

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

RICHARD FERRIS,
Plaintiff-Appellant,
v
DETROIT STOKER COMPANY,
Defendant-Appellee.

UNPUBLISHED
April 9, 1999
No. 205743
WCAC
LC No. 95-000055

Before: Markman, P.J., and Jansen and J.B. Sullivan*, JJ.

MARKMAN, P.J. (dissenting).

I would affirm the decision of the Worker's Compensation Appellate Commission (WCAC) and therefore respectfully dissent. The WCAC, in my judgment, did not misapprehend its role in reviewing the judgment of the magistrate and was duly cognizant of the deference to be given the decision of the magistrate, *Holden v Ford Motor Co*, 439 Mich 257, 267-69; 484 NW2d 227 (1992);¹ it did not misunderstand or grossly apply the substantial evidence standard, *id.*; and it offered an adequate reason grounded in the record for reversing the magistrate. *Id.* Therefore, our "judicial tendency," whether we agree or disagree with the substantive decision of the WCAC, should be to affirm "in recognition that the Legislature . . . bestowed on the WCAC final fact-finding responsibility subject to constitutionally limited judicial review." *Id.* Because it is not "manifest that the WCAC exceeded its reviewing power," we are obligated to defer to its judgment. *Id.*

The majority engages this Court in a far broader review of this administrative agency. Theirs is not a "determination of error manifest in the WCAC's decision itself," but rather is predicated upon a "determination, directly contrary to the findings of the WCAC, that the *magistrate's* findings were in fact supported by requisite, competent, material and substantial evidence on the whole record." *York v Wayne County Sheriff's Dep't*, 219 Mich App 370, 379-80; 556 NW2d 882 (1996) (cited with approval in *Goff v Bil-Mar Foods, Inc (Aft Rem)*, 454 Mich 507, 528 n 16 (opinion of Court); 543-44 (opinion by Weaver, J.); 563 NW2d 214 (1997)). This is not the proper means of appellate review in worker's compensation cases: rather, this Court's review is of the decisions of the WCAC, not those of the magistrate. For this Court to find that the WCAC exceeded its reviewing powers because the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

magistrate's findings were supported by the requisite substantial evidence on the whole record, this Court would have to engage in the very same kind of review de novo of the magistrate's findings for substantial evidence that the Supreme Court specifically rejected as inappropriate in *Holden, supra*. *York, supra* at 380.

The central issue here is whether defendant ceased working due to a work-related or a non-work-related condition. In setting forth the respective burdens of proofs of the parties in worker's compensation suits, *Haske v Transport Leasing*, 455 Mich 628, 634; 566 NW2d 896 (1997), observed that the employee must establish a work-related condition, a subsequent loss in wages, and "a causal link between the two." *Id.* at 634. In response, the employer "may refute the causal connection" with evidence that "other factors" are the real cause of the unemployment. *Id.* at 661 n 38. "[I]f the claimant's continued unemployment is the result, not of his employment-related impairment, but of personal ailments unrelated to his employment, there is no possible grounds for continuing temporary benefits." *Sobotka v Chrysler Corp*, 447 Mich 1, 26 n 26; 523 NW2d 454 (1994).

The WCAC here concluded that the magistrate's findings that plaintiff left work due to work-related injuries, specifically thoracic outlet or carpal tunnel syndromes, was not supported by the requisite evidence. With regard to the thoracic outlet syndrome, the WCAC found the syndrome to be work-related, but not to be responsible for plaintiff's departure from employment. "Plaintiff did not leave his employment for reasons related to any injury suffered here." Instead, the WCAC determined that plaintiff left his position as a result of persistent "lightheadedness and dizziness," symptoms which were "clearly not related" to the prior work-related injury that plaintiff had incurred. In support of this determination, the WCAC relied upon plaintiff's own testimony in which he acknowledged that the reason he left work was his blacking out from dizziness. Plaintiff stated that he could not continue working *only* because he was "afraid of hurting somebody" as a result of his dizziness-- "strictly because of dizziness." In addition, considerable evidence was introduced, including the testimony of plaintiff himself, that such dizziness was attributable to a non-work-related 80% blockage in his left coronary artery that had required bypass surgery. While there was conflicting medical testimony, one doctor (Dr. Brandt) found no evidence at all of orthopedic disability and another (Dr. Asuncion) found that plaintiff's dizziness was not related to his thoracic outlet syndrome.² Further, there was evidence to support the WCAC's conclusion that plaintiff's periodic sensations of numbness-- an additional basis for his departure from work-- were also connected to plaintiff's heart problems rather than to work-related disabilities. As defendant observes, plaintiff's numbness was felt throughout his body, including in areas such as his legs, neck and shoulders, where his work-related disabilities would "have no applicability."

With regard to the carpal tunnel syndrome, the WCAC determined that the condition was not work-related. In particular the WCAC observed,

We further find that plaintiff did in fact suffer an injury on March 3, 1986 and he is entitled to payment of reasonable and necessary medical expenses which relate to that injury. Unlike the magistrate, however, we do not find the carpal tunnel syndrome (which was mild and not disabling in the first place) to be work-related. Magistrate

Blair stated that Dr. Martinez' "explanation establishes a nexus between plaintiff's thoracic outlet syndrome and the carpal tunnel syndrome." It did no such thing. Dr. Martinez merely indicated that plaintiff's symptoms could be caused by any of four compression problems: cervical disk, thoracic outlet syndrome, ulnar nerve entrapment or carpal tunnel syndrome. He concluded that plaintiff perhaps had carpal tunnel syndrome based upon the report of Dr. Lawrence. Dr. Lawrence, however, relied upon a history of recent use of heavy tools and jack hammers which the record does not bear out.

In my judgment, the WCAC has set forth its findings here in reasonable detail, based upon the record as a whole, and with adequate deference accorded to the determinations of the magistrate.

Moreover, the WCAC's finding that plaintiff was performing a regular job as opposed to favored work at the time he left defendant's employ was also supported by the evidence. Plaintiff was performing general duties in the shipping department. Favored work (now known as reasonable employment) is work offered by an employer to accommodate a disability. Favored work cannot be self-imposed by the employee. *Jones v Auto Specialties Manufacturing Co*, 177 Mich App 59, 64; 441 NW2d 1 (1988). No evidence in the record showed that defendant offered plaintiff the position in the shipping department in order to accommodate a disability. The WCAC's finding that plaintiff left regular employment for reasons unrelated to that employment was therefore supported by the requisite evidence.

Therefore, I would affirm the decision of the WCAC that plaintiff was entitled to the payment of reasonable medical benefits as the result of a work-related thoracic outlet condition, but, unlike the majority, I would also affirm its decision reversing the magistrate's grant of an open award of weekly wage loss benefits, and the payment of reasonable medical expenses for plaintiff's carpal tunnel condition.

/s/ Stephen J. Markman

¹ "This Commission is to determine whether there is competent, material and substantial evidence on the whole record to support the magistrate's findings of fact."

² However, Dr. Asunction also determined that plaintiff was unable to return to work as a result of his thoracic outlet syndrome.