

STATE OF MICHIGAN
COURT OF APPEALS

JACKIE E. MACNEIL,

Plaintiff,

v

WORKER'S COMPENSATION APPELLATE
COMMISSION and GENERAL MOTORS
CORPORATION,

Defendants.

UNPUBLISHED

July 9, 1999

No. 211170

WCAC

LC No. 93-000771

Before: Jansen, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

This case is on remand from the Supreme Court “for a full hearing of the superintending control complaint pursuant to MCR 7.206(D)(3).” *MacNeil v WCAC*, 457 Mich 854; 578 NW2d 688 (1998). Plaintiff challenges an order of the Worker’s Compensation Appellate Commission (WCAC), which affirmed in part and vacated in part the magistrate’s opinion, and remanded to the magistrate for a new determination consistent with the WCAC’s opinion. The question in this appeal is whether the WCAC exceeded its authority in vacating the magistrate’s opinion. We deny plaintiff’s writ for superintending control.

Plaintiff’s last day of work date of injury with General Motors Corporation (GMC) was September 1, 1982. Plaintiff filed a claim for worker’s compensation benefits and, in a decision mailed October 10, 1985, an administrative law judge awarded plaintiff open benefits pursuant to MCL 418.401(b); MSA 17.237(401)(b). The administrative law judge specifically found that plaintiff had proven by a preponderance of the evidence that the repetitive physical activities she was required to perform in her job classification of assembler general contributed in a significant manner to the aggravation of her back and neck pathologies, rendering her disabled with respect to performing jobs in her classification. GMC subsequently filed a claim for review with the Worker’s Compensation Appeal Board (WCAB). In its decision dated March 26, 1991, the WCAB affirmed with modification, finding

that plaintiff suffered a continuing ongoing partial disability entitled her to weekly benefits, but pursuant to MCL 418.301(5); MSA 17.237(301)(5).

GMC then filed an application for leave to appeal with this Court, which was denied in an unpublished order dated June 14, 1991. GMC's application for leave to appeal to the Supreme Court was likewise denied on March 30, 1992. *MacNeil v WCAC*, 439 Mich 974; 483 NW2d 391 (1992). In the meantime, GMC filed a petition for the termination of benefits. In 1993, a hearing was held before a magistrate, and additional evidence was received. The magistrate then denied GMC's petition to terminate benefits-- although GMC was to receive credit for plaintiff's subsequent earnings-- and denied plaintiff's penalty petitions.

GMC appealed to the WCAC, which affirmed the magistrate's decision that GMC was entitled to credit for plaintiff's subsequent earnings, and denied plaintiff's penalty provisions. However, the WCAC otherwise vacated the magistrate's decision and remanded to the Board of Magistrates to consider the question "whether plaintiff continues to be disabled and, if so, the extent of such disability." In the previous paragraph, the WCAC stated that "[t]his opinion does not hold that plaintiff no longer has cervical problems, but that they are no longer disabling." Plaintiff now requests that this Court grant her writ for superintending control and reverse the WCAC.

Preliminarily, we recognize that some of the language of the WCAC's opinion is contradictory, since it indicates in one paragraph that plaintiff's cervical problems are "no longer disabling," while in the next paragraph the WCAC states that the question to be determined on remand is "whether plaintiff continues to be disabled and, if so, the extent of such disability." Specifically, the last two paragraphs of the WCAC's opinion provide:

Any reasonable and necessary medical expenses relating to the neck shall be paid by defendant. This opinion does not hold that plaintiff no longer has cervical problems, but that they are no longer disabling. The original date of injury, of course, remains intact, and any medical expenses arising from that date of injury are compensable, if reasonable.

In all other respects, the decision of the magistrate is vacated and remanded to the Board of Magistrates for a decision consistent with this opinion. The question to be considered is whether plaintiff continues to be disabled and, if so, the extent of such disability. See MCL 418.361(1).

If this were an ordinary appeal from the WCAC's decision, pursuant to this Court's appellate jurisdiction under MCL 418.861a(14); MSA 17.237 (861a)(14), it might be necessary for this Court to remand the case to the WCAC for clarification of its opinion. However, because this is not an appeal, but an original action for superintending control, this Court has the benefit of direct input from the WCAC, as a party to these proceedings. In its submissions to this Court, the WCAC denies making any independent determination regarding whether plaintiff remains disabled, and the WCAC explains that its intention was to leave issues of disability to be determined by the magistrate on remand. In our

judgment, the WCAC's representations to this Court suffice to eliminate the notion that the WCAC made any determination as to whether plaintiff's cervical problems are still disabling.¹

Accordingly, we address the question at issue in this case: whether plaintiff's writ for superintending control should be granted. Superintending control is an extraordinary remedy, superseding the writs of mandamus, prohibition and certiorari when directed against a lower court or tribunal. MCR 3.302(C). Accordingly, a complaint for superintending control is not a substitute for an appeal,² and the plaintiff has the burden of establishing that the defendant has breached a clear legal duty and/or exceeded its lawful authority. See, e.g., *In re Rupert*, 205 Mich App 474, 478; 517 NW2d 794 (1994); *Barham v Workers' Compensation Appeal Bd*, 184 Mich App 121, 127; 457 NW2d 349 (1990).

Because we do not believe that the WCAC exceeded its authority by remanding this case to the Board of Magistrates for a new determination, we deny plaintiff's request for superintending control. In our judgment, *Gretel v Worker's Compensation Appellate Comm (On Remand)*, 217 Mich App 653; 552 NW2d 532 (1996) is distinguishable and therefore is not controlling in this case. In *Gretel*, the WCAC found a magistrate's decision to grant benefits "insufficient for purposes of review," stating that the magistrate's opinion was "virtually silent as to the reasoning supporting its finding of disability." Instead of attempting to review the magistrate's decision on the merits or remanding the case to the magistrate for further articulation of reasoning, the WCAC in *Gretel* simply vacated the magistrate's decision in its entirety and remanded the case "to the Chief Magistrate for assignment to a new magistrate for preparation of a new decision." The plaintiff in *Gretel* then filed a complaint for superintending control in this Court, arguing that the WCAC lacked authority to vacate the magistrate's decision and remand the case for a new hearing before a new magistrate. This Court agreed, opining that while the WCAC has authority to remand a case for *completion* of a decision which it finds insufficient for purposes of review, it does not have authority to *vacate* a magistrate's decision so that a *new* hearing can be conducted before a *new* magistrate. *Gretel*, *supra* at 658.

In the instant case, the WCAC did not simply reject the magistrate's decision as insufficient for any review. To the contrary, the WCAC actually reviewed the magistrate's decision and found the magistrate's reasoning to contain errors of law. Specifically, the WCAC concluded that the magistrate "misstated the law to the extent that he bound defendant to showing an actual change of plaintiff's underlying condition as opposed to demonstrating a cessation of disability," and that the magistrate "compounded this error by failing to consider all the evidence on the record as it related to this question."

To the extent that the magistrate's findings of fact are predicated upon the application of an erroneous legal standard or framework, those findings may be set aside as legally erroneous, pursuant to the WCAC's review of questions of law. See, e.g., *Hoste v Shanty Creek Management, Inc.*, ___ Mich ___ ; 592 NW2d 360 (1999). When the WCAC rules on questions of law involved in the magistrate's decision, the standards expressed in MCL 418.861a; MSA 17.237(861a) regarding the WCAC's review of the record for "competent, material and substantial evidence" are inapplicable. *Abbey v Campbell, Wyant & Cannon (On Remand)*, 194 Mich App 341, 351; 486 NW2d 131 (1992).

Where the magistrate's decision is found to be affected by erroneous legal reasoning, it is appropriate for the WCAC to remand the case for reevaluation in light of the correct legal standards and requirements, as opposed to attempting to make its own findings and applying the correct legal standards on its own. Indeed, in *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494; 581 NW2d 244 (1998), the Court held that the WCAC *must* remand for further findings when the magistrate has not made the findings necessary to apply the correct legal standards. In fact, the Court frequently orders the WCAC to remand cases for "reconsideration," "new findings" or "further proceedings" by the magistrate, when the wrong legal framework has been applied. See, e.g., *Kamin v Detroit*, 459 Mich 902; 589 NW2d 284 (1998); *Turner v General Motors Corp*, 459 Mich 903; 589 NW2d 288 (1998); *Lindroth v Michigan Boiler & Engineering*, 459 Mich 903; 589 NW2d 284 (1998). Obviously, the Court would not order the WCAC to exercise such remand authority if the WCAC did not have that authority in the first instance.

By remanding this case for a "new determination" in light of the WCAC's opinion, the WCAC is not ordering the kind of "new hearing" that was ordered in *Gretel, supra*. Rather, the WCAC is ordering essentially the same kind of reconsideration that this Court or the Supreme Court would order upon finding that the proper legal standards had not been applied. Moreover, unlike the remand order in *Gretel*, the WCAC's decision in this case does not direct that the case be assigned to a new magistrate. The only reason this case will have to be assigned to a new magistrate on remand is that the original magistrate has since left the Board of Magistrates to become a federal administrative law judge. The WCAC is not responsible for this fortuity.

Plaintiff's reliance upon the 'no-rehearing rule,' restricting the authority of administrative tribunals to grant rehearing or reconsideration on substantive issues, is misplaced, because such a rule applies only when an administrative tribunal conducts a rehearing or reconsideration of its *own* prior decision. See, e.g., *Wemmer v National Broach & Machine*, 199 Mich App 376, 381; 503 NW2d 77 (1993). Here, the WCAC has not granted rehearing or reconsideration of any of its own decisions, but has instead vacated the decision of a subordinate tribunal on appeal and remanded the case for further proceedings by that tribunal. The 'no-rehearing rule' has no application in this situation. If it did, this Court and the Michigan Supreme Court would be powerless to remand cases to the WCAC and/or the magistrate for reconsideration and further findings.

Of course, even when it is appropriate for the WCAC to remand a case for further consideration, it does not necessarily follow that it is also appropriate for the WCAC to vacate the magistrate's original decision in the interim. Vacating the magistrate's decision may result in undue hardship in some cases, such as in *Gretel, supra*, where the WCAC's order vacating the magistrate's decision in its entirety had the effect of cutting off the plaintiff's statutory entitlement to receive partial benefits pending a final decision.

Apparently, it is the WCAC's position that it is necessary to vacate those portions of the magistrate's original decision which are to be reconsidered whenever the original magistrate is no longer available to render further findings on remand. We respectfully disagree, particularly in cases like the instant one, where the WCAC is not remanding the case for a clarification of the original magistrate's analysis, but rather for reevaluation in light of legal principles and evidence previously overlooked by the

magistrate. In such cases, there is little reason why the reevaluation cannot be performed effectively by a successor magistrate.³ As long as the WCAC clearly identifies those portions of the original decision which are to be reconsidered, there is no need for the WCAC to vacate those parts of the original decision in order to ensure that they will be addressed anew on remand. Cf. *In re Loose (On Remand)*, 212 Mich App 648; 538 NW2d 92 (1995), nullified 453 Mich 963; 557 NW2d 312 (1996). We note that when the Supreme Court directs the WCAC to remand a case to the magistrate for reconsideration, it ordinarily does not vacate the magistrate's original decision. See, e.g., *Layman, supra*; *Kamin, supra*; *Turner, supra*; *Lindroth, supra*. This is so even where, as here, the original magistrate has since left the Board of Magistrates. See, e.g., *Wakefield v Oakland-Livingston Human Services*, 459 Mich 902; 589 NW2d 288 (1998); *Densmore v Hoffman-Laroche, Inc.*, 459 Mich 903; 589 NW2d 283 (1998).

For the reasons outlined above, we do not believe that plaintiff has met the burden of establishing that the WCAC has exceeded its authority by remanding this case to the Board of Magistrates for a new determination of the issue of continued disability. Moreover, while we are not necessarily persuaded by the WCAC's arguments in support of its decision to vacate the magistrate's decision in conjunction with the remand, we fail to see how plaintiff is prejudiced by the WCAC vacating that part of the decision which is the subject of the remand, since plaintiff's underlying award of benefits remains intact and plaintiff's continued entitlement to benefits is preserved pending the outcome of the proceedings on remand.

We, therefore, deny plaintiff's writ for superintending control. The order of the WCAC is affirmed and the matter is remanded to the Board of Magistrates for proceedings consistent with the WCAC opinion in this case. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Stephen J. Markman

¹ That part of the WCAC's opinion which refers to plaintiff's cervical problems being "no longer disabling" should be interpreted in context. In that part of the WCAC's opinion, the WCAC was explaining why its decision had no effect upon plaintiff's continued entitlement to reasonable medical expense benefits. The WCAC had ordered reconsideration of the question of disability because the magistrate failed to realize that plaintiff could have no change in her underlying condition yet no longer be disabled by that condition. The point that the WCAC was making was that the magistrate's error in this regard did not affect plaintiff's entitlement to medical expense benefits, since medical benefits are payable for plaintiff's work-related injury even *if* that injury is no longer disabling. This interpretation is corroborated by the WCAC's own representations made directly to this Court.

² The WCAC correctly notes that a complaint for superintending control must be dismissed when an appeal is available. MCR 3.302(D)(2); *Barham v Workers' Compensation Appeal Bd, supra* at 127. However, an appeal is available only from "final" orders of the WCAC. MCL 418.861a(14); MSA 17.237(861a)(14). See *Boggeta v Burroughs Corp*, 368 Mich 600; 118 NW2d 980 (1962). Because the WCAC's order in this case remands the case for a further determination, the order is not

final for purposes of appeal. See 4 Am Jur 2d, *Appellate Review*, § 93, at 716. Moreover, the prospect of pursuing an appeal once a final order is entered after the proceedings on remand are concluded is not an adequate alternate remedy, rendering relief by superintending control inappropriate where, as here, the purpose of seeking superintending control is to avoid such further proceedings altogether. See *Chrysler Corp v Workers' Compensation Appeal Bd*, 174 Mich App 277, 280-81; 435 NW2d 450 (1988).

³ Of course, the original magistrate had an advantage in determining the credibility of live witnesses, based upon the opportunity to observe and evaluate the witness' demeanor. However, in this case, the opinion of original magistrate does not indicate that any significant witness credibility determinations were reached on the basis of witness demeanor.