STATE OF MICHIGAN

COURT OF APPEALS

HESSLEY HEMPSTEAD,

Plaintiff-Appellant,

v

DETROIT LIONS, INC., and
LIBERTY MUTUAL INSURANCE CO.,

Defendants-Appellees.

UNPUBLISHED
January 3, 2003

No. 239817
WCAC
LC No. 01-000162

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Plaintiff Hessley Hempstead appeals by leave granted a final order of the Workers' Compensation Appellate Commission (WCAC), which reversed the magistrate's ruling that plaintiff's benefits were not subject to coordination. We affirm.

I. Introduction

Plaintiff was employed as a professional football player for the Detroit Lions, Inc., a National Football League (NFL) franchise. Plaintiff claimed injuries that occurred in July, 1997 to his right shoulder in a collision with an opposing player, as well as to his neck while blocking an opposing player. Additionally, plaintiff claimed an injury to his left lower extremity as a result of his left leg locking in artificial turf while performing a running drill on April 6, 1998. As a result, he receives "line-of-duty" disability pension benefits pursuant to the Bert Bell/Pete Rozelle NFL Player Retirement Plan (PRP). PRP benefits are governed by the collective bargaining agreement between the NFL Players Association and the NFL Management Council.

The stipulated issue presented to the workers' compensation magistrate was whether plaintiff's PRP disability pension benefits were to be coordinated with his worker's compensation benefits. The parties provided no live testimony to the magistrate. Instead, they submitted three depositions and had several documents admitted as exhibits.[1]

[1] In their brief on appeal defendants argue that the NFL Standardized Contract supports their position. However, that document is not properly before this Court as it was never admitted into evidence before the magistrate or WCAC. We therefore decline to review it in coming to our (continued…)

Before 1993, the PRP was known as the "Bert Bell" NFL Player Retirement Plan (the Bell Plan). Article 6 of the Bell Plan provided for offset by worker's compensation benefits. In 1993, however, the Bell Plan was merged with the "Pete Rozelle" plan. Article 6 was amended as follows regarding the offset of benefits:

> **Applicability and Special Rules**. The above provisions of this Article 6 will apply to Players who first make application for line-of-duty disability benefits in the 1993 Plan year or later and who earn a Credited Season in 1993 or later. Players not described in the preceding sentence are subject to the following special rules:
>
> * * *
>
> (c) The following sentence is added to the end of Section 6.1: '*A Player's monthly line-of-duty benefit will be reduced by the payment for that month or the monthly equivalent of any lump sum payment for the same disablement which the Player receives as worker's compensation.*' [Emphasis added.]

Subsection (c) clearly provides for coordination between the line of duty benefit and workers' compensation benefits. It is equally clear that Article 6, subsection (c) does not apply to workers who first make application for benefits after 1993, a group that undisputedly includes plaintiff.

In his opinion dated March 16, 2001, Magistrate Patrick J. MacLean first found that plaintiff had been receiving line-of-duty disability benefits since March 1, 1999, based on four credited seasons with the Lions. The Lions contributed funding for the line-of-duty benefits pursuant to a multi-employer pension plan. The magistrate opined that because the line-of-duty disability benefits are part of the NFL players' retirement plan, then said benefits are part of a disability pension plan, not any other type of benefit plan.

After reviewing the testimony of several persons involved in the negotiations of the PRP, the magistrate observed that, prior to 1993, line-of-duty disability benefits under the PRP had been subject to offset by worker's compensation benefits. The 1993 amendment to the PRP, however, limited the offset to benefits pertaining to 1992 and earlier. The magistrate thus determined that the PRP provisions were ambiguous because they were subject to two or more interpretations. Further, the magistrate found the line-of-duty disability provisions were not silent regarding coordination because the absence of coordination language that long had been in the PRP illustrated an intent to treat the two different time periods (pre-amendment and post-amendment) differently regarding coordination of benefits. The magistrate concluded:

> Accordingly, I find that per the parties' intent, as well as the express language of the 1993 line-of-duty disability amendments/provisions, plaintiff met his burden of proof to show that the line line-of-duty disability provisions prohibit

(…continued)

decision. *Hawkins v Murphy,* 222 Mich App 664, 670; 565 NW2d 674 (1997).

> coordination with workers' compensation benefits pursuant to MCL 418.354 (14). Accordingly, defendants may not coordinate plaintiff's line-of-duty disability benefits with plaintiff's workers' compensation benefits.

In its opinion of February 13, 2002, the WCAC reversed. The WCAC noted that the magistrate had based his opinion on the testimony of Yaras-Davis, but she testified that the PRP did not contain language about coordinating benefits because the prior coordination language was removed. The WCAC therefore concluded:

> It is clear to us that there is no provision in the Plan that waives coordination of the disability pension benefits, as required by Section 418.354(14) of the Act. Magistrate MacLean construes the Plan's silence as an ambiguity in the contract that invites (indeed requires) examination of the parties' intent. We disagree. Silence does not infer more than one possible meaning.
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> Section 418.354(14) of the Act requires that the parties act affirmatively to opt out of the coordination. They must 'provide' that the payments under the plan shall not be coordinated. 'If the plan is silent on the subject, disability compensation benefits are subject to coordination.' *Sterner v McLouth Steel Products*, 211 Mich App 354, 355-356; 536 NW2d 225 (1995), citing *Scott v Jones Laughlin Steel Corp (On Remand)*, 202 Mich App 408; 509 NW2d 841 (1993). Since the Plan is silent coordination must be permitted. Magistrate MacLean's decision denying coordination is hereby reversed.

II. Standard of Review

The WCAC must consider the magistrate's findings of fact conclusive if they are supported by competent, material, and substantial evidence on the entire record. MCL 418.861a(3); *Mattison v Pontiac Osteopathic Hosp*, 242 Mich App 664, 670; 620 NW2d 313 (2000), citing *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698-699; 614 NW2d 607 (2000). Substantial evidence is evidence that a reasonable person would accept as adequate to justify a conclusion. *Mattison*, *supra*. Where substantial evidence on the whole record does not exist to support the magistrate's factual finding, the WCAC may substitute its own finding of fact for that of the magistrate. *Id*. In contrast, in the absence of fraud, this Court must treat findings of fact made by the WCAC acting within its powers as conclusive. MCL 418.861a(14).

This Court may review questions of law involved with any final order of the WCAC. MCL 418.861a(3) and (14). This Court, however, does not independently review whether the magistrate's findings of fact are supported by substantial evidence. *Id*. Rather, this Court's review is complete once it is satisfied that the WCAC has understood and properly applied its own standard of review. *Id*. at 670-671. As long as the WCAC did not "misapprehend or grossly misapply" the "substantial evidence" standard test and the record reflects evidence supporting the WCAC's decision, then this Court must treat the WCAC's factual decisions as conclusive. *Id*. at 671.

The magistrate and the WCAC differed on one crucial point: whether the PRP was ambiguous regarding the coordination of worker's compensation benefits. The existence of an ambiguity is a question of law, which we review de novo on appeal. *Farm Bureau Mut Ins Co v*

Buckallew, 246 Mich App 607, 612; 633 NW2d 473 (2001). As such, neither we nor the WCAC are required to defer to the magistrate's conclusion as to the existence of an ambiguity.

MCL 418.354(1) sets forth the requirement that, except as otherwise provided for in that section, an employer's obligation to pay weekly workers' compensation benefits "shall be reduced" in the amount set forth in subsection 1(a) – (f). MCL 418.354(14) contains an exception to this general rule, in that it provides that parties to a disability pension plan, such as the PRP, may "opt out" of coordination with workers' compensation benefits:

> This section does not apply to any payments received or to be received under a disability pension plan provided by the same employer which plan is in existence on March 31, 1982. *Any disability pension plan entered into or renewed after March 31, 1982 may provide that the payments under that disability pension plan provided by the employer shall not be coordinated pursuant to this section.* [MCL 418.354(14) (emphasis added).]

The parties do not dispute that the PRP here is subject to the above opt-out provision, since the PRP was entered into after 1982. Thus, because the statute permits parties to pension plans to affirmatively decline to coordinate benefits, we examine the PRP's language for any evidence that the parties in this case opted out of coordination.

The interplay between the general rule of subsection 1, and the permissive grant under subsection 14, was described in *Murphy v Pontiac*, 221 Mich App 639, 643; 561 NW2d 882 (1997):

> Section 354 generally allows coordination of benefits. However, subsection 14 exempts from coordination disability pension plans in existence on March 31, 1982, the effective date of the coordination provision. That subsection further provides that the disability pension plan renewed or entered into after that date may exclude benefits from coordination.

Because the statute requires some affirmative statement in a plan to be exempt from coordination, we have previously held that "[i]f the plan is silent on the subject, disability compensation benefits are subject to coordination." *Sterner v McLouth Steel Products*, 211 Mich App 354, 355-356; 536 NW2d 225 (1995).

The critical issue in this case is whether the failure of the parties to address coordination in the PRP for post-1993 players, i.e., the PRP's silence, causes the PRP to be ambiguous (as the magistrate concluded) or requires coordination because of the failure to provide for an exception from the statutory requirement (as the WCAC concluded). We conclude that the WCAC came to the correct legal conclusion.

