STATE OF MICHIGAN

COURT OF APPEALS

ROGER LUNDMARK,

Plaintiff/Cross-Appellee,

v

RUST ENGINEERING COMPANY and ARGONAUT INSURANCE COMPANY,

Defendants-Appellees/Cross-Appellants,

and

SECOND INJURY FUND (VOCATIONALLY HANDICAPPED PROVISIONS),

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
November 4, 1997

No. 190408
WCAC
LC No. 92-000473

Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendant Second Injury Fund (Vocationally Handicapped Provisions) (SIF) appeals by leave granted the decision of the Worker's Compensation Appellate Commission (WCAC) affirming the decision of the magistrate and holding the SIF liable for payment of benefits to plaintiff Roger Lundmark pursuant to MCL 418.921; MSA 17.237(921). Defendants Rust Engineering Company (Rust Engineering), and its insurer, Argonaut Insurance Company, have filed a claim of cross-appeal. We affirm in part, reverse in part, and remand.

Plaintiff worked as a pipefitter, a job requiring a great deal of strenuous physical activity. During the course of his work for various employers, plaintiff sustained a number of work-related back injuries. After one such injury in 1985, plaintiff stopped working. Eventually his condition improved, and in 1989 plaintiff resumed working. On September 21, 1989, plaintiff's union sent him to Rust

Engineering's jobsite. In an interview conducted during the orientation process, plaintiff acknowledged his previous back troubles. Rust Engineering required plaintiff to secure a letter from his physician stating that he could work. Plaintiff obtained the letter, and went through further orientation at Rust Engineering on September 23, 1989. On that date plaintiff was issued a hard hat and an employee badge, but did no work as a pipefitter. On September 25, 1989, plaintiff reported to Rust Engineering's jobsite at 6:30 a.m. At some point during the day he was taken to Michigan Rehabilitation Services (MRS) to obtain a vocationally handicapped card. Plaintiff obtained the card, returned to the jobsite, and began working as a pipefitter.

Initially, plaintiff worked for Rust Engineering without difficulty. However, on November 29, 1989, while climbing down from a tank, plaintiff felt a sharp pain in his lower back. He received treatment, and returned to his regular duties. In February 1990 plaintiff injured his back while unloading a trailer. He was placed on light duty; however, some of the tasks he was assigned to perform exceeded his restrictions. Plaintiff was scheduled to return to regular work in March 1990, but was unable to do so. Plaintiff's amended petition for worker's compensation benefits alleged disability due to a back injury, and claimed injury dates of November 29, 1989, February 12, 1990, and March 5, 1990 (the last day worked).

At the hearing, plaintiff testified that he continued to experience back pain, and that because of his condition he could not work as a pipefitter. He opined that he might be able to work as a foreman or job steward. Plaintiff acknowledged that he worked in an antique store he had owned since 1983. The medical testimony presented at the hearing differed. Drs. Rutherford and Roberts testified that the injuries plaintiff sustained in 1989 and 1990 aggravated his underlying condition. Dr. Tubbs opined that plaintiff's work for Rust Engineering exacerbated his symptons, but could not determine whether plaintiff's underlying condition had worsened between 1988 and 1990. Dr. Songer testified that plaintiff's condition was due to a degenerative disease, and that his work for Rust Engineering did not aggravate his underlying condition. Dr. Ketroser opined that plaintiff could do any type of work without restriction.

The magistrate found that plaintiff sustained work-related injuries on November 29, 1989, February 12, 1990, and March 5, 1990, while employed by Rust Engineering. The magistrate also found that the work that plaintiff performed for Rust Engineering aggravated his pre-existing condition, and that he was disabled from working as a pipefitter. The magistrate therefore granted plaintiff an open award of benefits. With respect to the SIF's liability under MCL 418.921; MSA 17.237(921), the magistrate found that, because plaintiff "did not engage in work activities on behalf of the employer prior to [the date of plaintiff's certification, September 25, 1989,] and since he was not paid [wages] for any day prior to 9/25/89," the SIF was liable for benefits paid by Rust Engineering's insurer that accrued after the end of the fifty-two week period following November 29, 1989, the initial date of injury.

On appeal to the WCAC, the SIF argued that plaintiff's activities on September 21 and 23, 1989, constituted employment. The SIF argued that it was therefore not liable for benefits because plaintiff was employed by Rust Engineering at the time he applied for certification and was employed within fifty-two weeks prior to certification. In a decision entered on October 18, 1995, the WCAC affirmed the decision of the magistrate. The WCAC adopted the magistrate's opinion and order as its

own. MCL 418.861a(10); MSA 17.237(861a)(10). The WCAC rejected the SIF's argument that plaintiff's activities on September 21 and 23, 1989, constituted employment. The WCAC noted that plaintiff was not allowed to engage in pipefitting activities until after he obtained certification, and that he "attended classes, met coworkers, and drew some equipment in preparation for starting work." The SIF now appeals to this Court from the decision of the WCAC.

A magistrate's findings of fact shall be considered conclusive by the WCAC if they are supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); MSA 17.237(861a)(3). Our review is limited to a determination whether the WCAC exceeded its reviewing powers. *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 514-517; 563 NW2d 214 (1997). Factual determinations of the WCAC, if acting within its powers, are conclusive absent fraud. *Id*. at 512. However, we review de novo questions of law from the WCAC's final orders. See *Haske v Haske Transport Leasing, Inc, Indiana*, 455 Mich 628, 662; 566 NW2d 896 (1997). "A decision of the WCAC is subject to reversal if the WCAC operated within the wrong legal framework or its decision was based on erroneous legal reasoning." *O'Connor v Binney Auto Parts*, 203 Mich App 522, 527; 513 NW2d 818 (1994).

The SIF argues on appeal that the WCAC erred in concluding that Rust Engineering was entitled to a limitation of liability. Although the findings of fact made by the WCAC are conclusive, we believe that the WCAC applied the incorrect legal standard. Therefore, we are remanding this issue to the WCAC for further proceedings.

MCL 418.905; MSA 17.237(905), provides:

> An unemployed person who wishes to be certified as vocationally handicapped for purposes of this chapter shall apply to the certifying agency on forms furnished by the agency. The certifying agency shall conduct an investigation and shall issue a certificate to a person who meets the requirements for vocationally handicapped certification. The certificate is valid for 2 calendar years after the date of issuance. After expiration of a certificate an unemployed person may apply for a new certificate. *A certificate is not valid with an employer by whom the person has been employed within 52 weeks before issuance of the certificate.* [Emphasis added.]

The WCAC's findings that plaintiff engaged in no work activities prior to the date he was certified, September 25, 1989, and that he was paid no wages prior to that date, are not disputed. However, § 905 does not require that a person have engaged in specific or compensated activities before he may be considered to have been employed by a specific employer. As we have previously held, the legal determination whether a person was "employed" for the purpose of § 905 is "the *fact* of hire, not the nature of the employment." *Tracer v City of Southgate*, 184 Mich App 811, 817; 459 NW2d 321 (1990) (emphasis in original). The record reflects that Rust Engineering's own witnesses testified that persons who participated in the kind of activities that plaintiff engaged in prior to his certification were considered to be employees.

Consequently, while the fact that an individual did not engage in actual compensated work for an employer before certification is relevant to the question whether he was employed during that period, the core legal inquiry under the relevant statute is whether the employer had, in fact, *hired* the individual before certification. Accordingly, because we believe that the WCAC applied the wrong legal standard in determining the SIF's liability, we remand this issue to the WCAC for consideration in light of the correct legal standard.

In their cross-appeal, Rust Engineering and Argonaut Insurance Company argue that the WCAC erred in granting plaintiff an open award of benefits because the finding that plaintiff's underlying condition was aggravated by his work was not supported by competent, material and substantial evidence on the whole record, which included plaintiff's long-standing history of back problems. We disagree.

The magistrate, and thereafter the WCAC, relied on plaintiff's testimony and the testimony given by the physicians, particularly Drs. Rutherford and Roberts, to support the finding that plaintiff's underlying condition was aggravated by his work for Rust Engineering. That finding was supported by the requisite evidence. The magistrate was entitled to rely on the medical testimony she found to be the most persuasive. *Miklik v Michigan Special Machine Co*, 415 Mich 364, 367; 329 NW2d 713 (1982). As the magistrate's findings were supported by the requisite evidence, they were conclusive on the WCAC and this Court. *Goff, supra*.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh