STATE OF MICHIGAN

COURT OF APPEALS

ANNIE M. HARRIS, Plaintiff-Appellee,	UNPUBLISHED December 2, 2010
V	No. 291779 WCAC
GENERAL MOTORS CORPORATION, Defendant-Appellant.	LC No. 08-000138

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant General Motors Corp. appeals by leave granted the order of the Workers' Compensation Appellate Commission (WCAC) that affirmed the magistrate's decision to grant plaintiff an open award of benefits. Because plaintiff failed to establish that her wage loss after her retirement from defendant's employ was causally connected to her injury, we reverse the WCAC's decision affirming the award.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff began working for defendant in assembly in 1976. In 1985, plaintiff transferred to the health and safety training center, where she became a trainer. Plaintiff worked as a trainer until her last day of work. On June 23, 2006, plaintiff signed a special attrition plan (SAP), which stated that plaintiff would retire from defendant's employ no later than January 1, 2007.[1] The SAP provided plaintiff with a $35,000 cash payment in addition to her nondisability pension.

On July 25, 2006, plaintiff fell over a fax machine. She injured her back and her entire left side. Plaintiff went to plant medical for treatment, and she did not return to work that day. She returned to work the next day, but the pain worsened; it became excruciating. She visited

[1] Plaintiff indicated that originally her attrition date was scheduled to be December 1, 2006, but that her supervisor extended the date to January 1, 2007, to allow her to train others. Nonetheless, it appears that plaintiff's last day of being employed by defendant was December 1, 2006. Her first pension payment was dated December 20, 2006.

plant medical almost every day. Plaintiff began sick leave on July 31, 2006. She visited her family doctor on August 31, 2006, and he took her off work. She never returned to work.[2]

The magistrate found that plaintiff suffered a personal injury arising in the course of her employment on July 25, 2006, that the injury constituted a "disability," as defined in MCL 418.301(4), and that plaintiff suffered a wage loss, as she could not and did not return to work after being off for her injury. The magistrate concluded that MCL 418.373, which provides that an employee is presumed not to have a loss of earnings or earning capacity when the employee retires and receives a nondisability pension, did not apply because plaintiff signed the SAP before she suffered the injury. Finally, the magistrate rejected defendant's argument that because plaintiff signed the SAP and planned to retire before she was injured, plaintiff did not suffer a wage loss. The magistrate reasoned that the argument was barred by MCL 418.815, which provides that any agreement by an employee to waive his rights to compensation benefits is not valid. The magistrate gave plaintiff an open award of benefits.

Defendant appealed the award to the WCAC. Specifically, it argued that plaintiff had not suffered a wage loss caused by her disability because plaintiff, pursuant to the SAP, had voluntarily removed herself from defendant's work force. The WCAC rejected the argument. It provided the following analysis:

> Before the decision of the Court of Appeals in *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1 (2008), this writer was of the opinion that the establishment of wage loss related to the injury was not necessary if one establishes that the limitation of wage earning capacity is related to the injury. The basis for this belief was an understanding that *Sington v Chrysler Corporation*, 467 Mich 144 (2002), had overruled *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997), both in terms of disability and the requirement of establishing wage loss related to the injury as long as it was established that the limitation of wage earning capacity was related to the injury. Under these circumstances it would not be a difficult task to affirm the magistrate's decision believing that his analysis was absolutely correct pertaining to all of defendant's arguments.
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> If there is a need to establish that plaintiff's wage loss is related to her injury at work, plaintiff has done so. Prior to separating from defendant's employ and accepting the SAP which defendant offered her, plaintiff was unable to work. Her loss in wages was due to her injury at work, as even defendant posits no other explanation for her loss of wages. At a later date, when the SAP became effective, there is at best an explanation for why plaintiff has not returned to work for defendant. The SAP, however, does not preclude plaintiff from working for another employer and does not represent anything more than a cause of plaintiff's

[2] Plaintiff detailed her medical treatment following the fall for the magistrate. The parties presented the magistrate with plaintiff's medical records, as well as the depositions of two independent doctors who examined plaintiff.

> wage loss. To the extent that the SAP prevents plaintiff from working for defendant, this is the same kind of employer-specific argument which both opinions in *Sweatt v Department of Corrections*, 468 Mich 172, 184, n 7, 192 (2003), rejected.

The WCAC also concluded that any reliance by defendant on MCL 418.301(5)(a) and MCL 418.373(1) to argue that plaintiff had not suffered a wage loss was misplaced. It reasoned:

> Defendant's reliance upon MCL 418.301(5)(a) is to no avail because the provision is not applicable unless, and until after, an offer of reasonable employment is made. While defendant has further referenced plaintiff's withdrawal from the work force, the Legislature in MCL 418.301(5)(a) has allowed this conclusion to be drawn only in the circumstance where plaintiff has refused reasonable employment. Even then, it is the refusal of the reasonable employment, and not the withdrawal from the work force, that gives rise to the sanction of a loss of wage loss benefits. In this case, with no offer made, there is nothing for plaintiff to refuse. MCL 418.301(5) does not provide a defense for defendant to refuse to pay wage loss benefits.
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> The inapplicability of MCL 418.373(1) is obvious. Plaintiff left active employment with defendant on September 1, 2006. When she retired in December of 2006 (or January of 2007, the record is not entirely clear), she did not leave active employment. Since MCL 418.373(1) is applicable to the "employee who terminates active employment," it follows that the provision is not applicable to plaintiff. [Citations omitted.]

The WCAC affirmed the open award of benefits.

This Court granted defendant's application for leave to appeal. *Harris v Gen Motors Corp*, unpublished order of the Court of Appeals, entered September 8, 2009 (Docket No. 291779).

II. STANDARD OF REVIEW

Our review of plaintiff's award begins with the WCAC's decision. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709; 614 NW2d 607 (2000). If the WCAC's factual findings are supported by any evidence, and if the WCAC did not misapprehend its administrative appellate role, we must treat the WCAC's factual findings as conclusive. *Id.* at 709-710. We review de novo any questions of law involved in any final order by the WCAC. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000). "[A] decision of the WCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework." *Id.* at 401-402.

III. ANALYSIS

On appeal, defendant claims that plaintiff is not entitled to an open award of benefits because plaintiff did not suffer a wage loss that was causally connected to her work-related injury.[3] We agree.

To receive benefits under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, an employee must show that she received an injury arising out of and in the course of her employment. MCL 418.301(1); *Haske v Transp Leasing, Inc, Indiana*, 455 Mich 628, 641; 566 NW2d 896 (1997), overruled in part on other grounds *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). "As a threshold matter in proving an injury . . . the employee must demonstrate that the personal injury is a work-related disability." *Haske*, 455 Mich at 641-642, citing MCL 418.401(2)(b). The WDCA defines "disability":

> As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss. [MCL 418.301(4).]

In *Sington*, 467 Mich at 160, our Supreme Court stated that the second sentence of MCL 418.301(4) "reflects an understanding that there may be circumstances in which an employee, despite suffering a work-related injury that reduces wage earning capacity, does not suffer wage loss." To make its point, the Supreme Court provided an example:

> [A]n employee might suffer a serious work-related injury on the last day before the employee was scheduled to retire with a firm intention to never work again. In such a circumstance, the employee would have suffered a disability, i.e., a reduction in wage earning capacity, but no wage loss because, even if the injury had not occurred, the employee would not have earned any further wages. [*Id.* at 160-161.]

Recently, in *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 8; 760 NW2d 586 (2008), this Court stated that an employee, to be entitled to wage-loss benefits under the WDCA, must not only establish that she suffered a disability but also that the disability resulted in a wage loss. It stated:

> In *Haske, supra* at 654, our Supreme Court stated that even if an employee establishes a disability, he or she must further prove wage loss . . . . Additionally, the employee's unemployment or reduced wages must be causally linked to the work-related disability. *Id.* at 658. . . .
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> The portion of *Haske* requiring proof of wage loss and a causal connection between the disability and the wage loss was not overruled by *Sington*. [*Id.* at 8-9.]

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[3] Defendant does not contest that plaintiff was entitled to benefits from the date of her injury through the date of her retirement.

One of the issues in *Romero* was whether the plaintiff had suffered a wage loss causally connected to his disability. In *Romero*, the defendant recruited the plaintiff, a Mexican citizen, to train as a millwright in the United States. Following the plaintiff's training, the defendant intended to employ the plaintiff at a sawmill in Mexico. The defendant assisted the plaintiff in obtaining a work visa, and the plaintiff began millwright training in the United States. During the training, plaintiff's right leg was crushed by a forklift. Due to the injury, the plaintiff could not complete his millwright training. The defendant continued to employ the plaintiff and obtained extensions of his visa, but the visa eventually expired. The plaintiff returned to Mexico, where he obtained other employment, but he was unable to maintain the employment due to the effects of his leg injury.

The defendant argued that the plaintiff had not suffered any wage loss causally connected to his leg injury because his inability to work in the United States was due to the expiration of his visa, not his injury. It characterized the plaintiff as the equivalent to the hypothetical retiree in *Sington*, claiming that the plaintiff, who could not work in the United States until he obtained a new work visa, was similar to the retiree, as both had no wages to replace in the United States. This Court distinguished the plaintiff from the hypothetical retiree, and concluded that there was a causal connection between the plaintiff's injury and wage loss:

> [T]his case is factually distinguishable from the illustration in *Sington*. In that illustration, the employee was injured just before retirement. He had no intention of ever working again, and even in the absence of the injury he would not have earned further wages. In this case, plaintiff was 21 years old when he was injured and was training for a future job as a millwright. [The defendant] was training plaintiff with the intent to employ him as a millwright in Mexico. But, because of his injury, plaintiff is now unable to work as a millwright in the United States or Mexico. While defendants are correct that plaintiff cannot legally work in the United States without a valid visa, plaintiff could have earned wages as a millwright in Mexico had the injury not occurred. Therefore, contrary to defendant's assertion, there is a causal connection between plaintiff's work-related injury and wage loss. [*Id.* at 9-10 (citations omitted).]

The issue in the present case is whether plaintiff's wage loss after she retired from defendant's employ was causally connected to the work-related injury she suffered on July 25, 2006. In its decision, the WCAC acknowledged that, pursuant to *Romero*, 280 Mich App at 8-9, plaintiff was not entitled to wage loss benefits after her retirement unless the wage loss was causally connected to her injury. Thus, the WCAC operated in the correct legal framework.[4] We conclude, however, that the WCAC engaged in erroneous legal reasoning in determining that plaintiff's wage loss was causally connected to her injury.

Plaintiff suffered her injury on July 25, 2006. More than a month earlier, on June 23, 2006, plaintiff had signed the SAP. By signing the SAP, plaintiff agreed to retire from

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[4] We do note that the WCAC incorrectly stated that plaintiff was injured before she accepted the SAP.

defendant's employ in December 2006. Thus, even absent her injury, plaintiff would have suffered a wage loss after the date of her retirement. But, as noted by the WCAC, the SAP did not preclude plaintiff from working for another employer after her retirement.

The only pertinent distinction between the present case and the retiree hypothetical in *Sington* is that the record in this case contains no evidence that plaintiff, upon signing the SAP and agreeing to retire, firmly intended to never work again. However, as plaintiff's counsel conceded at oral arguments, the record also contains no evidence that plaintiff, who was 61 years old at the time she signed the SAP, intended to seek work with another employer after she retired. Case law establishes that it is the plaintiff's burden to establish entitlement to benefits under the WDCA. See, e.g., *Aquilina v Gen Motors Corp*, 403 Mich 206, 211; 267 NW2d 923 (1978) ("Michigan authority reflects that a claimant must prove his or her entitlement to compensation benefits by a preponderance of the evidence."); *Romero*, 280 Mich App at 5 ("A claimant in a worker's compensation matter must establish a work-related disability and entitlement to benefits by a preponderance of the evidence."). As already stated, plaintiff, absent her injury, would have suffered a wage loss after her retirement. Therefore, in order to show a causal connection between her injury and wage loss, plaintiff needed to introduce evidence to allow the WCAC to find by a preponderance of the evidence that, absent the injury, she would have reentered the workforce after her retirement. Plaintiff did not introduce such evidence; therefore, she failed to carry her burden of proof to establish entitlement to benefits. By not holding plaintiff to her burden of proof, the WCAC engaged in erroneous legal reasoning in concluding that plaintiff established a causal connection between her injury and her wage loss.

Further, we reject plaintiff's argument that MCL 418.815 prohibits the SAP from acting as a barrier to an open award of benefits. MCL 418.815 provides:

> No agreement by an employee to waive his rights to compensation under this act shall be valid except that employees or their dependents as defined in [MCL 418.161], after injury only, may elect as provided in [MCL 418.161].

This statute nullifies any attempted waiver of the rights provided by the WDCA. *Staple v Staple*, 241 Mich App 562, 574-575; 616 NW2d 219 (2000).

MCL 481.815 does not apply to the SAP, because the SAP is not an agreement by plaintiff to waive her rights to benefits under the WDCA. Rather, plaintiff is not entitled to an open award of benefits because she failed to establish by a preponderance of the evidence her entitlement to benefits. She failed to establish that her wage loss, which would have occurred absent her injury because she signed the SAP, was causally connected to her injury.

Reversed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens