STATE OF MICHIGAN

COURT OF APPEALS

WALT INDUSTRIES, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF LABOR,

Defendant-Appellee,

and

JOSEPH A. COSGROVE,

Defendant.

UNPUBLISHED
April 11, 1997

No. 180124
Wayne Circuit Court
LC No. 94-413805-AA

Before: White, P.J., and Holbrook, Jr., and G.S. Buth*, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order affirming a decision of the Department of Labor ("the department") and remanding for calculation of compensation. We affirm.

Joseph Cosgrove, the complainant in the Department of Labor proceedings, was employed by plaintiff as a buffer/polisher. He was terminated after refusing to work on a polishing machine from which safety guards had been removed. Following a hearing, the department determined that Cosgrove had been discriminatorily fired for exercising his right, under the Michigan Occupational Health and Safety Act (MIOSHA), MCL 408.1001 *et seq.;* MSA 17.50(1) *et seq.*, to refuse to remove a mandatory safety guard and to refuse to work on a machine without the guard. Plaintiff appealed to the circuit court, which affirmed the department's determination but remanded for a determination of the amount of credit to which plaintiff was entitled for Cosgrove's earnings from other sources. We granted plaintiff's application for leave to appeal.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Pursuant to MCL 408.1044(3); MSA 17.50(44)(3), a decision of the Board of Health and Safety Compliance and Appeals is subject to judicial review in accordance with the Michigan Administrative Procedures Act, MCL 24.201 *et seq.;* MSA 3.456(101) *et seq.* An administrative agency's findings of fact are conclusive unless they are not supported by competent, material, and substantial evidence on the whole record. Legal rulings of administrative agencies are not accorded the deference that is accorded to factual findings. An agency's legal rulings will be set aside on appeal if they are in violation of the constitution or a statute, or are affected by substantial and material error of law. *Amalgamated Transit Union, Local 154, AFL-CIO v Southeastern Michigan Transportation Authority*, 437 Mich 441, 450; 473 NW2d 249 (1991). See also MCL 24.306(1)(a), (f); MSA 3.560(206)(1)(a), (f).

Plaintiff first argues that Cosgrove did not have the right under MIOSHA to refuse to work on the machine. We disagree. The United States Supreme Court has held, under federal language identical to MIOSHA, that an employer may not discipline an employee for refusing to work under dangerous conditions. *Whirlpool Corp v Marshall*, 445 US 1, 18-19 & n 31, 21-22; 100 S Ct 883; 63 L Ed 2d 154 (1980). Because this Court may not interpret MIOSHA provisions more narrowly than their federal counterparts, *Barker Bros Construction v Bureau of Safety and Regulation*, 212 Mich App 132; 536 NW2d 845 (1995), we conclude that Cosgrove had the right under MIOSHA to refuse to work on the machine without being disciplined for that refusal.

Plaintiff next argues that the department was collaterally estopped from finding that Cosgrove had been discharged for exercising a right protected by MIOSHA because the Michigan Employment Security Commission (MESC) had previously determined that Cosgrove was discharged for excessive absenteeism and tardiness. The Michigan Employment Security Act expressly provides that determinations made pursuant to the act "shall not be used in any action or proceeding before any court or administrative tribunal unless the [MESC] is a party to or a complainant in the action or proceeding."[1] MCL 421.11(b)(1); MSA 17.511(b)(1). Determinations in an MESC proceeding may not be the basis for collateral estoppel in a subsequent civil proceeding, and representations which a claimant made in an MESC proceeding cannot support judicial estoppel in a subsequent worker's compensation proceeding. *Paschke v Retool Industries*, 445 Mich 502, 515-518; 519 NW2d 441 (1994); *Storey v Meijer, Inc*, 431 Mich 368, 379; 429 NW2d 169 (1988). Accordingly, the department properly refused to apply collateral estoppel on the basis of the prior MESC determination.

Plaintiff next argues that Cosgrove failed to meet his burden of proving the amount of his lost wages because he only established his hourly wage, without showing the amount of his gross or net wages or the number of hours worked during any given period. Plaintiff asserts that the department assumed, without proof, that Cosgrove worked 40 hours per week and awarded back pay without proofs to support the amount of the award. The record shows that Cosgrove earned $7.00 per hour and his earnings for the period he was employed by plaintiff indicated that he worked 40 hours per week.[2] Accordingly, the department's determination that Cosgrove worked for plaintiff 40 hours per week is supported by the record.

Plaintiff further argues that the department erred because it did not have authority to award interest on the back pay award. We disagree. A party's right to interest on a judgment is purely statutory. *Federal-Mogul Corp v Dep't of Treasury*, 161 Mich App 346, 357; 411 NW2d 169 (1987). MCL 408.1065(2); MSA 17.50(65)(2) provides, in pertinent part:

> An employee who believes that he or she was discharged or otherwise discriminated against by a person in violation of this section may file a complaint with the department of labor. . . . If, upon the investigation, the department determines that this section was violated, *the department shall order all appropriate relief, including rehiring or reinstatement of an employee to his or her former position with back pay.* [Emphasis added.]

Prejudgment interest is intended to compensate a party for the time value of money lost due to the wrongful dismissal. Given its plain meaning and the remedial nature of the MIOSHA, the language of § 65(2) expressly authorizing the department to award "all appropriate relief" to an aggrieved employee must be interpreted to include prejudgment interest. Cf. *Federal-Mogul Corp*, *supra*. Notably, federal courts interpreting the nearly identical federal OSHA provision have held that an aggrieved employee is entitled to interest as a component of a compensatory back pay award.[3] *Starceski v Westinghouse Electric Corp*, 54 F3d 1089, 1101-1103 (CA 3, 1995); *Martin v HMS Direct Mail Service, Inc.*, 936 F2d 108, 109 (CA 2, 1991); *Donovan v Commercial Sewing, Inc*, 562 F Supp 548, 556 (D Conn, 1982). Accordingly, we conclude that, while plaintiff correctly asserts that MCL 600.6013; MSA 27A.6013 does not apply, the department nevertheless had authority to award Cosgrove interest on the back-pay award. We vacate the award of "statutory interest." On remand, the department is directed to reconsider the interest issue focusing on interest as an element of "appropriate relief." While doing so, the department should specifically consider whether such an award is appropriate for the thirteen-month delay in the issuance of the hearing officer's decision.

Affirmed, but remanded to the department for reconsideration of the interest issue, and recalculation of the employer's credit, as ordered by the circuit court.

/s/ Helene N. White
/s/ Donald E. Holbrook, Jr.
/s/ George S. Buth

[1] The statute contains an exception for proceedings concerning public benefits programs such as welfare and food stamps which does not apply in this case. MCL 421.11(b); MSA 17.511(b).

[2] This information is derived from the DOL record which includes Cosgrove's 1991 W-2 Form, indicating that he earned $6,668.70 in gross wages while employed by plaintiff in 1991. Considering Cosgrove's hourly rate and length of employment during that year, a 40-hour work week appears supported by the record.

[3] See 26 USC 660(c).