

STATE OF MICHIGAN
COURT OF APPEALS

TERRY B. ANGEL,

Plaintiff-Appellant/Cross-Appellee,

v

A1 SOUTH, L.L.C./GRAND RAPIDS
GRIFFINS/WAUSAU UNDERWRITERS
INSURANCE COMPANY,

Defendants-Appellees/Cross-
Appellants,

and

A1 SOUTH, L.L.C./GRAND RAPIDS
GRIFFINS/CITIZENS INSURANCE
COMPANY,

Defendants.

UNPUBLISHED
September 6, 2012

No. 295015
WCAC
LC No. 09-000070

ON REMAND

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

This case is on remand from our Supreme Court in light of *Findley v DaimlerChrysler Group*, 490 Mich 928; 805 NW2d 833 (2011).¹

In our prior opinion, we held that a remand to the WCAC was required because the commission had not reached a true majority decision, relying on *Findley v DaimlerChrysler Corp*, 289 Mich App 483; 797 NW2d 175 (2010). However, our Supreme Court vacated the *Findley* decision, holding that “a WCAC decision does not require a ‘true majority’ ‘decision based on stated facts.’” *Findley*, 490 Mich at 928. In light of the Supreme Court’s

¹ *Angel v A1 South LLC*, 491 Mich 876; 809 NW2d 593 (2012).

pronouncement in *Findley*, the majority rationale of the WCAC decision is no longer at issue, a remand on this basis is unnecessary, and we address the merits of plaintiff's appeal.

Plaintiff contends that there was substantial evidence to support the magistrate's finding of disability and a college degree or the possibility of lower paying employment did not negate disability. We disagree. Appellate review of WCAC decisions is limited. *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003). In the absence of allegations of fraud, the appellate court must consider the WCAC's factual findings conclusive if there is any competent evidence in the record to support them. *Id.*; MCL 418.861a(14). Questions of law, including issues involving statutory interpretation, are reviewed de novo. *Rakestraw*, 469 Mich at 224.

In *Stokes v Chrysler LLC*, 481 Mich 266, 297; 750 NW2d 129 (2008), our Supreme Court delineated the procedure and burden of proof regarding disability in the workers' compensation process:

The claimant bears the burden of proving a disability by a preponderance of the evidence under MCL 418.301(4), and the burden of persuasion never shifts to the employer. The claimant must show more than a mere inability to perform a previous job. Rather, to establish a disability, the claimant must prove a work-related injury *and* that such injury caused a reduction of his maximum wage-earning capacity in work suitable to the claimant's qualifications and training. To establish the latter element, the claimant must follow these steps:

- (1) The claimant must disclose all of his qualifications and training;
- (2) the claimant must consider other jobs that pays his maximum pre-injury wage to which the claimant's qualifications and training translate;
- (3) the claimant must show that the work-related injury prevents him from performing any of the jobs identified as within his qualifications and training; and
- (4) if the claimant is capable of performing some or all of those jobs, the claimant must show that he cannot obtain any of those jobs.

If the claimant establishes all of these factors, then he has made a prima facie showing of disability satisfying MCL 418.301(4), and the burden of producing competing evidence then shifts to the employer. The employer is entitled to discovery before the hearing to enable the employer to meet this production burden. While the precise sequence of the proofs is not rigid, all these steps must be followed. [*Id.* at 297-298 (emphasis in original).]

To make a proper determination that a claimant has proved a disability, all relevant facts must be presented. *Id.* at 294. The phrase "qualifications and training" encompasses "formal education, work experience, special training, skills, and licenses." *Id.* at 277. Continuing education or college attendance is relevant to determine if a claimant has any post injury job qualifications and training. *Id.* at 296. In fact, education, skills, experience, and training are relevant regardless of whether or not they bear any relationship to the job the claimant was performing at

the time of the injury. *Id.* at 281-282. When a claimant fails to present evidence that there were other jobs paying appropriate wages that he could perform, his proofs are deficient. *Id.* at 291.

The *Stokes* claimant was a forklift driver from 1971 to 1999. During the last five years of employment, he drove the forklift for five hours a day, but performed dispatch work for the remainder of the day. The claimant's pain in his neck and arms increased to such an extent that he was unable to work in the fall of 1999. His physician opined that the physical repetitiveness of his work aggravated his rheumatoid arthritis, and the claimant had surgery on his cervical spine in the winter of 2000. The claimant filed a petition for workers' compensation benefits, asserting cervical spine disability. *Id.*, 481 Mich at 270-271. The magistrate concluded that the claimant met the standard for disability, and the WCAC affirmed. *Id.* at 272.

However, our Supreme Court held that the claimant failed to satisfy the disability burden:

We hold that claimant did not satisfy his burden of establishing a disability. Claimant's demonstration that he could no longer perform his job because of a work-related injury was simply insufficient to establish a "disability" under MCL 418.301(4). . . . claimant was required to demonstrate that the injury to his cervical spine limited his maximum wage-earning capacity in work suitable to his qualifications and training. Claimant merely testified regarding his employment and educational background. Claimant presented no evidence that he had even considered the possibility that he was capable of performing any job other than driving a forklift. Likewise, the lower court, the magistrate, and the tribunal seemingly assumed that because claimant had driven a forklift for so many years, that was all he was able to do and that he had acquired no additional skills throughout his life that might translate to other positions of employment. At a minimum, claimant was required by the WDCA to show that he had considered other types of employment within his qualifications and training that paid his maximum wages and that he was physically unable to perform any of those jobs or unable to obtain those jobs. There is no evidence in this case that claimant sought *any* post-injury employment or would have been willing to accept such employment within the limits of his qualifications, training, and restrictions. . . .

In this case, claimant did not meet his burden of proving a disability under the WDCA because he only presented evidence of an inability to perform his prior job. [*Id.* at 285-287 (emphasis in original).]

Applying the *Stokes* decision to our case, the WCAC properly held that plaintiff failed to meet his burden of proving his disability. Although plaintiff disclosed his qualifications and training, he did not present evidence of available jobs in light of his qualifications and training or jobs he was unable to attain despite his qualifications and training.

Next, plaintiff contends that the *Stokes* decision and *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), were wrongly decided. "This Court is bound by the doctrine of stare decisis and is powerless to overturn a decision of the Supreme Court." *Ratliff v Gen Motors Corp*, 127 Mich App 410, 416-417; 339 NW2d 196 (1983). Accordingly, plaintiff must direct any challenge to the Supreme Court.

On cross-appeal, defendants contend that the WCAC erred by concluding that there was an employment relationship when, although a contract for reimbursement of expenses had been signed, there was no compensation delineated in the contract, and plaintiff was participating in tryouts at the time of injury. Accordingly, we must determine whether a “contract of hire” existed between plaintiff and defendants in order to resolve the issue whether plaintiff was defendants’ employee.²

In *Hoste v Shanty Creek Mgt*, 459 Mich 561, 575, 579; 592 NW2d 360 (1999), the Michigan Supreme Court concluded that the plaintiff was not an employee because no “contract of hire” existed between the plaintiff and the defendants. In that case, the plaintiff, a volunteer ski patroller, was paid no wages, but was offered complimentary lift tickets, hot beverages, skiing privileges, and reduced prices for meals and merchandise in exchange for his services. *Id.* at 577. The Court explained its conclusion that the plaintiff was not an employee by citing the fact that “the benefits did not represent payments intended as wages, i.e., the type of real, palpable, and substantial consideration that a reasonable person would accept in exchange for forgoing the right to bring a tort action against an employer and that would be understood as such by the employer.” *Id.* at 576, 578.

While plaintiff and defendants in this case had an agreement that governed the tryout period, plaintiff was not an employee or paid a wage at the time he was injured. The parties’ agreement provided that defendants would cover plaintiff’s expenses while plaintiff attended the tryout camp, but did not guarantee future employment. Under these circumstances, we cannot conclude that plaintiff was injured as an employee under a contract of hire because the promise to reimburse expenses falls short of payment of wages as defined by the Court in *Hoste*. Accordingly, we reverse the WCAC’s determination that plaintiff and defendants had an employment relationship.³

Affirmed in part, reversed in part. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter

² “Employee” is defined in MCL 418.161 of the Worker’s Disability Compensation Act (WDCA), the relevant subsection in this case is subsection 161(1)(I), which provides in pertinent part that an employee constitutes “[e]very person in the service of another, under any contract of hire, express or implied.”

³ Plaintiff cites this Court’s decision in *Moore v Gundelfinger*, 56 Mich App 73, 82-83; 223 NW2d 643 (1974), in support of his contention that there was an employment relationship. We need not distinguish *Moore* in this case because *Moore* was decided without the benefit of, and did not apply the definition set forth in, *Hoste*. Moreover, the opinion is not binding precedent under Administrative Order No. 1990-6 because it was decided before November 1, 1990.