STATE OF MICHIGAN

COURT OF APPEALS

RICHARD E. MILLER,

Plaintiff-Appellant,

v

BYRON CENTER PUBLIC SCHOOLS and SECOND INJURY FUND,

Defendants-Appellees.

UNPUBLISHED
November 22, 1996

No. 187105
LC No. 91-000769
ON REMAND

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals on leave granted after remand from the Supreme Court the decision of the Worker's Compensation Appellate Commission (WCAC) modifying the magistrate's open award of disability benefits. The parties have stipulated to the dismissal of defendant Byron Center Public Schools, thus the reimbursement of health insurance benefits is no longer an issue. We affirm.

Plaintiff was employed by Byron Center Schools as a part-time wrestling coach. On November 21, 1988, while conducting a strenuous practice, plaintiff began to experience pain in his chest and back. He was taken to the hospital, where a myocardial infarction was diagnosed. Following his release from the hospital, plaintiff began a program of cardiac rehabilitation. On December 28, 1988, he suffered a second heart attack while working out on a stationary bicycle. The damage from the second attack was severe, and as a result plaintiff underwent a heart transplant on July 9, 1989.

Plaintiff's principal employment was as a self-employed manufacturer's representative. Plaintiff conceded that this employment was not covered by the Worker's Disability Compensation Act. After his heart transplant, plaintiff was no longer able to perform this work or his work as a wrestling coach. After extensive proceedings, the WCAC found that plaintiff was disabled by a work-related heart attack. It held that the magistrate properly excluded plaintiff's self-employment earnings from the average weekly wage, and awarded benefits based solely on plaintiff's earnings as a coach.

Both parties appealed the WCAC'S order. This Court denied both applications for leave to appeal. Plaintiff applied for leave to appeal to the Supreme Court, which remanded to this Court for

consideration on leave granted, inviting this Court to give particular attention to the now-dismissed argument in regard to reimbursement for medical benefits. 449 Mich 861 (1995). The remaining issue is whether the commission properly excluded plaintiff's self-employment earnings from his average weekly wage.

MCL 418.371; MSA 17.237(371) provides in pertinent part:

> (1) The weekly loss in wages referred to in this act shall consist of the percentage of the average weekly earnings of the injured employee computed according to this section as fairly represents the proportionate extent of the impairment of the employee's earning capacity in the employments covered by this act in which the employee was working at the time of the personal injury. The weekly loss in wages shall be fixed as of the time of the personal injury, and determined considering the nature and extent of the personal injury. The compensation payable, when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not exceed the employee's average weekly earnings at the time of the injury.
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> (2) As used in this act, "average weekly wage" means the weekly wage earned by the employee at the time of the employee's injury in all employment, inclusive of overtime, premium pay, and cost of living adjustment, and exclusive of any fringe or other benefits which continue during the disability.

Plaintiff relied on the language of the dual employment provision to assert that all earnings should be considered in determining the average weekly wage. MCL 418.372; MSA 17.237(372) provides in part:

> (1) If an employee was engaged in more than 1 employment at the time of a personal injury or a personal injury resulting in death, the employer in whose employment the injury or injury resulting in death occurred is liable for all the injured employee's medical, rehabilitation, and burial benefits. Weekly benefits shall be apportioned as follows:
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> (b) If the employment which caused the personal injury or death provided 80% or less of the employee's average weekly wage at the time of the personal injury or death, the insurer or self-insurer is liable for that portion of the employee's weekly benefits as bears the same ratio to his or her total weekly benefits as the average weekly wage from the employment which caused the personal injury or death bears to his or her total weekly wages. The second injury fund is separately but dependently liable for the remainder of the weekly benefits. The insurer or self-insurer has the obligation to pay the employee or the employee's dependents at the full rate of compensation. The

second injury fund shall reimburse the insurer or self-insurer quarterly for the second injury fund's portion of the benefits due the employee or the employee's dependents.

Plaintiff argues that § 372 refers to wages from all employments and is not limited to employments covered by the act. This argument is without merit. In *Tulppo v Ontonagon Co*, 207 Mich App 277; 523 NW2d 883 (1994), this Court found that the provisions of § 371 govern the determination of weekly wage loss when an employee is engaged in multiple employments. This Court found that national guard employment was employment covered under the act, thus the WCAC was required to consider those wages in determining the plaintiff's wage loss.

As noted by defendant, the Legislature amended §§ 371 and 372 in 1980 PA 357 and 1982 PA 32, adding more restrictive language in 1982 to limit the wages included in the dual employment calculation. Given these amendments, it is the clear intent of the Legislature to limit compensation in dual employment situations to employments covered by the act. There is no rational basis to extend the liability of the Second Injury Fund to a wage base, such as self-employment, that is not subject to worker's compensation coverage. See MCL 418.111; MSA 17.237(111).

We affirm.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard A. Bandstra