

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT M. CAIN,

Plaintiff-Appellee,

v

WASTE MANAGEMENT INC. and
TRANSPORTATION INSURANCE CO.,

Defendants-Appellants,

and

SECOND INJURY FUND,

Defendant-Appellee.

FOR PUBLICATION

November 6, 2003

9:10 a.m.

No. 242104

WCAC

LC No. 98-000390

SCOTT M. CAIN,

Plaintiff-Appellee,

v

WASTE MANAGEMENT INC. and
TRANSPORTATION INSURANCE CO.,

Defendants-Appellees,

and

SECOND INJURY FUND,

Defendant-Appellant.

No. 242123

WCAC

LC No. 98-000390

Updated Copy

January 16, 2004

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

COOPER, P.J.

In Docket No. 242104, defendant Waste Management, Inc., and its insurer appeal by leave granted from a May 24, 2002, order of the Worker's Compensation Appellate Commission (WCAC), after remand from our Supreme Court, awarding plaintiff total and permanent disability benefits. In Docket No. 242123, defendant the Second Injury Fund (SIF), Total and Permanent Disability Provisions, appeals by leave granted from the same order. These appeals were consolidated for purposes of appeal. We affirm.

We are asked to determine (1) whether the WCAC used the proper standard in determining "specific loss" and (2) whether the WCAC could properly award plaintiff "total and permanent" disability benefits on the basis of its finding that plaintiff suffered the specific loss of his left leg. After reviewing the decision in *Cain v Waste Mgt, Inc.*,¹ we find that our Supreme Court did not overrule or abrogate its previous decision in *Pipe v Leese Tool & Die Co.*² In *Pipe*, the Court held that specific loss can be determined by applying the "loss of industrial use" standard. Accordingly, we uphold the WCAC's decision to affirm the magistrate's determination that plaintiff suffered a specific loss of his left leg, under MCL 418.361(2)(k), where plaintiff lost the industrial use of his left leg in its uncorrected state. We additionally find that the WCAC properly awarded plaintiff total and permanent disability benefits under MCL 418.361(3)(b) for his specific (anatomical) loss of his right leg and the specific (industrial) loss of his left leg. This was a reasonable construction of the statute and the only logical conclusion given the facts in this case. We find this to be especially true given the remedial nature of the Worker's Disability Compensation Act (WDCA)³ and the WCAC's finding that plaintiff suffered the specific loss of both legs.⁴

I. Facts and Procedural History

These appeals arise from injuries plaintiff suffered approximately fifteen years ago. The case has a lengthy appellate history, and the following facts are taken in large part from the facts stated by our Supreme Court in *Cain*.⁵

Plaintiff worked as a truck driver and trash collector for defendant Waste Management. In October 1988, as he was standing behind his vehicle emptying a rubbish container, he was struck by an automobile that crashed into the back of the truck. Plaintiff's legs were crushed. His right leg was amputated above the knee. Doctors were able to save his left leg with extensive surgery and bracing.

In February 1990, plaintiff was fitted with a right leg prosthesis, and he was able to begin walking. He returned to defendant's employ performing clerical duties. But plaintiff's left leg

¹ *Cain v Waste Mgt, Inc.*, 465 Mich 509; 638 NW2d 98 (2002).

² *Pipe v Leese Tool & Die Co.*, 410 Mich 510; 302 NW2d 526 (1981).

³ MCL 418.101 *et seq.*

⁴ See *Hagerman v Gencorp Automotive*, 457 Mich 720, 739; 579 NW2d 347 (1998).

⁵ *Cain*, *supra* at 513-516.

continued to deteriorate and, in October, he suffered a distal tibia fracture. Doctors diagnosed it as a stress fracture caused by preexisting weakness from the injury sustained in the accident. After extensive physical therapy and further surgery on his left knee, plaintiff was able to return to work in August 1991, first working as a dispatcher and then in the sales department. Defendant voluntarily paid plaintiff 215 weeks of worker's compensation benefits for the "specific loss" of his right leg.⁶ But there was disagreement concerning whether plaintiff was entitled to additional benefits.

In August 1992, plaintiff filed a petition for "total and permanent disability benefits" for the "industrial loss of use of both legs." Without citing a particular subsection of MCL 418.361, plaintiff stated the following:

My legs were crushed in a motor vehicle accident resulting in an amputation above the knee of my right leg. The severity of my injuries to my left leg result [sic] in the industrial loss of use of both legs. I am, therefore, entitled to permanent and total disability benefits.

At the end of the last hearing day, plaintiff moved to amend his petition to add a claim for the "specific loss" of his left leg under MCL 418.361(2)(k), but the magistrate denied the motion.

Less than a week later, plaintiff filed a second petition requesting benefits for the specific loss of his left leg. Plaintiff's second petition stated the following:

In addition to my initial application, I am claiming specific loss of my left lower extremity for dates of injury of 10/25/88 and 10/21/90. On 10/21/90, while walking down a ramp at home, I refractured my left tibia causing it to become necessary for me to wear a permanent brace on my left leg.

In December 1993, the magistrate issued an opinion and order awarding specific loss benefits for the loss of both legs. Although the magistrate had denied the motion to add a claim for the specific loss of the left leg, he nonetheless awarded the benefits, reasoning that plaintiff's initial petition for benefits for the loss of the industrial use of both legs had implicitly included a claim for the specific loss of the left leg. The magistrate found that the left leg had been effectively lost when the stress fracture occurred in October 1990, and that "any hope of restoring the member was abandoned." Thus, the magistrate ruled that the SIF was obligated to pay benefits for total and permanent disability because plaintiff had lost the industrial use of both legs.⁷

Defendant and its insurer appealed to the WCAC, which reversed the judgment of the magistrate in April 1997. The WCAC ruled that, in light of the phrasing of plaintiff's initial petition to the bureau, the magistrate had erroneously awarded benefits for the specific loss of the

⁶ See MCL 418.361(2)(k).

⁷ See MCL 418.361(3)(g).

left leg. The WCAC also held that the magistrate had committed legal error in his analysis of plaintiff's claim of total and permanent disability because the magistrate had failed to use a "corrected" (i.e., measured with the help of prosthetics) standard to examine the remaining usefulness of plaintiff's left leg. Applying this standard, the WCAC concluded that plaintiff could not recover total and permanent disability benefits under MCL 418.361(3)(g) because plaintiff retained the industrial use of his left leg when braced.

In May 2000, this Court affirmed in part, reversed in part, vacated in part, and remanded for further proceedings.⁸ We affirmed the WCAC's denial of specific loss benefits, agreeing that plaintiff's petition did not state a claim for such benefits. However, this Court reversed and vacated the WCAC's finding that plaintiff was not totally and permanently disabled, holding that claims for total and permanent disability benefits must be analyzed under an "uncorrected" (i.e., measured without the help of prosthetics) test.

Our Supreme Court granted leave to appeal to consider whether the corrected standard applied to a vision claim in *Hakala v Burroughs Corp (After Remand)*,⁹ should be applied to a claim regarding permanent and total loss of industrial use of both legs, MCL 418.361(3)(g).¹⁰ In holding that the corrected standard applied, our Supreme Court reasoned that the words "total" and "permanent," as used in MCL 418.361(3)(g), suggested a situation that could not be corrected.¹¹ The Court held that plaintiff had not demonstrated total and permanent disability under subsection 361(3)(g) because his left leg, when braced, could support industrial use.¹²

Our Supreme Court remanded the case "to the WCAC to consider plaintiff's specific loss claim." The relevant footnote to its opinion provided the following:

We also are satisfied that the WCAC should have considered plaintiff's specific loss claim regarding his left leg. While this claim may not have been pleaded as specifically as it should have been, we discern no prejudice or surprise. Accordingly, we remand this claim to the WCAC for resolution.^[13]

On remand, the WCAC found that "[t]he magistrate reasonably accepted the testimony that the injury to plaintiff's left leg equates with anatomical loss and that the limb retains no substantial utility." The WCAC therefore concluded that there was competent, material, and substantial evidence to support the magistrate's 1993 finding that plaintiff had sustained the

⁸ Unpublished opinion per curiam of the Court of Appeals, issued May 2, 2000 (Docket No. 214445).

⁹ *Hakala v Burroughs Corp (After Remand)*, 417 Mich 359; 338 NW2d 165 (1983).

¹⁰ *Cain, supra* at 517.

¹¹ *Cain, supra* at 520.

¹² *Cain, supra* at 515, 524.

¹³ *Id.* at 510 n 1.

"specific loss" of his left leg under MCL 418.361(2)(k). The WCAC further held that "[h]aving shown specific loss of each leg, plaintiff is entitled to total and permanent disability benefits."

II. Analysis

These consolidated appeals concern the following two related issues: first, whether specific loss under MCL 418.361(2) may still be determined by applying a "loss of industrial use" standard in light of the *Cain* decision; and, second, assuming the "loss of industrial use" standard is appropriate for determining specific loss, whether the specific (industrial) loss of one leg may constitute one of the two losses required for awarding total and permanent disability benefits to an employee for the loss of both legs, MCL 418.361(3)(b). This Court may review questions of law involved with any final order of the WCAC.¹⁴ Issues requiring statutory construction are reviewed de novo by this Court.¹⁵

A. Award of Specific Loss Benefits

There are two broad categories of benefits awarded under the WDCA to workers who are injured or become disabled on the job: scheduled benefits and general disability benefits.¹⁶ This case concerns scheduled benefits, which are payable for the permanent loss of a specific anatomical member or function.¹⁷ There are two types of scheduled benefits: benefits for "specific losses" and benefits for "total and permanent disabilities."

The specific loss and total and permanent disability entitlements are now separately identified in their own subsections of MCL 418.361. Subsection 361(2) delineates the specific losses for which benefits will be paid. The pertinent portion of MCL 418.361(2) provides as follows:

In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:

* * *

(k) Leg, 215 weeks.

¹⁴ MCL 418.861a(3) and (14).

¹⁵ *McCaul v Modern Tile & Carpet, Inc.*, 248 Mich App 610, 619; 640 NW2d 589 (2001).

¹⁶ *Cain*, *supra* at 511; *Redfern v Sparks-Withington Co.*, 403 Mich 63, 79; 268 NW2d 28 (1978).

¹⁷ *Redfern*, *supra* at 79.

An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

Although income replacement remains the major function of benefits granted under the WDCA, specific loss benefits have a broader purpose.¹⁸ They focus on the employee's anatomical loss or its equivalent, irrespective of wage earning ability.¹⁹ "[S]pecific losses affect the quality of life apart from wage earning capacity,' and that 'the impairment of normal function and the effect on the worker's personal life is serious.'"²⁰ For this reason, specific loss benefits are payable for the period indicated regardless of whether the employee returns to work or is found to have a general disability as a result of the loss.²¹ Further, specific loss benefits are payable despite the correctability of the employee's loss.²²

In *Pipe*, our Supreme Court interpreted the term "loss" in the specific loss provision, MCL 418.361(2), to mean not only anatomical loss but also loss of the industrial use of the body part.²³ The Court held that

[f]or purposes of determining an award of specific-loss benefits for the loss of a hand, there must be a showing of either anatomical loss or loss of the industrial use of the hand as determined by the loss of the primary service of the hand in industry. We are satisfied that this test is comparable to the test that is most universally applied in the other jurisdictions of this country.^[24]

The Court determined that the plaintiff in *Pipe* had lost the industrial use of his right hand and was therefore qualified for specific loss benefits.²⁵ In making this decision, the Court noted that the plaintiff had suffered an eighty-six percent anatomical loss to his right hand, with no significant power grasp or pinch function, some precision grasp, and some hook and push function.²⁶

¹⁸ *Tew v Hillsdale Tool & Mfg Co*, 142 Mich App 29, 37; 369 NW2d 254 (1985).

¹⁹ *Cain*, *supra* at 524.

²⁰ *Tew*, *supra* at 37, quoting *Redfern*, *supra* at 81.

²¹ Welch, *Worker's Compensation in Michigan: Law & Practice* (4th ed), § 12.1.

²² *Tew*, *supra* at 35.

²³ *Pipe*, *supra* at 526-527

²⁴ *Id.* at 527.

²⁵ *Id.* at 528.

²⁶ *Id.*

Courts have since followed the rule of law from *Pipe* that a specific loss may be demonstrated by showing a loss of industrial use.²⁷ And a leading commentary on worker's compensation law provides that a worker may claim a specific loss by showing a loss of industrial use of a specific member.²⁸

Defendant Waste Management, however, asserts that in light of our Supreme Court's decision in *Cain*, the rule established in *Pipe* is no longer valid. In particular, defendant claims that specific losses can no longer be determined by applying the loss of industrial use standard. Defendant opines that this Court should apply MCL 418.361(2) "as it is written" and not borrow the loss of industrial use standard from the total and permanent disability context for determining a specific loss. Even if *Cain* did not overrule *Pipe*, defendant contends that a corrected test must be used to assess claims of loss of industrial use under MCL 418.361(2). We disagree.

As previously indicated, our Supreme Court in *Cain* stated that it was addressing "only one issue: whether the 'corrected' standard of *Hakala*, applied to a vision claim pursuant to MCL 418.361, should be applied to a permanent and total loss of industrial use of both legs claim pursuant to MCL 418.361(3)(g)."²⁹ Although the Court highlighted the distinctions between specific loss benefits and total and permanent disability benefits, it did so only within the context of opining that the uncorrected test applicable to measuring specific losses should not apply to measuring a total and permanent disability under MCL 418.361(3)(g).

Notably, the Court did not indicate any intent to call into question the rule of law from its 1981 decision in *Pipe* that specific losses may be proved by showing either an anatomical loss or loss of industrial use. If our Supreme Court intended to overrule *Pipe* or call it into doubt, it had the opportunity to make that intention clear. In short, we conclude that *Pipe* is still good law. Accordingly, the WCAC did not err in approving the magistrate's application of the loss of industrial use standard to conclude that plaintiff had sustained the specific loss of his left leg under MCL 418.361(2)(k).

B. Award of Total and Permanent Disability Benefits

Defendant SIF challenges the WCAC's subsequent finding that plaintiff is eligible to receive total and permanent disability benefits having shown the specific loss of both legs under MCL 418.361(2)(k). The WCAC did not specify which subsection of MCL 418.361(3) it relied on in granting plaintiff total and permanent disability benefits. However, the Supreme Court determined that plaintiff could not seek relief for total and permanent disability benefits under MCL 418.361(3)(g) (industrial loss of both legs).³⁰ Consequently, we logically presume that the

²⁷ See *Kidd v Gen Motors Corp*, 414 Mich 578, 586; 327 NW2d 265 (1982); *O'Connor v Binney Auto Parts*, 203 Mich App 522, 530; 513 NW2d 818 (1994); *Tew*, *supra* at 35.

²⁸ *Welch*, *supra* at § 12.2.

²⁹ *Cain*, *supra* at 517.

³⁰ See *Cain*, *supra* at 524.

WCAC's grant of total and permanent disability benefits on remand was under MCL 418.361(3)(b) (loss of both legs).

Initially, the SIF claims that the WCAC's award of total and permanent disability benefits exceeded the scope of the Supreme Court's order of remand and that such benefits were unavailable absent a specific request from plaintiff. We find no merit to these arguments. The Supreme Court's remand instructions did not preclude the WCAC from considering whether plaintiff was entitled to total and permanent disability benefits under another subsection of MCL 418.361(3).³¹ Rather, the Supreme Court simply instructed the WCAC to consider whether plaintiff suffered the specific loss of his left leg. There were no restrictions placed on the WCAC from making the next logical conclusion if it found that plaintiff had lost the specific use of both his legs. Further, we do not find that plaintiff's failure to request total and permanent disability benefits on remand should negate the WCAC's award. We note that plaintiff made a general request for total and permanent disability benefits in his initial petition. Indeed, our Supreme Court directed the WCAC to consider plaintiff's specific loss claim despite his failure to plead it as specifically as possible.³² Similarly, we discern no surprise to the SIF on remand, and hold that the WCAC could properly award plaintiff such relief.

Even if the WCAC acted within the scope of the order of remand, the SIF asserts that plaintiff is not entitled to total and permanent disability benefits under MCL 418.361(3)(b). According to the SIF, the WCAC used an uncorrected test in determining that plaintiff suffered the loss of both legs and that this was in violation of the Supreme Court's decision in *Cain*. Because our Supreme Court concluded that plaintiff was ineligible to receive benefits under MCL 418.361(3)(g), as he retained the use of his left leg when braced, the SIF argues that plaintiff cannot now show the total and permanent loss of both legs under MCL 418.361(3)(b). We disagree.

As explained in *Cain*, "[t]otal and permanent disability benefits are intended for those who sustain the more catastrophic loss of more than one member."³³ MCL 418.361(3) provides as follows:

Total and permanent disability, compensation for which is provided in section 351 means:

- (a) Total and permanent loss of sight of both eyes.
- (b) Loss of both legs or both feet at or above the ankle.
- (c) Loss of both arms or both hands at or above the wrist.

³¹ See, e.g., *Modreski v Gen Motors Corp*, 417 Mich 323, 333-334; 337 NW2d 231 (1983).

³² *Cain*, *supra* at 510, n 1.

³³ *Cain*, *supra* at 512.

(d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).

(e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.

(f) Incurable insanity or imbecility.

(g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature.³⁴ The first criterion in determining intent is the specific language of the statute.³⁵ If reasonable minds can differ as to the meaning of the statute, then judicial construction is appropriate.³⁶ "The court must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose, but should also always use common sense."³⁷ Accordingly, when construing statutes, courts should seek to avoid a construction that would produce absurd results, injustice, or prejudice to the public interest.³⁸

Our Supreme Court in *Cain* specifically discussed whether a corrected or uncorrected test was applicable when determining if an individual was eligible for total and permanent disability benefits under MCL 418.361(3)(g).³⁹ The Court noted that the "total loss of industrial use" category allows recovery where there is a loss of industrial use of an individual's limb short of actual amputation.⁴⁰ It further noted that subsection 361(3)(g) requires proof of an impaired wage earning capacity because it is primarily concerned with an individual's ability to earn a living.⁴¹ The Supreme Court also cited the Legislature's use of the words "total" and "permanent" in subsection 361(3)(g) as suggesting an injury that could not be corrected or improved.⁴² Accordingly, the Court held that the test for total and permanent disability under

³⁴ *McCaul, supra* at 619.

³⁵ *Id.*

³⁶ *Id.* at 619-620.

³⁷ *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, __; __ NW2d __ (2003).

³⁸ *Id.*

³⁹ *Cain, supra* at 517.

⁴⁰ *Cain, supra* at 512.

⁴¹ *Cain, supra* at 512 n 2, 523.

⁴² *Cain, supra* at 519-520.

subsection 361(3)(g) would be a corrected test.⁴³ It is noteworthy for purposes of the instant appeal, however, that the Supreme Court expressly limited its decision in *Cain* to MCL 418.361(3)(g).⁴⁴

Significantly, the WCAC's decision in this appeal is based on plaintiff's entitlement to total and permanent disability benefits under a different subsection, MCL 418.361(3)(b). After reviewing the record, we find that the WCAC's decision was consistent with its conclusion that plaintiff suffered the specific loss of both legs. Following the SIF's rationale in this case would produce absurd results. For instance, a double amputee would be denied total and permanent disability benefits. The WCAC's decision is also in line with the fact that the WDCA "is remedial in nature, and must be 'liberally construed to grant rather than deny benefits.'"⁴⁵ We further note that the WCAC's interpretation and application of a provision of the WDCA are entitled to considerable deference from this Court where that interpretation is not clearly incorrect.⁴⁶

The record reveals support for the magistrate's finding that the condition of plaintiff's unbraced left leg is tantamount to an amputation. We also note that even with his left leg braced, plaintiff is still unable to support himself without wearing a prosthesis on his right leg. It would be nonsensical and specious to determine that an individual who suffered the specific loss of each leg would then not also be entitled to total and permanent disability benefits for the loss of both legs. The facts of this case indicate that plaintiff cannot walk without the assistance of a man-made device on each leg. And, even then, he cannot walk on a constant basis because at some point one or both of the devices must be removed for purposes of comfort. Plaintiff's brace and his prosthetic leg are mutually dependent on each other—neither can support plaintiff independently. We find no logic to the position that an individual who has been determined to have suffered the specific loss of both legs would be ineligible to receive total and permanent disability benefits under MCL 418.361(3)(b). To hold otherwise would produce unfair results and would essentially result in a statutory interpretation that exalts form over substance.

Affirmed.

Fitzgerald, J., concurred.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald

⁴³ *Cain*, *supra* at 519-520.

⁴⁴ *Cain*, *supra* at 517.

⁴⁵ *Hagerman*, *supra* at 739, quoting *Sobotka v Chrysler Corp (After Remand)*, 447 Mich 1, 20 n 18; 523 NW2d 454 (1994) (Boyle, J., lead opinion).

⁴⁶ *McCaul*, *supra* at 619.