As the WCAC opinion makes clear, this is a rather straightforward case, resolved by five principles. First, state law generally provides for coordination of benefits. MCL 418.354(l); *Murphy, supra.* Second, the only way to avoid the coordination of benefits is if the plan "provide[d] that the payments under that disability pension plan provided by the employer shall not be coordinated . . ." MCL 418.354(14); *Murphy, supra.* Third, because the statute requires some affirmative indication in the plan that benefits are to be exempt, silence in a plan requires

coordination of benefits. *Sterner, supra.* Fourth, because the PRP contains no indication that the benefits of post-1993 players are not to be coordinated, under the statute and case law, they are to be coordinated. *Id.* Fifth, because the statute fills in the gap created by the PRP's silence, the silence does not create an ambiguity in the contract. *Norman v Norman*, 201 Mich App 182, 184; 506 NW2d 254 (1993)("silence does not equal ambiguity if the law provides a rule to be applied in the absence of a provision to the contrary").

Norman is illustrative of why this result is compelled. In that case, the parties' consent judgment of divorce provided that the lien on the marital home would accrue interest, but did not specify whether the interest was simple or compound. *Norman, supra* at 183-184. The trial court determined that the silence as to what type of interest to apply created an ambiguity, and thus made an equitable determination. This Court reversed, holding that the failure to specify (i.e., the silence) in the judgment did not create an ambiguous document, because the law filled in the ultimate answer – the law disfavored compound interest unless it was specifically provided for in the agreement. *Id.* at 187. Here, as in *Norman,* the law provides the answer to the silence of the parties as to whether the benefits are to be coordinated: benefits are to be coordinated in the absence of a specification otherwise.

The magistrate committed two legal errors which resulted in its erroneous decision. First, the magistrate failed to apply the PRP as written. The magistrate failed to do so by not recognizing (and *accepting*) the fact that the PRP contains no language providing for an exemption, and by not following the resulting conclusion that must be made under the statute from that silence. *Sterner, supra.* Second, by concluding that the PRP's specific coordination language for pre-1993 players created an ambiguity as to the parties' intent for the post-1993 players (because of the silence on the issue as to these players), the magistrate elevated the probable intent of the parties over the plain terms (or, more precisely, the lack of such terms) of the PRP. In other words, if the law says one must do a specific affirmative act in order to accomplish a particular result, which is what MCL 418.354(14) requires, then the failure to do that affirmative act, which the *Sterner* Court determined also compels a particular result, cannot create an ambiguity. *Norman, supra.* Moreover, the PRP's silence as to post-1993 players and the specific coordination language for pre-1993 players do not conflict, as under both provisions player benefits are coordinated with workers' compensation benefits. *Petovello v Murray,* 139 Mich App 639, 642; 362 NW2d 857 (1984)(contract is ambiguous if terms are inconsistent).

Acceptance of the magistrate's conclusion would in no uncertain terms require us to ignore the language in the PRP actually agreed to by the parties, and in doing so rely on what after-the-fact testimony establishes as the parties' "intent." This we cannot do. *Amtower v William C Roney & Co,* 232 Mich App 226, 233; 590 NW2d 580 (1998). We also are unwilling to redraft the PRP by judicial construction, which is what we would be doing if we were to construe silence as a positive, affirmative statement to exempt the players' benefits from the coordination requirements of state law.

Finally, we do not believe the *Sterner* decision controls this case. The plan in *Sterner*, unlike the PRP, had a provision specifically indicating the parties' intent to not have pension benefits coordinated with workers' compensation benefits. *Sterner, supra* at 356. This is a

significant distinction, because the sole issue in this case is how to treat the PRP's purported failure to address the coordination issue for post-1993 players.[2]

Affirmed.

/s/ Richard Allen Griffin
/s/ Christopher M. Murray

[2] *Sterner* also contains statements with which we do not agree. In its decision, the *Sterner* Court criticized the WCAC for relying on the plain language of the agreement, rather than relying on the "probable intent of the parties." *Sterner, supra* at 357. In our view, what is paramount is the plain language used in the contract itself. *Amtower, supra.* See also *Kleczewski v McLouth Steel Products Corp*, 465 Mich 904, 635 NW2d 306 (2001)(Statement of Justice Markman criticizing the contract analysis found in *Sterner*). Additionally, the *Sterner* Court found an ambiguity because of different interpretations given to the language by the parties and the lower tribunals, a principle to which we do not adhere. See *Henderson v State Farm First Casualty,* 460 Mich 348, 355 n 3; 596 NW2d 190 (1999); *Adair v State of Michigan,* 250 Mich App 691, 708; 651 NW2d 393 (2002).