STATE OF MICHIGAN

COURT OF APPEALS

JAMES B. LOYD,

Plaintiff-Appellant,

v

CELLASTO PLASTICS CORPORATION and EMPLOYERS INSURANCE OF WAUSAU,

Defendants-Appellees.

UNPUBLISHED
November 25, 1997

No. 198755
WCAC
LC No. 93-001118

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the September 30, 1996, order of the Worker's Compensation Appellate Commission (WCAC), but only to the extent that it affirmed the magistrate's decision that res judicata prevents plaintiff from contending that he cannot do any favored work he might be offered in the future because of a mental disability. We hold that the magistrate and the WCAC erred as a matter of law in holding that plaintiff may never decline an otherwise reasonable offer of favored work on the basis of his alleged nonwork-related mental condition, but we also hold that plaintiff is not entitled to an advance ruling that his alleged mental condition prevents him from accepting any favored work which his employer might offer in the future.

I

Plaintiff suffered a back injury at work on April 5, 1986. His last day of work was April 26, 1986. In November 1988, defendant invited plaintiff to return to the plant to try lighter duty or favored work. Plaintiff attempted some work, but found it to exceed his medical restrictions.

Plaintiff filed an application for benefits, claiming work-related disability because of his back. The magistrate found plaintiff disabled as a result of his back injury, and rejected the argument that plaintiff should forfeit his right to benefits because he had refused an offer of favored work. On May 18, 1992, the WCAC voted 2-1 to affirm the magistrate's finding that plaintiff is disabled, but to reverse and deny benefits because plaintiff had unreasonably refused an offer of favored work. This Court peremptorily vacated the WCAC's order and remanded for a

new opinion because the WCAC majority's opinion was deficient in certain ways. *Loyd v Cellasto Plastics Corp*, unpublished order of the Court of Appeals, entered January 4, 1993 (Docket No. 153439).

On remand the WCAC once again voted 2-1 to affirm the finding of disability and to reverse and deny benefits because of plaintiff's failure to perform favored work. This Court granted plaintiff's subsequent application, and reversed and reinstated the magistrate's award of benefits. *Loyd v Cellasto Plastics Corp*, unpublished opinion per curiam of the Court of Appeals, issued November 14, 1995 (Docket No. 167515).

As a result of the WCAC's May 18, 1992, decision, defendants stopped paying benefits to plaintiff. Plaintiff filed a new petition in July 1992 alleging that defendants had improperly ceased paying benefits, and requesting a finding that he suffers from an independent psychiatric impairment which would prevent him from doing any possible favored work which his employer might offer. Defendants also filed a petition to stop payment of benefits. In an opinion and order mailed October 21, 1993, the magistrate denied defendants' petition and ordered defendants to resume paying plaintiff benefits for his back disability. However, the magistrate rejected plaintiff's claim that as a result of an independent nonwork-related psychiatric condition, he cannot do any work for his employer, favored or otherwise.

> Defendant argues the psychiatric claim is barred under the doctrine of res judicata as outlined in *Gose v Monroe Auto Parts*, 409 Mich 147 (1980). The Supreme Court in *Gose* clearly enunciates the principle that res judicata bars a second claim for workers' compensation if the question was litigated in prior proceeding. Furthermore, the Court ruled that further claims are barred which arise out of the same transaction, but were not litigated though they could have been. Although plaintiff is not arguing that his psychiatric disability is work related, *Gose* still is applicable. Dr. Schmidt clearly testified plaintiff was psychiatrically incapable of performing work for defendant in 1988 and 1990 and, of course, presently. In 1990 Dr. Schmidt noted plaintiff sought treatment with a Dr. Stephen Lazar two and a half years before (late 1987 or early 1988). In 1992 he noted plaintiff had suicidal thoughts from 1986 to 1988 and perhaps later. Plaintiff never raised the non-work related psychiatric disability argument until July of 1992.
>
> It is held here that plaintiff clearly and unequivocally was aware as early as late 1987 that he had potentially disabling psychiatric problems. Obviously this was prior to his attempt to return to work in November 1988. Furthermore, and perhaps more importantly this awareness predates his initial petition for hearing of November 18, 1988. With these facts in mind, plaintiff clearly would be precluded from bringing an action for a work-related psychiatric disability. Of course, plaintiff does not argue that he suffers from a work-related psychiatric disability. Rather the argument is that a non-work-related psychiatric disability prevents a return to favored work.
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> I fail to see how the two can be distinguished in this case. In either case the psychiatric problems may be disabling, but were not argued as such when they first

manifested themselves. Therefore, plaintiff is now precluded from raising a non work-related psychiatric disability as excusing him from the performance of favored work just as he would be precluded from now arguing a psychiatric disability to be work related. See also *Hlady v Wolverine Bolt Co*, 393 Mich 368 (1975).

On appeal the WCAC affirmed in all respects. In particular, the WCAC held that the magistrate's application of *res judicata* is correct for the reasons given. This Court granted plaintiff's application for leave to appeal from that decision.

II

The WCAC must consider the magistrate's findings of fact conclusive if they are supported by competent, material, and substantial evidence on the whole record. This Court's review of a decision by the WCAC is very limited. *Goff v Bill-Mar Foods, Inc (After Remand)*, 454 Mich 507, 512; 563 NW2d 214 (1997). However, this Court is empowered to review questions of law involved with any final order of the WCAC. MCL 418.861a(14); MSA 17.237(861a)(14).

Res judicata principles apply to worker's compensation cases. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 378; 521 NW2d 531 (1994) and cases cited therein. Res judicata applies not only to facts previously litigated, but also to points of law necessarily adjudicated in determining and deciding the subject matter of the litigation. Michigan follows the "broad" application of res judicata, which bars claims arising out of the same transaction which could have been but were not litigated, as well as those questions which were actually litigated. The doctrine applies equally to facts and law. *Gose v Monroe Auto Equipment Co*, 409 Mich App 147, 161; 294 NW2d 165 (1980), *Jones v State Farm Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993).

We hold that the magistrate and the WCAC did not err in applying the doctrine of res judicata to plaintiff's mental disability claim, insofar as plaintiff means to assert a separate basis for weekly wage-loss benefits because of his mental disability. However, we further hold that the magistrate and the WCAC erred in applying res judicata principles to plaintiff's claim that, as a result of a mental disability from whatever source, he is totally disabled and therefore not capable of performing favored work which defendant might offer him now or in the future.

Under the doctrine of favored work, now codified in §301(5) and (9) of the Worker's Disability Compensation Act, MCL 418.301(5) and (9), an employer can reduce or eliminate its obligation to pay benefits by providing work "that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence."

If plaintiff does suffer from some mental disability, his condition is a relevant factor in determining whether any job offered by his employer is within his capacity to perform and poses no threat to his health and safety. This is true whether the condition is causally related to his employment or to some other source. An employer may not escape worker's compensation liability by offering a job

to an employee which may fall within the medical restrictions occasioned by the work-related disability, but which fall outside of the medical restrictions occasioned by some nonwork-related condition. *Bower v Whitehall Leather Co*, 412 Mich 172, 187-188; 312 NW2d 640 (1981) (even if an employee with a back problem could do certain sedentary work, an employer cannot escape liability if subsequent to the work-related accident the employee suffers a nonwork-related accident which deprives him of the use of both of his arms, and which makes it impossible to do the sedentary work offered by the employer).

The magistrate and the WCAC erred in holding that plaintiff may never decline an otherwise reasonable offer of favored work on the basis of his alleged nonwork-related mental condition. However, plaintiff is not entitled to an advance ruling that his mental condition prevents accepting any favored work which his employer might offer in the future. The claim is not ripe for adjudication. Unless and until plaintiff is offered favored work, it cannot be determined whether plaintiff is capable of performing it.

Affirmed in part and reversed in part.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff