STATE OF MICHIGAN

COURT OF APPEALS

BRETTEN STONE, Plaintiff-Appellee,	UNPUBLISHED April 3, 2008
v	No. 275684 WCAC
R.W. LAPINE, INC., and ACCIDENT FUND INSURANCE COMPANY OF AMERICA, Defendants-Appellants.	LC No. 05-000242

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

This matter returns to us on remand from our Supreme Court for consideration as on leave granted. Defendants R.W. Lapine, Inc ("defendant employer") and Accident Fund Insurance Company appeal a decision of the Worker's Compensation Appellate Commission ("WCAC") that granted plaintiff an open award of benefits for a left shoulder injury, a cervical strain or sprain, a low back condition and injury-related migraine headaches. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant employer hired plaintiff, a journeyman steamfitter, to perform steamfitter work at its plant in Kalamazoo. After nine days on the job, plaintiff sustained injury when he stood up and struck his left shoulder blade and the base of his neck on metal flanges. Plaintiff did not return to work with defendant employer because defendant employer had no work to offer plaintiff within his work restrictions. Defendants voluntarily paid wage loss and medical benefits. Plaintiff has never returned to work as a pipe fitter. Subsequently, plaintiff filed a petition for review in the Bureau of Workers' Disability Compensation, seeking weekly wage loss benefits, reasonable and necessary medical care, vocational rehabilitation, and any applicable penalties.

The magistrate granted plaintiff a closed award of benefits for a left shoulder injury and a cervical strain or sprain, but rejected plaintiff's claims based on a right shoulder injury, injury-related migraine headaches, and a low back condition. The magistrate determined plaintiff's average weekly wage ("AWW") by applying the "special circumstances" provision of MCL 418.371(6).

The WCAC affirmed the magistrate's denial of plaintiff's right shoulder claim, as well as his findings of a work-related left shoulder injury and cervical strain, but otherwise reversed the

magistrate's determinations, finding that those determinations were predicated on "multiple legal and factual errors" and a reliance on the magistrate's own medical opinions, rather than the evidence. The WCAC then opined that the evidence supported the finding that plaintiff suffered continuing work-related conditions, including a left shoulder injury, a cervical strain, and a low back condition, as well as injury-related migraine headaches. Next, the WCAC determined that these conditions were disabling under *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002). Finally, the WCAC found that the magistrate erred when he applied the "special circumstances" provision of MCL 418.371(6) to calculate plaintiff's AWW. Instead, the WCAC concluded that plaintiff's AWW should have been calculated pursuant to MCL 418.371(3), with the magistrate taking into account plaintiff's partial work week in accordance with our Supreme Court's directives in *Rowell v Security Steel Co*, 445 Mich 347; 518 NW2d 409 (1994).

Defendants challenge the jurisdiction of the Bureau of Worker's Compensation to entertain plaintiff's petition. Their jurisdictional challenge presents a question of law, which we review under the de novo standard of review. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 697 n 3; 614 NW2d 607 (2000).

We conclude that the WCAC committed no legal error in affirming the magistrate's determination that the bureau had jurisdiction to consider the merits of plaintiff's petition. Section 841 of the Workers' Compensation Disability Act[1] ("WDCA") provides that "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable." MCL 418.841(1). A "dispute or controversy" within the meaning of the WDCA is a jurisdictional element that must exist at the time of filing. *Adams v Great Atlantic & Pacific Tea Co*, 81 Mich App 91, 94; 265 NW2d 53 (1978). Whether plaintiff is "disabled" within the meaning of the act and has a right of recovery is a "dispute or controversy concerning compensation or other benefits," and plaintiff is a real party in interest to this claim, MCL 418.847(1). Likewise, whether defendants are under a continuing obligation to pay medical benefits constitutes a "dispute or controversy concerning … other benefits," and plaintiff is a real party in interest to the claim for unpaid medical benefits where plaintiff is liable to pay any reasonable medical expenses wrongly left unpaid by defendants, MCL 418.315(1).

Next, defendants argue that the WCAC misapprehended its administrative appellate role, and misapplied the substantial evidence standard by engaging in independent fact-finding even though the magistrate's fact finding was supported by substantial evidence on the whole record. We disagree.

Our review of the WCAC's decision is solely limited to ensuring the integrity of the administrative process. *Mudel, supra*, 462 Mich at 701. "Findings of fact made or adopted by the WCAC are conclusive on appeal, absent fraud, if there is any competent supporting evidence in the record, but a decision of the WCAC is subject to reversal if the WCAC operated within the

---

[1] MCL 418.101 *et seq*.

wrong legal framework or if its decision was based on erroneous legal reasoning." *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 471; 673 NW2d 95 (2003).

Having reviewed the WCAC's opinion, we find no error in the exercise of its administrative appellate role. Indeed, the WCAC's opinion demonstrates a complete understanding of its standard for reviewing the magistrate's opinion. Moreover, the testimony of Dr. Neese constitutes "any evidence" supporting the WCAC's decision to award benefits to plaintiff. *Mudel, supra*, 462 Mich at 703-704. The WCAC preserved the integrity of the administrative process by vacating the magistrate's personal medical opinions and crafting an opinion based on the evidence in the record.

Defendants also argue that the magistrate correctly calculated plaintiff's AWW in a manner consistent with the principles and intent of the WDCA, and the principles announced in *Sington, supra*, and that the WCAC erred in reversing the magistrate's legal determination, which was based on plaintiff's realistic earning capacity, his transient employment history and the record evidence. Again, we disagree.

The "weekly loss in wages" referred to in the WDCA consists of the percentage of the average weekly earnings of the injured employee computed according to the applicable subsections of MCL 418.371. See generally, Welch & Royal, Worker's Compensation In Michigan: Law & Practice (5th ed), §§ 12.8-12.13. In general, an employee's AWW is "determined by computing the total wages paid in the highest paid 39 weeks of the 52 weeks immediately preceding the date of injury, and dividing by 39." MCL 418.371(2). However, subsection (3) of MCL 418.371 provides that

> [i]f the employee worked less than 39 weeks in the employment in which the employee was injured, the average weekly wage shall be based upon the total wages earned by the employee divided by the total number of weeks actually worked. For purposes of this subsection, only those weeks in which work is performed shall be considered in computing the total wages earned and the number of weeks actually worked.

Finally, subsection (6) of MCL 418.371 provides that

> [i]f there are special circumstances under which the average weekly wage cannot justly be determined by applying subsections (2) to (5), an average weekly wage may be computed by dividing the aggregate earnings during the year before the injury by the number of days when work was performed and multiplying that daily wage by the number of working days customary in the employment, but not less than 5.

The magistrate did not apply subsection (3) even though "the employee worked less than 39 weeks in employment in which the employee was injured." Rather, the magistrate applied the "special circumstances" language of subsection (6) to determine plaintiff's AWW based on the magistrate's assessment of plaintiff's ability to earn wages in 2001.

The WCAC preserved the integrity of the administrative process by reversing the magistrate's AWW determination. The WCAC properly calculated plaintiff's AWW by

applying MCL 418.371(3) because the clear and unambiguous language of subsection (3) refers to a situation where, as here, an employee has not yet worked thirty-nine weeks at the place of employment where he was injured. *Toth v AutoAlliance Int'l Inc*, 246 Mich App 732, 738 n 3; 635 NW2d 62 (2001); *Montano v General Motors Corp*, 187 Mich App 230, 236; 466 NW2d 707 (1991). Because the AWW could be determined by applying subsection (3), subsection (6) did not apply by its own terms. There is no error for this Court to correct.

We decline to address defendants' remaining issues because they were not raised or addressed in the proceedings below. *Calovecchi v Michigan*, 461 Mich 616, 626; 611 NW2d 300 (2000).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette