STATE OF MICHIGAN

COURT OF APPEALS

FRED STORMER,

Plaintiff-Appellant,

v

CITY OF PONTIAC,

Defendant-Appellee.

UNPUBLISHED
December 8, 1998

No. 196889
WCAC
LC No. 93-001013

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals by leave granted a July 5, 1996, order of the Worker's Compensation Appellate Commission (WCAC), which affirms a magistrate's decision denying plaintiff's claim for medical benefits under the Worker's Disability Compensation Act (WDCA). We affirm.

I.

This case has a rather complicated 20-year history. In 1979, a hearing referee awarded plaintiff worker's compensation benefits for total and permanent disability attributable to injuries plaintiff sustained in the course of his employment as a police officer for defendant City of Pontiac in 1977. On appeal, this Court remanded the matter for a determination whether plaintiff's duty disability pension benefits under the city charter constitute "like benefits" for purposes of the election provisions of § 161 of the WDCA, MCL 418.161; MSA 17.237(161).

On remand, the WCAC found plaintiff's pension benefits to be "like benefits" under § 161 and therefore remanded the case to the Bureau of Magistrates for plaintiff to make an election between receiving pension benefits under the city charter or worker's compensation benefits. In the meantime, plaintiff had filed a new petition for hearing, seeking reimbursement under the WDCA for certain medical expenses and attendant care not covered by his duty disability pension, but the proceedings on the new petition were held in abeyance pending resolution of the "like benefits" election issue.

Magistrate Sharon L. Smith issued an order directing the parties to appear by December 10, 1992, so that plaintiff could make his election under § 161, advising that "failure to make such election will result in the waiver and forfeiture of Worker's Compensation benefits." Although plaintiff claims his counsel appeared as ordered and elected pension benefits over worker's compensation, Magistrate Smith entered an order, mailed May 26, 1993, dismissing plaintiff's case on grounds that plaintiff had "forfeited" worker's compensation benefits by failing to appear and make an election as ordered.

Subsequently, Magistrate Paula S. Olivarez considered plaintiff's new petition for medical expense reimbursement under the WDCA. Magistrate Olivarez noted that the "like benefits" election provision of § 161 had been amended in 1983 to provide that an election of "like benefits" does not prohibit employees or dependents from obtaining reimbursement under the WDCA for medical expenses not otherwise covered by the village or municipality. She requested briefs from the parties addressing whether the 1983 amendment applies retroactively in this case involving a 1977 date of injury. In response, counsel for both parties stipulated that they "do not see the change in language to 161 as being an issue in this case," and that plaintiff is eligible for medical expense benefits under the WDCA, should they be deemed to be reasonable, necessary and related to his work injury.

Magistrate Olivarez also requested input from the parties as to whether Magistrate Smith's "finalization of the election of benefits matter" affects the disposition of plaintiff's new petition for medical expense and attendant care benefits. Plaintiff's counsel responded that Magistrate Smith's dismissal order is of no significance, and that the order is also erroneous because plaintiff had in fact timely appeared and advised Magistrate Smith that he intended to elect "like benefits" over worker's compensation benefits, but Magistrate Smith apparently forgot this. The record contains no response from defense counsel on this matter.

In a decision mailed November 15, 1993, Magistrate Olivarez opined that Magistrate Smith's dismissal order is controlling and overrides the parties' stipulation regarding plaintiff's eligibility for worker's compensation medical expense benefits because the order declares an unqualified forfeiture of all of plaintiff's rights under the WDCA. Therefore, Magistrate Olivarez concluded that she was "precluded from rendering a decision in this matter pursuant to the previous finding of Magistrate Smith that plaintiff had forfeited his rights under the Act."

Plaintiff filed a timely claim for review from Magistrate Olivarez's decision, and subsequently filed an untimely claim for review from Magistrate Smith's dismissal order as well. Although the WCAC granted plaintiff's motion for delayed appeal, its order erroneously indicated that the delayed appeal was from Magistrate Olivarez's decision mailed November 15, 1993, rather than the order of Magistrate Smith mailed May 26, 1993, as indicated in plaintiff's belated claim for review.

Plaintiff's two appeals from the two magistrate decisions were separately briefed but submitted together for decision by the WCAC. With regard to the dismissal order mailed May 26, 1993, plaintiff argued that he had properly made an election of "like benefits" pursuant to § 161, that Magistrate Smith had no legitimate basis or authority for declaring a forfeiture of plaintiff's rights under the WDCA, and that the order should be vacated and replaced with an order reflecting plaintiff's election of "like

benefits." Defendant argued that plaintiff's appeal from Magistrate Smith's order had been filed too late, and that Magistrate Smith had authority to declare a forfeiture of plaintiff's rights in the event that plaintiff failed to appear as ordered, although defendant acknowledged that it lacked first hand knowledge whether plaintiff failed to appear and make an election.

In a 2-1 split decision, the WCAC majority concluded that the erroneous language of the WCAC's order granting plaintiff's motion for delayed appeal limited the WCAC's review to the decision of Magistrate Olivarez only. However, while the WCAC agreed with Magistrate Olivarez that Magistrate Smith's dismissal order is binding, the WCAC disagreed with Magistrate Olivarez's interpretation of that order, stating that Magistrate Smith's order should be interpreted as merely making a "like benefits" election on plaintiff's behalf, as opposed to declaring a forfeiture of all plaintiff's rights under the WDCA. Nevertheless, the WCAC majority affirmed Magistrate Olivarez's result, concluding that the version of § 161 in effect at the time of plaintiff's injury in 1977 is controlling. In contrast, the WCAC dissent would remand the case to Magistrate Olivarez for consideration of the merits of plaintiff's claim for medical benefits.

II.

We agree with the WCAC majority that plaintiff's claim for medical and attendant care reimbursement under the WDCA is unavailing because plaintiff's case is controlled by the law in effect at the time of his work injury in 1977. In worker's compensation cases, the general rule is that the law in effect at the time of the relevant work injury must be applied unless the Legislature has clearly indicated a contrary intention. E.g., *Nicholson v Lansing Bd of Ed*, 423 Mich 89, 93; 377 NW2d 292 (1985). We disagree with plaintiff's contention that the Legislature's use of mandatory language in the 1983 amendment to § 161, providing that an election of municipal or village benefits "shall not" prohibit employees or their dependents from being reimbursed for medical expenses not otherwise provided for by the municipality or village, indicates that the Legislature intended this language to have retroactive application. See, e.g., *Sokolek v General Motors Corp*, 450 Mich 133; 538 NW2d 369 (1995); *White v General Motors Corp*, 431 Mich 387; 429 NW2d 576 (1988).

We recognize that a statute may have retroactive application if it is remedial in nature, *i.e.*, if it is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good. *Rookledge v Garwood*, 340 Mich 444, 453; 65 NW2d 785 (1954). However, that part of the 1983 amendment to § 161 that is at issue in this case did not operate in furtherance of a remedy already existing, but rather, created a new right to recover medical expense reimbursement notwithstanding a "like benefits" election which did not exist previously. Compare *Spencer v Clark Twp*, 142 Mich App 63, 68; 368 NW2d 897 (1985).

Contrary to plaintiff's speculation, we find little indication that the 1983 amendment to § 161 was intended as a legislative answer to the criticisms set forth in a footnote to this Court's opinion in *Johnson v Muskegon*, 61 Mich App 121; 232 NW2d 325 (1975). That footnote only called for legislative clarification of the language in § 161 so as to put police officers and fire personnel on notice that an election of "like benefits" pursuant to § 161 waives all benefits under the WDCA, including

medical expense benefits not provided by the village or municipality. See *Johnson, supra* at 124-125, n 4. The Legislature never clarified the language in the manner suggested by this Court, however. Instead, the Legislature amended the substance of § 161 in 1983 to provide that an election of "like benefits" does not necessarily affect the rights of employees or dependents to medical care reimbursement under the WDCA. Moreover, as noted by the WCAC, the Legislature amended § 161 on several occasions in the seven-year period following our decision in *Johnson*, yet the Legislature took no action to amend the "like benefits" provision in response to *Johnson* during that time.

Plaintiff's reliance upon *Hatton v Saginaw*, 159 Mich App 522; 406 NW2d 871 (1987), is also misplaced. As noted by the WCAC, *Hatton* only addressed that part of the 1983 amendment to § 161 which eliminated language restricting the scope of the "like benefits" provision to disability benefits prescribed by municipal charter. *Hatton* does not address that part of the 1983 amendment that is at issue in this case. We are not persuaded that both parts of the 1983 amendment, involving completely different statutory changes, necessarily must have identical application without regard to injury date simply because the two statutory changes were enacted at the same time and involved the same statutory sentence.

We also find plaintiff's remaining issues unavailing. Contrary to plaintiff's argument, the WCAC was not bound by the parties' stipulation as to the legal question of plaintiff's eligibility for medical expense reimbursement pursuant to the 1983 amendment to § 161 of the WDCA. See, e.g., *Magreta v Ambassador Steel Co*, 378 Mich 689, 705; 148 NW2d 767 (1967), modified on other grounds 380 Mich 513; 158 NW2d 473 (1968). As for the WCAC's conclusion that plaintiff's late appeal from Magistrate Smith's order was not properly before it, plaintiff was not substantially prejudiced by that ruling. Notwithstanding the WCAC's professed refusal to review Magistrate Smith's order, the WCAC effectively granted plaintiff the relief he was seeking in that appeal by ruling that the effect of Magistrate Smith's order was merely to reflect an election of "like benefits" on plaintiff's behalf.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Jane E. Markey
/s/ William C. Whitbeck