

STATE OF MICHIGAN
COURT OF APPEALS

HAROLD F. SCHIAN,

Plaintiff-Appellant,

v

CONLEE OIL COMPANY, EMPLOYERS
INSURANCE OF WAUSAU and
FEDERATED MUTUAL INSURANCE
COMPANY,

Defendants-Appellees.

UNPUBLISHED
February 6, 1998

No. 208482
WCAC
LC No. 90000420

ON REMAND

Before: Reilly, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

In an opinion released November 29, 1994, this Court affirmed the decision of the Worker's Compensation Appellate Commission (WCAC) reversing the magistrate and denying plaintiff's claim for benefits. Plaintiff applied to the Supreme Court for leave to appeal. In lieu of granting leave, the Supreme Court remanded to this Court for reconsideration in light of *Goff v Bil-Mar Foods (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997). We now reverse and remand for reconsideration in light of *Goff* the question whether plaintiff voluntarily retired

I.

We incorporate by reference the summary of facts and proceedings and the analysis of the issues contained in this Court's previous opinion in this case.

In *Goff*, the Supreme Court clarified the nature of the WCAC's review of magistrate's decisions and this Court's review of WCAC decisions. In particular, the Supreme Court reaffirmed *Holden v Ford Motor Co*, 439 Mich 257; 484 NW2d 227 (1992), and cited with approval the interpretation of *Holden* given by this Court in *York v Wayne Co Sheriff's Dept*, 219 Mich App 370; 556 NW2d 882 (1996) remanded 456 Mich 891; ___ NW2d ___, after remand ___ Mich App ___; ___ NW2d ___. *Goff*, *supra* at 528 n 16. In *York*, this Court interpreted *Holden* as forbidding this Court from separately assessing whether a magistrate's decision is supported by substantial evidence on

the whole record. That task is for the WCAC. This Court's task is to determine whether the WCAC properly applied its own standard of review, i.e., whether the WCAC properly applied the substantial evidence test and gave an adequate reason grounded in the record if it reversed the magistrate. As long as the WCAC does not misapprehend or grossly misapply the substantial evidence test and gives an adequate reason for reversing the magistrate, this Court should affirm.

In *Goff*, the Supreme Court also clarified the nature of the WCAC's review of magistrate decisions. The Court found that the WCAC properly reversed the magistrate on the basis of lack of substantial evidence supporting the magistrate's findings. In particular, the Court noted that the magistrate found Mr. Goff to be a somewhat incredible witness, stating that if Mr. Goff had only his own credibility to rely upon, he would probably lose. *Goff, supra* at 526. The magistrate nevertheless awarded benefits on the basis of the opinion of Dr. Glessner. However, the Court agreed with the WCAC and this Court that Dr. Glessner's testimony was not sufficient because Dr. Glessner admitted that there was no objective basis for plaintiff's complaints, and thus his opinion was based solely on the subjective reports of the plaintiff. In light of the magistrate's finding that Mr. Goff was not credible, the Supreme Court held that the WCAC properly concluded that the magistrate's determination to award benefits was not supported by substantial evidence.

In the companion case of Mr. Dudley, the Supreme Court reversed the WCAC's reversal of the magistrate, finding that the WCAC exceeded its authority. Contrary to the case of Mr. Goff, Mr. Dudley presented objective evidence of a disabling condition, as well as medical testimony demonstrating a significant workplace aggravation of his underlying arthritic condition. *Goff, supra* at 535. The Supreme Court found that the WCAC paid only lip-service to the requirement that it give due deference to the magistrate's factual findings, especially his credibility determinations. *Id.* at 536.

In conclusion the Supreme Court stated:

If the magistrate's decision is reasonably supported in the record by any competent, material, and substantial evidence, then it is conclusive and the WCAC must affirm. If it does not, it is exceeding the scope of its reviewing power and impermissibly substituting its judgment for the magistrate's. In reviewing the magistrate's decision, the WCAC must do so with sensitivity and deference toward the findings and conclusions of the magistrate in its assessment of the record. If in its review the WCAC finds that the magistrate did not rely on competent evidence, it must carefully detail its findings of fact and the reasons for its findings grounded in the record. If after such careful review of the record the WCAC finds that the magistrate's determination was not made on the basis of substantial evidence and is therefore not conclusive, then it is free to make its own findings. In such circumstances, the findings of fact of the WCAC are conclusive if the commission was acting within its powers. Ultimately the role of the Court of Appeals and this Court is only to evaluate whether the WCAC exceeded its authority. [*Id.* at 538.]

II.

We reaffirm the previous holding in this case, rejecting plaintiff's contention that the WCAC erred by applying the retiree presumption of the Worker's Disability Compensation Act, because there is no evidence that the WCAC applied the presumption at all. Similarly, we reaffirm the previous rejection of plaintiff's argument that the WCAC should have found that he was performing favored work following his return to work after the 1980 explosion and fire. The record supports the WCAC's conclusion that plaintiff was not performing favored work. Moreover, we find no evidence that the magistrate found that plaintiff was performing favored work. Finally, we reaffirm the holding that the WCAC properly reversed the magistrate's finding that plaintiff's employment between 1980 and 1987 aggravated plaintiff's ear and hand problems. The medical experts traced these problems to the 1980 explosion and did not testify that plaintiff's subsequent employment aggravated the underlying conditions. However, we remand this case to the WCAC for reconsideration of plaintiff's claim that he was forced to retire and did not voluntarily terminate his employment.

Plaintiff testified that by July or August of 1987 his vision had deteriorated to the point that he was no longer able to read the cash register, make change or keep accounts. His work was largely confined to maintenance and janitorial duties thereafter. However, he never suffered a reduction in pay and was never demoted. Plaintiff further testified that at approximately this time his supervisors began to pressure him to quit or retire, noting that he would soon be sixty-two and thus eligible for a pension. Plaintiff testified that but for this pressure, he would have worked until he was sixty-five. Plaintiff's supervisor testified that plaintiff was not pressured into retiring, and that it was plaintiff who asked his supervisor several times about the possibility of retiring.

The magistrate stated in his opinion:

I further find that plaintiff's testimony as to the circumstances surrounding his termination of employment to be persuasive. That is, that he intended to work until the age of 65 and in effect was persuaded or told or forced to terminate his employment prior to his anticipated time.

There is no question in this magistrate's mind that the "early severance" of plaintiff by the defendant was precipitated by the nature and extent of his injuries and his inability to do productive work for defendant.

In reversing the WCAC stated:

The record shows that plaintiff left his job in 1987, not because of any disability (i.e., problems related to his 1980 injury), but because of 1) his deteriorating eyesight, and 2) his desire to retire. Plaintiff thus voluntarily removed himself from the workplace for nonwork-related reasons. Plaintiff is, therefore, not entitled to benefits.

As noted in the previous opinion, the WCAC did not explain its reasons for rejecting the magistrate's finding that plaintiff was forced to retire. In light of the Supreme Court's holdings in *Goff*

that the WCAC must give more than lip service to the deference due a magistrate's factual findings, including credibility determinations, and the need for the WCAC to give written reasons grounded in the record if it reverses a magistrate, we must conclude that the WCAC erred in making a factual finding contrary to the magistrate's without explaining its reasons for doing so. We therefore reverse and remand to the WCAC for reconsideration of this issue only in light of *Goff*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly

/s/ E. Thomas Fitzgerald

/s/ Henry W. Saad