# STATE OF MICHIGAN

# COURT OF APPEALS

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JAMES MITCHELL,

Plaintiff-Appellant,

v

EAGLE CLEANING COMPANY, ACCIDENT FUND COMPANY, and SECOND INJURY FUND,

Defendants-Appellees.

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UNPUBLISHED
May 21, 1999

No. 207372
WCAC
LC No. 96-000342

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

Leave was granted in this case to consider a decision of the Worker's Compensation Appellate Commission (WCAC) which affirmed a magistrate's decision denying plaintiff's claim for benefits based upon a work-related left ankle disability. Both the WCAC and the magistrate operated within the wrong legal framework and based their decisions on erroneous legal reasoning. *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494; 581 NW2d 244 (1998); *Bates v Mercier*, 224 Mich App 122, 124; 568 NW2d 362 (1997). Accordingly, we reverse and remand for further proceedings before a magistrate.

Plaintiff was employed by defendant Eagle Cleaning Company as a window washer on April 11, 1984 when he fell from a ladder and broke his left leg in the area of his ankle. The injury was serious and plaintiff never returned to work for defendant. Plaintiff returned to light duty work in his second job as a police officer the following August, but was awarded a duty disability pension due to psychological stress in April 1985.

Plaintiff drove a truck for the Sealy Mattress Company for about a year and a half in 1985 and 1986. He primarily used his right foot and was assigned a helper. In 1987, plaintiff and his wife moved to Florida. There, plaintiff drove a bus for the Walt Disney Company from February 9, 1991 until August 11, 1992. Plaintiff voluntarily left this job because of discomfort in his left leg and because his supervisors objected to him wearing a leg brace. Plaintiff filed the instant application for worker's compensation benefits on July 14, 1993.

The circumstances surrounding plaintiff's departure from Sealy were not well developed at trial. When plaintiff was asked why he stopped working for Sealy, he answered:

> I stopped just before a labor dispute. They expected us to drive past the picket line. That was, the mattress company was on strike and they had a different union than the drivers and I didn't want to cross the picket line. They had problems with the workers.

However, plaintiff also testified that the strike was not the only reason he left Sealy, and that his leg condition probably would have prevented him from continuing to work for Sealy indefinitely:

> Q Would it be fair to say sir that if it had not been for the labor dispute that caused you to leave Sealy you would have continued working at Sealy earning about $9.50 an hour or so?
>
> A I don't believe so.
>
> Q Why is that?
>
> A Because I just came there on a temporary basis originally. I didn't plan on staying as long as I did.
>
> Q Would it be fair to say that you had the physical ability to stay there perhaps not the desire but indeed the physical ability to continue working for Sealy?
>
> A No, I became nauseous many times because of my injury.
>
> Q Why is that?
>
> A Because of the pain.
>
> Q But the only reason you stopped working for them was because of this labor dispute?
>
> A That was the main reason at that time, yes.

The only medical evidence was the deposition of orthopedic surgeon Peter Boruta, who examined plaintiff on May 4, 1994. Boruta concluded that plaintiff had extensive degenerative changes and progressive post-traumatic arthritis in his left ankle, and he thought that plaintiff would be a candidate for an ankle fusion in the future. Boruta believed that plaintiff's ankle problems were the result of the April 11, 1984 injury, that plaintiff should be restricted from certain activities, and that plaintiff was disabled from the type of work he performed for defendant. Boruta further testified that some types of work could accelerate the arthritic process:

> Q Doctor, if indeed he had been required to perform work which was outside of those restrictions [no climbing, carrying heavy objects, working on uneven surfaces, prolonged walking or standing; only occasional climbing in and out of

vehicles], do you have an opinion whether it could have hastened the progression of the arthritic condition?

A It's hard to say.

Q I understand it's hard to say with any certainty, but could it have?

A It's possible.

The magistrate found plaintiff credible and found him disabled because of the 1984 injury, noting that plaintiff could return to only limited work after the injury. The magistrate further found, however, that plaintiff had permanently forfeited his entitlement to worker's compensation benefits. The magistrate reasoned that plaintiff's employment with Sealy ended because of plaintiff's refusal to cross a picket line, and therefore plaintiff's entitlement to benefits was suspended as long as that refusal continued. The magistrate in part relied upon this Court's decision in *Derr v Murphy Motor Freight Lines*, 195 Mich App 333; 489 NW2d 183 (1992), amended on other grounds 452 Mich 375 (1996).

This Court's essential holding in *Derr* was overruled by a majority of the Justices in *Derr v Murphy Motor Freight Lines*, 452 Mich 375; 550 NW2d 759 (1996), after the magistrate mailed his decision. Our Supreme Court in *Derr* concluded that benefits may be forfeited under MCL 418.301(5)(a); MSA 17.237(301)(5)(a) only during the period an employee unreasonably refuses to accept reasonable employment. *Id.*, p 387. A permanent forfeiture of benefits is not intended, and once an offer has been withdrawn, benefits must be reinstated as long as the employee is available for work. *Id.*, pp 390-391.

In light of our Supreme Court's decision in *Derr*, the magistrate operated within an incorrect legal framework when he reached the conclusion that plaintiff's benefits were permanently forfeited. The WCAC's affirmance was similarly in error because, contrary to the analysis of the WCAC, the decision in *Derr* represented the view of at least a majority of Justices. Three Justices agreed that there is no "reasonable time limitation" for an employee accepting an offer of reasonable employment. Concurring Justice Boyle agreed under the facts in *Derr*, and Justice Boyle also rejected the "reasonable time limitation" in her opinion in *Nederhood v Cadillac Malleable Iron Co*, 445 Mich 234; 518 NW2d 390 (1994).

The magistrate's principal finding was that plaintiff permanently forfeited his benefits because he did not return to work for Sealy within a reasonable time. Under *Derr*, this was an erroneous finding warranting reversal and a remand for further consideration. In addition, the magistrate's implicit finding that plaintiff unreasonably refused an offer of reasonable employment from Sealy is not supported by competent, material, and substantial evidence on the whole record as required by MCL 418.861a(3); MSA 17.237(861a)(3). The circumstances of plaintiff's departure from Sealy were simply not developed at trial. There was no evidence before the magistrate that plaintiff was "fired", as the magistrate stated at one point in his opinion. There was no evidence before the magistrate that plaintiff was "terminated for refusing to perform his job" as stated at another point in the WCAC's opinion.

Indeed, the record does not establish whether Sealy discharged plaintiff, whether plaintiff quit, or whether plaintiff merely did not show up for work.

While the magistrate made no such finding, the WCAC concluded that the record compelled a finding that plaintiff's job with Sealy was terminated for "good cause." While it is true that a striking employee is not entitled to benefits, *Pigue v General Motors Corp*, 317 Mich 311; 26 NW2d 900 (1947), and that an employee who voluntarily quits reasonable employment he is able to perform forfeits his benefits, *Dimcevski v Utica Packing Co (On Remand)*, 215 Mich App 332; 544 NW2d 763 (1996), in this case, given the lack of evidence about the circumstances surrounding plaintiff's departure, it cannot be determined whether plaintiff's job was terminated for good cause. The WCAC's suggestion that there was an "outright refusal to perform work within a claimant's capabilities" constitutes improper speculation. *Layman, supra,* p 505; *Woody v Cello-Foil Products*, 450 Mich 588, 597; 546 NW2d 226 (1996). Whether plaintiff refused reasonable employment for good and reasonable cause was a question of fact to be decided by the magistrate in the first instance. *Layman, supra*; *Pulver v Dundee Cement Co*, 445 Mich 68, 81; 515 NW2d 728 (1994).

Nor was consideration given to how long plaintiff might have continued working for Sealy had there not been a strike. Plaintiff's testimony indicated that his ankle condition would have prevented him from working for Sealy indefinitely. When the time came that plaintiff's deteriorating ankle condition prevented him from working for Sealy, plaintiff's job with Sealy would no longer be "reasonable employment" under § 301(5)(a), and plaintiff's refusal to perform the job would be for good and reasonable cause. In either event, it would no longer be appropriate to suspend plaintiff's benefits.

In his opinion, the magistrate also found that "plaintiff's condition was aggravated by his employment at Disney." The WCAC viewed this as a finding that plaintiff suffered a "new" injury while working for Disney. The magistrate's opinion in relevant part reads:

> It is also found, based on Dr. Boruta's credible and unrebutted testimony, that plaintiff's arthritic changes in the ankle were caused by the April 11, 1984 injury. Nevertheless, the doctor admitted that activity could cause the arthritis to accelerate.
>
> Moreover, although plaintiff testified that his symptoms increased while working at Disney World, he also testified that his ankle got worse each year and that after working for 1 and ½years at Disney he quit due to discomfort and his supervisors' objection to him wearing a leg brace on the job. There was no testimony that plaintiff had ever needed a leg brace while working the light-duty desk job at the Detroit Police Department or the truck-driving job at Sealy.
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> Accordingly, I find based on plaintiff's own testimony and Dr. Boruta's admission that activity could have accelerated plaintiff's arthritic changes that plaintiff's condition was aggravated by his employment at Disney. This finding is further supported by plaintiff's testimony that at Disney he was supposed to walk around when he was not operating a bus, but he could not do so. As such, I find that the Disney

employment required plaintiff to be on his feet for prolonged periods of time, which was outside the restrictions given by Dr. Boruta in 1994.

Assuming the WCAC correctly construed the magistrate's opinion to mean that plaintiff suffered a "new" injury while driving buses for Disney, that finding was not supported by competent, material, and substantial evidence on the whole record, at least not as discussed by the magistrate. MCL 418.861a(3); MSA 17.237(861a)(3). Plaintiff testified that his ankle condition deteriorated with time. That testimony was consistent with Dr. Boruta's conclusion that plaintiff's condition could progressively worsen. It was Boruta's opinion that plaintiff's disability related to his 1984 injury. Boruta acknowledged the possibility that work could accelerate the arthritic process, but Boruta's testimony cannot be fairly read to mean that Boruta believed plaintiff's work for Disney accelerated plaintiff's ankle condition. Furthermore, plaintiff's testimony that he could not do the walking he was supposed to do at Disney does not support a finding that his condition was aggravated by his employment at Disney. In short, the magistrate's opinion was not based on evidence leading to the conclusion that plaintiff suffered a new injury while working at Disney. Given our determination that the magistrate's opinion inadequately dealt with the issue whether plaintiff received a "new" injury while working in Florida, we need not consider the ramifications of *Smith v Lawrence Baking Co*, 370 Mich 169; 121 NW2d 684 (1963).

Reversed and remanded for reconsideration by a magistrate. The issue presented by the Second Injury Fund must also be considered if necessary. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Barbara B. MacKenzie
/s/ Helene N. White