

STATE OF MICHIGAN
COURT OF APPEALS

JOHN D. KUZMA,

Plaintiff-Appellant/Cross-Appellee,

v

GREAT LAKES BEVERAGE COMPANY a/k/a
WOLPIN COMPANY,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

July 22, 2004

No. 245734

WCAC

LC No. 01-000291

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals and defendant cross-appeals a decision of the Worker's Compensation Appellate Commission (WCAC) affirming a magistrate's decision granting plaintiff benefits. After this Court initially denied plaintiff's application for leave to appeal, *Kuzma v Great Lakes Beverage Co*, unpublished order of the Court of Appeals, entered June 10, 2002 (Docket No. 240270), the Supreme Court remanded this case to this Court for consideration as on leave granted, *Kuzma v Great Lakes Beverage Co*, 467 Mich 930 (2002). We affirm in part, reverse in part, and remand.

The WCAC affirmed the magistrate's decision granting benefits, but modified the decision as to the method for calculating the amount of plaintiff's weekly benefit payment. Plaintiff argues that the WCAC's determination regarding the calculation of benefits is erroneous. We agree.

This issue involves a question of law. This Court may review questions of law involved with any final order of the WCAC. MCL 418.861a(14); *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 569; 592 NW2d 360 (1999); *Holden v Ford Motor Co*, 439 Mich 257, 262 n 8; 484 NW2d 227 (1992). The WCAC's decision may be reversed if it operated within the wrong legal framework or based its decision on erroneous legal reasoning. MCL 418.861a(14); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000).

MCL 418.301(5) provides, in part:

If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:

* * *

(b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's *after-tax weekly wage* before the date of injury and the *after-tax weekly wage* which the injured employee is able to earn after the date of the injury, but not more than the maximum weekly rate of compensation ... [Emphasis supplied.]

In interpreting a statute, the primary goal is to ascertain and give effect to the Legislature's intent. *Adrian Sch Dist v Michigan Pub Sch Employees' Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998). The language is to be read according to its ordinary and generally accepted meaning, *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 398; 572 NW2d 210 (1998), and if the language is clear and unambiguous, judicial construction is not permitted, *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). "Where the statutory language is clear, courts should not add or detract from its provisions." *Derr v Murphy Motor Freight Lines*, 452 Mich 375, 388; 550 NW2d 759 (1996). This Court should give great weight to the WCAC's interpretation of the statute, unless its interpretation is clearly incorrect. *Hoste, supra*.

The language of subsection 301(5) is clear and unambiguous. If the employee's average weekly wage is less than that received before the injury, the benefits payable to the employee are eighty percent of the difference before the employee's "*after-tax weekly wage* before the date of injury and the *after-tax weekly wage*" that the employee is able to earn after the injury. MCL 418.301(5)(b) (emphasis supplied). The WCAC utilized an average weekly wage in this formula. This is erroneous. Had the Legislature intended that the wages be averaged, it would have included such language in the statute. Thus, remand for recalculation of plaintiff's benefits consistent with this opinion is necessary.

Defendant argues that plaintiff is not entitled to ongoing wage loss benefits because he returned to work and his post injury earnings exceeded his average weekly wage at the time of his injury. We disagree.

Defendant's reliance on *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), is misplaced because the WCAC found that plaintiff's post-injury employment constituted reasonable employment. Because plaintiff is engaged in reasonable employment, which is a finding that defendant does not challenge, plaintiff's entitlement to benefits is determined under MCL 418.301(5). Further, defendant's argument does not properly challenge the finding of disability. In the absence of fraud, this Court must accept as conclusive the WCAC's findings that plaintiff is disabled and engaged in reasonable employment. MCL 418.861a(14).

Finally, defendant argues that the WCAC erred in failing to find that plaintiff established a new wage earning capacity. We disagree.

To determine whether an employee established a new wage-earning capacity, the factors to consider include: (1) the severity of the injury; (2) the severity of the disability resulting from the injury; (3) the nature of the reasonable employment performed by the employee; and (4) the reasons for the loss of reasonable employment. *Doom v Brunswick Corp*, 211 Mich App 189, 194; 535 NW2d 244 (1995). Defendant relies on the wages earned by plaintiff in his reasonable employment and its position that plaintiff did not provide evidence that his post-injury employment was “created or customized in such a fashion that it bore no resemblance to marketable jobs with other employers.” The WCAC found that plaintiff works with a helper to perform job functions that he is now unable to perform as a result of his injury. This helper is paid from plaintiff’s wages. The fact that plaintiff needs assistance in performing what is a one-person job indicates that plaintiff’s job is not a “regular job with ordinary conditions of permanency.” *Id.* at 198. Defendant has not demonstrated that plaintiff established a new wage-earning capacity.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra