STATE OF MICHIGAN

COURT OF APPEALS

LEONARD E. BURNS,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 20, 1998

No. 195042
WCAC
LC No. 93 000560

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a decision of the Worker's Compensation Appellate Commission (WCAC), which reversed a magistrate's award of weekly disability compensation benefits to plaintiff. We reverse and remand to the WCAC for further proceedings consistent with this opinion.

We begin by noting that the scope of our review is limited. The Michigan Supreme Court has articulated a four-part guide for evaluating a WCAC decision:

> If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal or, if it is granted, to affirm. [*Goff v Bil-Mar Foods, Inc*, 454 Mich 507, 517; 563 NW2d 214 (1997) (quoting *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992))].

The Court provided additional guidance regarding review of factual findings:

> 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.]

Our review in this case is somewhat different than that anticipated in *Goff*. Here, the WCAC made findings of fact on issues which the magistrate did not even address. Under these circumstances, we believe that we must defer to the WCAC's factual findings if there is any competent evidence in the record to support them. *Holden, supra* at 263. However, in considering the competency of the evidence, we are cognizant that the WCAC is not in a position to determine credibility. *Goff, supra* at 516. In addition, we review questions of law de novo. *Tyler v Livonia Public Schools (On Remand)*, 220 Mich App 697, 699; 561 NW2d 390 (1996).

In this case, plaintiff apparently injured his shoulder while working for defendant. After his injury, plaintiff was often absent from work. These absences were due in part to his injury and in part to other illnesses and problems. Plaintiff filed a worker's compensation claim related to his injury, but withdrew it after he reached a settlement with defendant. Plaintiff was eventually discharged due to his excessive absences. He then filed a new claim seeking weekly benefits. The magistrate ruled that plaintiff's claim was not barred by the previous settlement. The magistrate also found that plaintiff had proved a work-related disability, and granted him an open award of weekly benefits and medical expenses. The magistrate did not decide whether defendant was justified in discharging plaintiff for excessive absences. Defendant then appealed to the WCAC.

On appeal to the WCAC, defendant argued that: (1) plaintiff's claim for benefits was barred by res judicata based on the previous settlement, (2) plaintiff was not entitled to benefits because he was terminated for good cause, and (3) the magistrate's finding that plaintiff suffered a work-related disability was not supported by the record. The WCAC agreed with the magistrate that plaintiff's claim was not barred by the previous settlement. However, the WCAC concluded that plaintiff had been fired for good cause and was not entitled to benefits. The WCAC declined to review the magistrate's finding that plaintiff was disabled.

The WCAC began by finding that the magistrate failed to apply § 301(5) of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*; MSA 17.237(101) *et seq*. That subsection reads, in part, as follows:

> If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal. [MCL 418.301(5)(a); MSA 17.237(301)(5)(a).]

The WCAC found that plaintiff had been fired for good cause or had refused reasonable employment without good and reasonable cause. The WCAC then ruled that, pursuant to § 301(5), plaintiff was

disentitled from the receipt of weekly benefits. The question now before this Court is whether the WCAC properly applied § 301(5) to the facts in this case. We conclude that it did not.

Statutory interpretation presents a question of law which we review de novo. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). There are two relevant inquiries to determine if an employee is entitled to worker's compensation benefits: (1) whether an employee has proven that a disability exists, and (2) if the employee proves that a disability exists, whether the employee has proven that the disability resulted in a wage loss. *Haske v Transport Leasing*, 455 Mich 628, 642; 566 NW2d 896 (1997). These inquiries embody three distinct elements: (1) a work-related injury, (2) subsequent loss in actual wages, and (3) a causal link between the two. *Id.* at 634.

Because the WCAC declined to address the disability issue, for purposes of this appeal we defer to the magistrate's finding that plaintiff proved a disability. The parties did not dispute that plaintiff suffered a wage loss. The remaining issue is whether plaintiff proved that his wage loss resulted from his disability. This issue is addressed in § 301(5), which deals with the calculation of wage loss. Specifically, § 301(5)(a) disallows benefits where there has been (1) a bona fide offer of reasonable employment, and (2) a refusal without good and reasonable cause. "Reasonable employment" is defined in the WDCA as

> 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. The employee's capacity to perform shall not be limited to jobs in work suitable to his or her qualifications and training. [MCL 418.301(9); MSA 17.237(301)(9).]

The Michigan Supreme Court has explained that, in order to qualify as a bona fide offer of reasonable employment, an employer must present an offer of specific employment with established responsibilities within the employee's limitations. A general invitation to work is insufficient. *Price v City of Westland Police Dep't*, 451 Mich 329, 337; 547 NW2d 24 (1996). An employees' refusal of an offer may be for good and reasonable cause where the employee was disabled from doing the work demanded by the employer. *McKissack v Comprehensive Health Svs*, 447 Mich 57, 68; 523 NW2d 444 (1994).

While § 301(5)(a) specifically refers to an "offer" and a "refusal," Michigan courts have construed these terms broadly. A job which is "reasonable employment" or "favored work"[1] may constitute an offer. Thus, when an employee quits or is dismissed from such a job for reasons unrelated to her disability, she may be deemed to have refused reasonable employment. *Dimcevski v Utica Packing Co (On Remand)*, 215 Mich App 332, 336-337; 544 NW2d 763 (1996); *Coon v Rycenga Homes*, 146 Mich App 262, 265-266; 379 NW2d 480 (1985).

Here, the WCAC apparently assumed that the job plaintiff held immediately before he was terminated was reasonable employment: "To the extent plaintiff is viewed as having performed reasonable ("favored") employment after his 1984 injury, the statute clearly provides that plaintiff lost his entitlement to wage loss benefit due to the circumstances of his departure from work." The WCAC cited no evidence in the record which would support a finding that defendant presented an offer of specific employment with established responsibilities within plaintiff's limitations. The only evidence on

this point came from plaintiff, who testified that he had never been offered any alternative employment within the limitations recommended by his doctors.[2] Thus, we question the WCAC's conclusion that plaintiff was offered reasonable employment.[3] However, we need not decide whether there was any evidence to support this conclusion because we find no evidence in the record to support the WCAC's finding that plaintiff's discharge was unrelated to his disability. Specifically, we find no evidence that plaintiff's non-injury-related absences were sufficiently numerous to justify his dismissal under defendant's attendance policy. For this reason, we must reverse.

Defendant's absenteeism policy apparently called for an employee to be discharged after three consecutive six-month periods of excessive absenteeism. However, defendant offered only limited evidence regarding plaintiff's absences. This evidence came in the form of several exhibits that simply set out the number of plaintiff's absences, without reference to the reason for those absences. The only evidence regarding the reason for plaintiff's absences came from plaintiff himself, who testified that a substantial number of his absences were due to his injury. In addition, defendant's exhibits only dealt with two six-month periods; there were no exhibits regarding the final six-month period. Again, the only evidence on this point came from plaintiff:

> *Q.* Had you ever become aware that [during the third six-month period] you had an absence [rate]of 56.7 percent; were you aware of that?
>
> *A.* No. I was off on sick leave from my shoulder injury.

Because defendant's testimony on this point was unrefuted, there was no evidence to support the WCAC's conclusion that plaintiff's absences were "primarily unrelated to any injury complaints." Thus, even if plaintiff had been offered reasonable employment, he was still entitled to benefits because defendant failed to show that his discharge was unrelated to his disability. *Porter v Ford Motor Co*, 109 Mich App 728, 732; 311 NW2d 458 (1981).[4]

As noted, the above discussion assumes, based on the magistrate's original finding, that plaintiff is disabled . However, because defendant appealed this finding and the WCAC never addressed it, we remand for consideration of this issue.

Reversed and remanded to the WCAC. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Myron H. Wahls
/s/ Clifford W. Taylor

[1] We have recognized that § 301(5) was designed to be consistent with past precedent regarding the judicially created "favored work" doctrine. *Brown v Contech*, 211 Mich App 256, 263-264; 535 NW2d 195 (1995).

[2] There was one statement in plaintiff's signed Application for Mediation or Hearing which refers to favored work: "Mr. Burns was fired with being on restrictions and on favored work because G.M. is unwilling to change Mr. Burns' Attendance Code." Although plaintiff was "on restrictions," he testified that defendant did not consistently honor those restrictions. The WCAC's decision made no reference to any of this evidence.

[3] We decline to read the "offer of reasonable employment" requirement out of § 301(5)(a). A primary purpose of the reasonable-employment doctrine codified in subsection 301(5) is to allow employers to mitigate their worker's compensation liability by providing work within the injured employee's physical capacity. The refusing employee's benefits are cut off during the period of refusal in order to encourage the employee to accept the offer and thus effectuate the employer's ability to mitigate. *Derr v Murphy Motor Freight Lines*, 452 Mich 375, 389; 550 NW2d 759 (1996) (Mallet, J.). Allowing an employer to receive the benefit of the reasonable-employment doctrine without first offering an employee reasonable employment would not further this purpose. Thus, if defendant failed to offer plaintiff reasonable employment, then § 301(5)(a) is inapplicable, even if defendant was otherwise fired for good cause.

[4] The burden of showing that the employee's discharge was for just cause unrelated to the employee's disability is on the employer. See *Porter, supra* at 732 ("If [the employer] can show that plaintiff was fired for violation of company rules which would normally result in termination of a nondisabled employee, and that the violation was not caused by plaintiff's disability, then benefits may properly be denied.").