STATE OF MICHIGAN

COURT OF APPEALS

ISRAEL D. RAYBON,

Plaintiff-Appellee,

v

DP FOX FOOTBALL HOLDINGS LLC, GRAND RAPIDS RAMPAGE, and TRAVELERS INDEMNITY CO.,

Defendants-Appellants.

UNPUBLISHED
July 17, 2007

No. 268634
WCAC
LC No. 04-000420

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendants appeal by leave granted from the Worker's Compensation Appellate Commission's (WCAC's) order affirming the magistrate's decision granting plaintiff a closed award of benefits. The order granting leave limits this appeal to the issue of whether the WCAC and magistrate committed an error of law by awarding plaintiff wage loss benefits during the off season when he would not otherwise have been earning wages playing professional football. We reverse the WCAC's order and remand the matter to the magistrate to determine what portion of plaintiff's lost wages in the closed awards, if any, was caused by the end of the football-playing season rather than by plaintiff's disability.

Plaintiff played football for defendant's arena football team, the Grand Rapids Rampage. He began playing offensive and defensive positions for defendants in the mid-season of 2002, around April of 2002. In July of 2002 he suffered severe pain in his foot, later diagnosed as plantar fasciitis. He also sustained a strain to the medial collateral ligament (MCL) in his right knee. Plaintiff was unable to play and received wage continuation pay from July 15 to 27, 2002. The July 2002 injuries were treated conservatively and apparently resolved before the start of the next season. Plaintiff returned to training camp in January of 2003. He was placed on his team's injured reserve on February 1, 2003, but returned to play two weeks later. On April 13, 2003, plaintiff was injured again, suffering a fractured right ankle. The ankle fracture was corrected with surgery. Plaintiff's treating physician believed he could return to play football on August 13, 2003.

Plaintiff sought wage-loss and medical benefits based on the July 2002 and April 2003 injury dates. Following trial, the magistrate found that plaintiff had sustained work-related injuries, which rendered him disabled from July 28, 2002 through February 13, 2003, and April

13, 2003 through August 13, 2003. The magistrate rejected defendant's arguments that plaintiff's average weekly wage should be calculated in a manner, which would not extend benefits beyond the normal arena football system, explaining as follows:

> The Defendant contends the Plaintiff's yearly wages must be divided by 52, the number of weeks in the contract year. The Defendant also argues it is unfair to extend benefits beyond the normal arena football season. I see no reason to depart from the clear language of Section 371(3) [MCL 418.371(3)]. Mr. Raybon was a seasonal employee of the Rampage. He worked during pre-season in training camp, during the normal season in regular games, and when the opportunity was available, in post-season playoff games. He should not be treated any differently than other Michigan seasonal workers, be they school teachers, lifeguards, restaurant workers in resort towns, etc., or workers that are only hired for a single day of work or for a finite job task. A seasonal workers' entitlement to wage loss benefits does not end when the "season" ends. The entitlement to wage loss benefits extends through the period of disability. *Branch v Flint Bd of Ed*, 1991 ACO 140; *Dube v Industrial Maintenance Services, Inc*., 1999 ACO 480.

The magistrate awarded plaintiff wage-loss benefits for the closed periods from July 28, 2002 through February 13, 2003, and April 13, 2003 through August 13, 2003. The magistrate apparently calculated the average weekly wage for each period using defendant's pay records and the method provided by MCL 418.371(3).

Defendants appealed the magistrate's decision to the WCAC. Among other issues, defendant argued that plaintiff sustained no loss of wage-earning capacity or wages in the off seasons and so cannot receive wage-loss benefits for time he was not employed during the off seasons. The WCAC rejected this argument, stating simply "We are of the opinion that *Gasparick v* [*H C*] *Price Constr* [398 Mich 483; 247 NW2d 824 (1976)] is controlling on this issue and we affirm the magistrate's determination pertaining to compensable wage loss." With regard to the average weekly wages for each date of injury, the WCAC noted that the parties had stipulated to those amounts and ordered the award modified to reflect the numbers stipulated to by the parties. The WCAC affirmed the closed award of wage-loss benefits as modified.

On appeal, defendants argue that the WCAC and magistrate erred by awarding plaintiff wage loss benefits during the off season when he would not otherwise be earning wages playing professional football or engaged in other wage-earning employment. We agree.

Defendants' appeal argues that the WCAC committed an error of law. Such questions are reviewed de novo on appeal. *Rakestraw v Gen Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003).

MCL 418.301(4) provides:

> As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. *The establishment of disability does not create a presumption of wage loss*. [Emphasis added.]

In *Haske v Transport Leasing*, 455 Mich 628; 566 NW2d 896 (1997)[1], our Supreme Court pointed out that even "[I]f the employee establishes a disability, he must further prove a wage loss because wage loss will not be presumed." *Id.* at 654. The Court explained, "[u]nemployment or reduced wages *must be causally linked to work-related injury*." *Id.* at 658 (emphasis added). The portion of *Haske* requiring proof of wage loss and a causal connection between the disability and the wage loss was not overruled by *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002), but instead was expressly preserved by the Court, which explained:

> [T]he second sentence [of §301(4)] reflects an understanding that there may be circumstances in which an employee, despite suffering a work-related injury that reduces wage earning capacity, does not suffer wage loss. For example, an employee might suffer a serious work-related injury on the last day before the employee was scheduled to retire with a firm intention to never work again. In such a circumstance, the employee would have suffered a disability, i.e., a reduction in wage earning capacity, but no wage loss because, even if the injury had not occurred, the employee would not have earned any further wages. [*Id.* at 160-161 (footnote omitted).]

This interpretation of §301(4) was followed by our Supreme Court in *Sweatt v Dep't of Corrections*, 468 Mich 172, 187-188 n 11, 190-191 n 13; 661 NW2d 201 (2003), where the Court concluded that even where the plaintiff has proven both a work-related injury and the loss of wage-earning capacity, he must still show that his work-related injury caused his current loss of wage-earning capacity. *Sweatt* involved the situation where a claimant could no longer be employed by the Department of Corrections because he had been convicted of a felony following his disabling injury. The Court reversed this Court's and the WCAC's decisions affirming the magistrate's award of benefits and remanded the matter to the magistrate "to determine to what extent, if any, plaintiff's loss of wage-earning capacity is because of a work-related injury, and, to what extent, if any, plaintiff's loss of wage-earning capacity is because of the 'commission of a crime.'" *Id.* at 190.

Following *Haske*, *Sington*, and *Sweatt*, *supra*, we agree with defendants that plaintiff's loss of wages must be attributable to his work-related injuries rather than to the end of the football season and that he cannot receive wage loss benefits for time in the off season when he would not otherwise be earning wages. We reverse the WCAC's order affirming the closed awards of benefits in part and remand the case to the magistrate to determine what portion of plaintiff's lost wages in the closed awards, if any, was caused by the end of the football-playing

[1] Subsequently overruled in part by *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002).

season rather than by plaintiff's disability. The magistrate should then adjust the closed awards of benefits accordingly. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens