obligates the Fund to reimburse a self-insured employer or an employer's insurance carrier to the extent of any enhanced benefit awarded.

argues he would have continued to work at Action, gaining experience that would earn him a wage commensurate with that of a skilled roofer.

Section 356(1) provides in part:

> An injured employee who, at the time of the personal injury, is entitled to a rate of compensation less than 50% of the then applicable state average weekly wage as determined for the year in which the injury occurred pursuant to section 355, may be entitled to an increase in benefits after 2 years. *After 2 years of continuous disability, the employee may petition for a hearing at which the employee may present evidence, that by virtue of the employee's age, education, training, experience, or other documented evidence which would fairly reflect the employee's earning capacity, the employee's earnings would have been expected to increase.…* [MCL 418.356(1) (footnotes omitted; emphasis added).]

The magistrate denied plaintiff's request for a benefit increase for the reason that "[p]laintiff's position that he would have had increased wages based on his age, education, training, experience and other documented evidence, is speculative." The WCAC affirmed the magistrate's ultimate determination, with the majority opining that plaintiff had not established that his earnings would have increased, in light of "plaintiff's history as a high school drop out with a significant learning disability, sporadic work history limited to unskilled manual labor, nine months of employment at the defendant without a pay raise and no definite plan to support his dream of becoming a crew leader or business owner."

Our review of the WCAC's decision is solely limited to ensuring the integrity of the administrative process. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). "As 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." *Id*. at 703-704. This Court reviews de novo questions of law involved in a final order of the WCAC, including questions that involve the construction of the provisions of the Workers' Disability Compensation Act. *Id*. at 697 n 3; *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003).

Section 356(1) allows for an increase in benefits for low-wage workers under special circumstances. Welch & Royal, Worker's Compensation in Michigan: Law and Practice (5th ed), § 11.12, p 11-12. "The worker must establish that because of age, education, training, or experience, his or her earnings would have been expected to increase if he or she were still working." *Id*.; see also *Matney v Southfield Bowl*, 218 Mich App 475, 479-480; 554 NW2d 356 (1996), aff'd in part and rev'd in part 458 Mich 851; 587 NW2d 631 (1998). Extrinsic economic forces alone are insufficient to justify a wage-loss benefit increase under § 356(1). *Matney v Southfield Bowl*, 458 Mich 851; 587 NW2d 631 (1998); *Kurz v Michigan Wheel Corp*, 236 Mich App 508, 513 n 1; 601 NW2d 130 (1999). Accordingly, a claimant is not entitled to an increase in wage-loss benefits under § 356(1) that simply reflects the effects of inflation, wage minimums, or increased seniority. *Grigg v Upjohn Healthcare Services*, 459 Mich App 908; 589 NW2d 769 (1998).

We cannot conclude the WCAC erred in concluding that plaintiff failed to establish that his earnings would have been expected to increase to that of a skilled roofer. There is record evidence that plaintiff's education, training, and experience in the area of roofing were limited, and we agree with the WCAC that plaintiff's claim that he would have earned as much as a skilled roofer is speculative.

There is no dispute that plaintiff has difficulty reading, did not complete high school and has not been able to pass a GED exam. While there was some evidence that plaintiff took vocational classes in high school, those classes do not appear particularly relevant to roofing. In short, plaintiff's educational background does not suggest that his earnings would have been expected to increase.

Plaintiff testified that his employment with Action was his first exposure to commercial roofing. He explained:

> You laid down – you had to screw down insulation and then put rubber over the top of that and or different roofs which would be a valance or a different roof, you know, that you lay down insulation and then you would lay the rubber down, seal the seams, and dump gravel on top of that.

When the owner of Action, Ernest Grabman, was asked "did you train [plaintiff] specifically as a commercial roofer in any particular ways," he replied:

> No. It wasn't really training. He was hired as a laborer, which entails just showing up for the job and taking instruction and doing what they are told. There was no training. I guess you call that a hands-on training.

Plaintiff characterized his on-the-job training as a "short demonstration." Thus, evidence supports the WCAC's finding that plaintiff received limited training in the area of commercial roofing.

In regard to experience, plaintiff worked at Action for nine months. We also mention that plaintiff had previously worked periodically with his uncle on residential roofs over a six-year period. At that job, his duties were limited to handing shingles to the person doing the shingling, shingling, carrying shingles onto the roof, and performing basic clean up duties. Plaintiff thus had some experience in roofing. However, the crux of plaintiff's claim is that he would have continued to gain experience through employment with Action and eventually become a skilled roofer.

However, the WCAC need not accept the premise that plaintiff's continued employment with Action, by itself, compels the finding that his earnings would have been expected to increase to those of a skilled roofer. Asked how employees are given raises, Grabman indicated that:

> Based on how – the performance of the employee, and if they would show up every day, attitude and that type of thing, and also depending on the amount of work that was needed. At that period of time, if there was some growth in the company, which there wasn't, then sometimes I will bring people on out of the

> labor sector who want to grow, but most of the time, the employees would come to me and ask for that type of situation to proceed, and to get better, and to then higher raises. At this time, I was never asked for any – Sanger never asked for any increase in rate.

Asked on cross-examination whether "a person acquires more, naturally does their pay increase commensurately," Grabman answered: "Yes and no. Like there again, it depends on the attitude, you know, and whether or not the employee fits in, you know. He could be very skilled and not have the attitude and not – of course, wash out and not be able to continue."

Soon afterwards Grabman was pressed to answer whether if "an individual has experience of two or three years, perhaps not with your company, but in general, and they are doing commercial roofing, what can they expect to make." He replied,

> I really can't answer that. I don't know. There again, it all depends on, you know, the individual and if they are successful or not. A lot of people wash out in those stages. Very few are able to continue because of – actually because of the insurance. So it would be hard for me to say.

Strikingly, there was no evidence presented in regard to plaintiff's attendance and attitude at Action, though his performance was mentioned as satisfactory. Rather than assume from no evidence that plaintiff would have become a skilled roofer, the WCAC could rationally conclude that had plaintiff not been injured he would have continued to perform the same work that he had before his accident. Although plaintiff through continued employment with Action may have become better at his job, there is no persuasive evidence that plaintiff would have become a skilled roofer. Accordingly, this Court cannot disturb the WCAC's decision.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood