STATE OF MICHIGAN

COURT OF APPEALS

DONNA JEAN GRIGG,

Plaintiff-Appellant,

v

UPJOHN HEALTHCARE SERVICES, AETNA CASUALTY & SURETY, and SECOND INJURY FUND (TWO YEARS CONTINUOUS DISABILITY PROVISIONS),

Defendants-Appellees.

UNPUBLISHED
January 6, 1998

No. 197717
WCAC
LC No. 93-000121

ON REMAND

Before: Kelly, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

This case is remanded from the Michigan Supreme Court for consideration by this Court as on leave granted.[1] Plaintiff appeals from a decision of the Worker's Compensation Appellate Commission (WCAC) reversing a magistrate's decision to award plaintiff an increase in benefits. We affirm in part and reverse in part.

Plaintiff began working for Upjohn Healthcare Services in 1976 on a full-time basis. On January 19, 1985, she received a disabling injury. At the time of her injury, plaintiff was working part-time with Upjohn Healthcare Services as a nurse's aide. Plaintiff had also been employed part-time by another employer at some time prior to her injury. Subsequently, a magistrate found that plaintiff was partially disabled and awarded benefits to her at a rate of $75.91 per week. In 1990, plaintiff filed a petition seeking an increase in the rate of her benefits pursuant to MCL 418.356(1); MSA 17.237(356)(1). After a hearing, a magistrate found (1) that plaintiff had suffered a change in her condition leaving her totally disabled, (2) that based on plaintiff's age, education, experience and training, she could have been employed as a nurse's aide at a rate of $7.46 per hour in 1990, (3) that "in all likelihood," plaintiff would have been working forty hours per week, and (4) that there was no evidence that plaintiff's "dream to become a nurse" would have become a reality. Consequently, the magistrate increased the rate of plaintiff's benefits to $186.20 per week, based on the wage plaintiff

could have earned working forty hours per week as a nurse's aide. Defendant, Second Injury Fund, was responsible for the $110.29 increase in plaintiff's benefits.

Both plaintiff and Second Injury Fund appealed to the WCAC. Plaintiff argued that the evidence in the record justified a finding that plaintiff would have had a much higher earning capacity by virtue of having moved into a higher level of employment. The WCAC disagreed and affirmed the magistrate's factual finding that plaintiff would have remained in her pre-injury position as a nurse's aide. Second Injury Fund argued that the magistrate erred when she increased plaintiff's benefit rate pursuant to § 356(1) without finding any probable enhancement of job classification or qualification. The WCAC agreed and reversed the magistrate's award, explaining that a claimant is not entitled to an increase in the rate of benefits pursuant to § 356(1) where the increase "merely reflects the effects of inflation, wage minimums, or increased seniority."

On appeal, plaintiff first argues that the WCAC exceeded the scope of its review function by "reversing the magistrate's finding of fact as to plaintiff's entitlement to an increase in benefits." We disagree with plaintiff's contention that the WCAC exceeded the scope of its review function, but conclude that the WCAC made an error of law when it reasoned that a claimant is not entitled to an increase in benefits under § 356(1) where there is no finding of any probable enhancement of job classification or qualification. This Court may reverse a WCAC decision if the Commission operated within the wrong legal framework or if its decision was based on erroneous legal reasoning. *Saraski v Dexter Davison Kosher Meat & Poultry*, 206 Mich App 347, 351; 520 NW2d 383 (1994). Statutory interpretation is a question of law subject to de novo review on appeal. *Id.*

Section 356(1) provides for a one-time increase in weekly wage-loss benefits after two years of continuous compensable disability, up to fifty percent of the state average weekly wage applicable to the employee's date of injury, for employees whose benefit rate is less than fifty percent of the applicable state average weekly wage for that injury date, based upon proof that, because of the employee's earning capacity, the employee's earnings would have been expected to increase if the employee had not become disabled. *Matney v Southfield Bowl*, 218 Mich App 475, 479-480; 554 NW2d 356 (1996). This Court, in *Matney*, *supra* at 485, held that nothing in § 356(1) requires proof that the worker would have actually risen to a higher level of employment in order to receive the one-time increase in benefits. The *Matney* Court further explained that the statute does not preclude reliance upon changes in the base salary for the employee's former job, even if the changes are attributable only to inflation, cost of living, or seniority adjustments. *Id.* at 485-486. Accordingly, the WCAC misapplied the law when it reasoned that plaintiff was not entitled to an increase in her benefit rate pursuant to § 356(1) simply because there had been no finding of any probable enhancement of her job classification or qualification. Therefore, we reverse the WCAC with respect to its resolution of Second Injury Fund's appeal from the magistrate's determination. *Saraski*, *supra* at 351.

Plaintiff next contends that the WCAC erred when it affirmed the magistrate's finding regarding plaintiff's earning capacity. We disagree. The WCAC must consider a magistrate's findings of fact conclusive if they are supported by competent, material, and substantial evidence on the whole record. Substantial evidence is evidence that a reasonable person would accept as adequate to justify a conclusion. This Court's review of a decision by the WCAC is limited. In the absence of fraud,

findings of fact made by the WCAC acting within its powers shall be conclusive. *Camburn v Northwest School Dist/ Jackson Community Schools (On Remand)*, 220 Mich App 358, 364; 559 NW2d 370 (1996).

Plaintiff argues that the record supported a finding that plaintiff's earning capacity would have been far greater than the amount of $7.46 per hour found by the magistrate. However, plaintiff misconstrues the proper standard of review. The question is not whether there was competent, material, and substantial evidence to support plaintiff's position, but whether there was competent, material, and substantial evidence to support the decision of the magistrate. *Camburn*, *supra* at 364. Our review of the record reveals that there was competent, material, and substantial evidence to support the magistrate's decision. Accordingly, we affirm the WCAC with respect to its resolution of plaintiff's appeal regarding the magistrate's findings of fact.

Finally, the Michigan Supreme Court has directed this Court to "consider the significance, if any, of the magistrate's factual finding that, 'in all likelihood, the plaintiff would have been working 40 hours per week. This is based upon the fact that she worked for both Provincial House and Upjohn Health Care until just a few months before her injury in 1985.' "[2] Plaintiff did not address this question in her brief on appeal, and defendants asserted that "the factual finding referred to by the Supreme Court is of no legal moment." Accordingly, because the question has not been addressed by either of the parties, we deem the magistrate's factual finding to have been of no significance to the resolution of this appeal.

Affirmed in part and reversed in part.

/s/ Michael J. Kelly
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] See *Grigg v Upjohn Healthcare Services, Inc*, 453 Mich 883 (1996).

[2] *Grigg*, *supra* at 883.