

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT THIBODEAU,

Plaintiff-Appellant,

v

UNIROYAL, INC., and SECOND
INJURY FUND,

Defendants-Appellees.

UNPUBLISHED
October 1, 1999

No. 210423
WCAC
LC No. 88 000424

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a February 18, 1998, opinion and order of the Worker's Compensation Appellate Commission (WCAC), following a third remand from this Court. We reverse.

I.

The procedural history of this worker's compensation case is rather lengthy and complex, spanning nearly two decades. Additional complexity results from the fact that the proceedings before WCAC involved three separate matters: (1) the proceedings on plaintiff's claim for compensation; (2) an appeal by defendant-employer Uniroyal, Inc., (hereafter "defendant") from a magistrate's decision denying defendant's petitions to stop payment of benefits; and (3) defendant's motion for summary reversal of plaintiff's award of benefits and dismissal of plaintiff's claim for compensation.

THE PROCEEDINGS ON PLAINTIFF'S CLAIM FOR COMPENSATION

In a decision mailed June 14, 1982, a hearing referee granted plaintiff an open award of partial disability benefits for a back condition causally related to the "wire service" job plaintiff performed for defendant until a temporary layoff in March of 1979. Weekly wage loss benefits were awarded at the maximum available weekly rate based upon plaintiff's 1979 date of injury and four dependents, i.e., \$173 per week. The award was subject to credits for post-injury wages plaintiff earned while performing non-favored post-injury work for defendant on the "mold cleaner" job from October of

1979 until plaintiff's last day at work in July of 1980, when defendant's plant was closed down, and for any unemployment compensation benefits plaintiff may have received after the January 1, 1982 effective date of MCL 418.358; MSA 17.237(358).

Both plaintiff and defendant appealed the referee's decision to the now-defunct Worker's Compensation Appeal Board (WCAB). Plaintiff challenged the referee's rejection of plaintiff's lung disability claim and his claimed 1980 last-day-of-work injury date. Defendant challenged the referee's finding of a work-related back disability and the determination of plaintiff's dependents. The WCAB did not render its decision until approximately nine years later, in 1991. The WCAB affirmed the hearing referee's 1982 open award of partial disability benefits, finding that plaintiff remained partially disabled in common labor following his last day of work for defendant. However, without explanation, the WCAB reduced the rate of plaintiff's weekly benefits for partial disability from \$173 to \$119 per week. The WCAB also remanded the matter to the Bureau, without retaining jurisdiction, for the purpose of taking further proofs as to the dependency of plaintiff's spouse and the respective birth dates of plaintiff's children.

Only plaintiff applied for leave to appeal the WCAB's decision to this Court. Plaintiff challenged the WCAB's reduction of his weekly benefit rate to \$119, arguing that the WCAB probably arrived at the \$119 figure by mistakenly using the minimum rate for a 1979 injury according to the Bureau's weekly benefit rate tables when the WCAB should have used the maximum rate based upon a 1979 injury date and zero dependents, i.e., \$156 per week, subject to augmentation based upon the resolution of the still-pending dependency issues. See *Gusler v Fairview Tubular Products*, 412 Mich 270, 294; 315 NW2d 388 (1981).

In lieu of granting plaintiff's application for leave to appeal, this Court entered a peremptory order vacating the WCAB's order in part, with respect to the reduction of plaintiff's weekly benefit rate only, and remanding the case to the WCAB for a supplemental opinion explaining the reason for the \$119 reduced benefit rate. On remand, the case was assigned to the WCAC, as successor to the now-defunct WCAB.

THE PROCEEDINGS ON DEFENDANT'S PETITIONS TO STOP

In the meantime, defendant had filed a number of petitions to stop further payment of benefits in 1986 and 1987, while its appeal from the 1982 open award was still pending before the WCAB. Those petitions were ultimately heard and decided by Worker's Compensation Magistrate Gary W. Brasseur, who was also the original hearing referee who granted plaintiff's open award of benefits in 1982. Although the primary issue raised in the petitions to stop was whether plaintiff had recovered from his partial disability, the issue of the dependency of plaintiff's spouse was also raised. In a decision mailed May 26, 1988, Magistrate Brasseur found the evidence insufficient to establish that plaintiff had either recovered or established a new wage-earning capacity. However, Magistrate Brasseur agreed with defendant that plaintiff had not proven the factual dependency of his spouse and therefore ordered a \$5 reduction in plaintiff's the weekly benefit rate.

Defendant appealed Magistrate Brasseur's 1988 decision to the WCAC, because the decision involved proceedings held pursuant to petitions to stop filed after March 31, 1986. See MCL 418.859a; MSA 17.237(859a). The WCAC initially held defendant's appeal in abeyance pending resolution of the parties' still-pending appeals before the WCAB. Later, after the WCAB issued its 1991 decision and this Court subsequently remanded the matter for clarification of reasoning regarding plaintiff's weekly benefit rate, the WCAC granted defendant's motion to consolidate the remanded "WCAB" case with defendant's appeal from Magistrate Brasseur's 1988 decision denying defendant's petitions to stop.

THE PROCEEDINGS ON DEFENDANT'S MOTION FOR SUMMARY REVERSAL AND DISMISSAL

In 1993, after the WCAC had granted defendant's motion to consolidate, defendant filed a motion for "summary reversal or dismissal" on the basis of this Court's decisions in *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702; 499 NW2d 453 (1993), reversed 445 Mich 502; 519 NW2d 441 (1994) and *Sobotka v Chrysler Corp (On Rehearing)*, 198 Mich App 455 (1993), reversed 447 Mich 1: 523 NW2d 454 (1994). In an order dated June 14, 1993, the WCAC held defendant's motion in abeyance, while remanding the consolidated case to the Board of Magistrates for a "supplemental opinion" addressing the issues raised in defendant's motion, i.e., whether plaintiff's application for unemployment benefits estopped him from seeking worker's compensation benefits pursuant to *Paschke, supra*, or whether plaintiff has a post-injury residual wage-earning capacity pursuant to *Sobotka, supra*. The WCAC retained jurisdiction.

On remand, the case was assigned to Magistrate Patrick J. MacLean, as successor to Magistrate Brasseur, who had since left the Board of Magistrates. In a "supplemental opinion" mailed May 1, 1995, Magistrate MacLean noted that this Court's decision in *Paschke, supra*, had been reversed by the Michigan Supreme Court. Accordingly, Magistrate MacLean concluded that plaintiff's application for and receipt of unemployment compensation benefits after leaving defendant's employ in 1980 did not preclude plaintiff from receiving worker's compensation benefits. However, relying upon the Michigan Supreme Court's plurality decision in *Sobotka, supra*, and *Pulley v Detroit Engineering & Machine Company*, 378 Mich 418; 145 NW2d 40 (1966), as well as the WCAB's previous determination that plaintiff's "mold cleaner" job was not favored employment, Magistrate MacLean opined that plaintiff's performance of the "mold cleaner" job established a post-injury wage-earning capacity which was equal to or greater to plaintiff's previous wage-earning capacity on the "wire service" job. Therefore, Magistrate MacLean concluded that plaintiff is not entitled to any wage loss benefits for partial disability, except for the brief interim period between plaintiff's last day of work on the "wire service" job in March of 1979 and his return to work at the "mold cleaner" job in October of that year.

THE 1995 DECISION OF THE WCAC

On December 20, 1995, the WCAC issued an opinion and order purporting to affirm the supplemental opinion of Magistrate MacLean, modifying Magistrate MacLean's decision only to

provide that the issue of reimbursement from the Second Injury Fund would be left for determination in future proceedings. The WCAC opined that Magistrate MacLean's findings on the issue of plaintiff's post-injury wage-earning capacity were consistent with the Michigan Supreme Court's plurality decision in *Sobotka, supra*, and the previous findings of the WCAB. However, the WCAC never actually made any ruling on defendant's motion for summary reversal and dismissal. Nor did the WCAC ever address Magistrate Brasseur's 1988 decision on defendant's petitions to stop, apparently reasoning that defendant's appeal from that decision had become moot in light of its affirmance of Magistrate MacLean's 1995 supplemental opinion on the issues raised in defendant's summary reversal motion. As for this Court's remand to the WCAB on the question of plaintiff's reduced weekly benefit rate, the WCAC opined that the WCAB had mistakenly reduced plaintiff's weekly rate from \$173 to \$119 by using the 70% benefit rate which was being paid during the pendency of appeal. However, the WCAC also concluded that its affirmance of Magistrate MacLean's supplemental opinion rendered the benefit rate issue moot as well.

THIS COURT'S REMAND ORDERS OF 1996 AND 1997

In 1996, and again in 1997, this Court entered peremptory orders remanding the case for reconsideration by the WCAC. The main reason for those remands was the WCAC's reliance upon Magistrate MacLean's 1993 supplemental opinion which was neither germane to the limited issue on remand in the "WCAB" proceedings on plaintiff's claim for compensation nor defendant's subsequent appeal from Magistrate Brasseur's 1988 decision on the petitions to stop. Specifically, the "WCAB" proceedings on plaintiff's claim for compensation were limited by this Court's remand order to the task of explaining the reduction of plaintiff's weekly benefit rate only. In all other respects, the WCAB's decision was final and binding as to all issues arising as of the date that the record was closed in those proceedings. The proceedings on defendant's petitions to stop were limited in scope to matters arising subsequent to the closing of the record in the proceedings on plaintiff's claim for compensation, and it was defendant's burden to establish some change in circumstances since that time justifying a discontinuation of plaintiff's award.

Magistrate MacLean, who had been directed by the WCAC to address the issues raised in defendant's summary reversal motion, did not address the weekly benefit rate reduction matter that was the subject of this Court's remand order in the "WCAB" proceedings, nor did Magistrate MacLean address any change in circumstances subsequent to the closing of the record in the proceedings on plaintiff's claim for compensation. Instead, Magistrate MacLean's supplemental opinion addressed the issue of residual wage earning capacity based upon plaintiff's post-injury work activities *prior* to the closing of the original evidentiary record in 1982.

In the 1996 remand order, this Court resolved the weekly wage rate reduction issue by modifying the WCAB's order to reflect a \$179 weekly benefit rate, based upon the WCAC's determination that the WCAB had reduced plaintiff's benefit rate to \$119 erroneously.¹ This Court then remanded the case to the WCAC with instructions to separately adjudicate defendant's appeal from Magistrate Brasseur's 1988 decision on defendant's petitions to stop. However, on remand, the WCAC reiterated its previous decision affirming the supplemental opinion of Magistrate MacLean.

In the 1997 remand order, this Court again ordered the WCAC to address defendant's appeal from Magistrate Brasseur's 1988 decision on defendant's petitions to stop. This Court's order explained that Magistrate MacLean's 1993 supplemental opinion was not germane to the appeal from the decision on the petitions to stop because it was based upon an improper relitigation of matters occurring prior to the closing of the record in the proceedings on plaintiff's claim for compensation:

Magistrate MacLean's supplemental opinion does not replace or supersede the 1988 decision of Magistrate Brasseur denying defendant's petitions to stop. See *Gretel v WCAC (On Remand)*, 217 Mich App 653 [552 NW2d 532] (1996). Moreover, the WCAB decision upheld by this Court is binding res judicata as to all issues of plaintiff's disability and wage-earning capacity through the date of the hearing in 1982, including the issue of whether plaintiff's performance of post-injury work at Defendant establishes a continuing residual wage-earning capacity. See, e.g., *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 380 [521 NW2d 531] (1994).

Additionally, this Court specifically directed the WCAC to limit its review of the appeal on defendant's petitions to stop to changes occurring after the closing of the hearing on plaintiff's claim for compensation:

On remand, the WCAC shall separately adjudicate defendant's appeal from Magistrate Brasseur's 1988 decision on the petitions to stop without reliance upon the evidence presented in the original trial in 1982 regarding plaintiff's ability to perform post-injury work at Defendant, and shall limit its review to the issues germane to defendant's 1986 and 1987 petitions to stop.

THE WCAC'S FEBRUARY 18, 1998, DECISION

On remand, the WCAC issued another opinion and order denying benefits, this time analyzing the case in a "bifurcated" manner, first reviewing and affirming Magistrate MacLean's 1995 supplemental opinion holding that plaintiff is not entitled to benefits, and then reviewing and reversing Magistrate Brasseur's 1988 decision denying defendant's petitions to stop. In each part of its bifurcated analysis, the WCAC focused upon plaintiff's performance of non-favored post-injury work for defendant and the fact that plaintiff ultimately lost that job in 1980 because of a lay-off. Citing *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628; 566 NW2d 896 (1997), the WCAC concluded these facts show that plaintiff's unemployment is not causally related to his work injury and therefore plaintiff is not entitled to wage loss benefits.

As a result of the bifurcated analysis, the WCAC's dispositive order contains two separate holdings. Framed in the alternative: (1) plaintiff is not entitled to any weekly benefits for his 1979 work injury at all, based upon the WCAC's affirmance of Magistrate MacLean's 1995 supplemental opinion, or (2) plaintiff is not entitled to weekly benefits after December 19, 1986, based upon the reversal of Magistrate Brasseur's 1988 decision.

II.

This Court's review is limited to questions of law involved in the WCAC's order. Findings of fact made by the WCAC while acting within the scope of its authority are conclusive on appeal, absent fraud, if there is any competent record evidence to support those findings, but the WCAC's decision is subject to reversal if the WCAC operated within the wrong legal framework or based its decision on erroneous legal reasoning. MCL 418.861a(14); MSA 17.237(861a)(14); *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 512; 563 NW2d 214 (1997); *Bates v Mercier*, 224 Mich App 122, 124; 568 NW2d 362 (1997).

III.

On appeal, plaintiff argues that the WCAC violated this Court's remand orders by reconsidering facts and issues that were the subject of the proceedings on plaintiff's claim for compensation rather than focusing solely upon the facts and issues that were properly within the scope of defendant's petitions to stop. We agree.²

The WCAC improperly relied upon Magistrate MacLean's 1995 supplemental opinion as a basis for its decision on remand. As previously noted in this Court's remand 1997 order, Magistrate MacLean's opinion was based upon facts occurring prior to the closing of the original evidentiary record in 1982, i.e., plaintiff's performance of non-favored "mold cleaner" work and plaintiff's subsequent lay-off. The significance of those facts in relation to plaintiff's entitlement to benefits was subject to litigation only in the proceedings on plaintiff's claim for compensation. Because defendant did not appeal the WCAB's determination of compensable disability and wage loss in those proceedings, the WCAB's decision is final and binding as to those issues, and the matter was not subject to relitigation pursuant to defendant's 1993 motion for summary reversal. Magistrate MacLean's opinion addressed the issues raised in defendant's motion for summary reversal, not the issues properly before the WCAC in the appeal from the denial of defendant's petitions to stop or this Court's remand for an explanation of the WCAB's reduction of plaintiff's weekly benefit rate.

The WCAC also improperly relied upon facts occurring prior to the closing of the original evidentiary record in 1982 when reviewing Magistrate Brasseur's 1988 decision on defendant's petitions to stop. In its appellee brief, defendant acknowledges that "petitions to stop only address issues and circumstances that have come into being subsequent to a prior order granting benefits." Here, however, the WCAC reversed Magistrate Brasseur's decision on the basis of circumstances antecedent to the original award of benefits in 1982, i.e., plaintiff's performance of non-favored "mold cleaner" work and his eventual lay-off from that work in 1980. In fact, the WCAC actually reasoned that Magistrate Brasseur should have granted the petitions to stop because there had *not* been any change in plaintiff's condition since his lay-off in 1980.

With regard to the circumstances arising after plaintiff's award, such as plaintiff's landscaping, wood-cutting and airplane construction activities, the WCAC expressly declined to disturb Magistrate

Brasseur's conclusion that such "quasi-vocational" activities were neither inconsistent with plaintiff's claim of continuing disability nor indicative of new wage earning capacity. Given the WCAC's decision to uphold Magistrate Brasseur's findings in that regard, the WCAC should have affirmed Magistrate Brasseur's decision.

IV.

We reverse the February 18, 1998, decision of the WCAC, vacate Magistrate MacLean's 1995 supplemental opinion, and reinstate and affirm Magistrate Brasseur's 1988 decision denying defendant's petitions to stop. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

¹ As a practical matter, defendant's appeal from the denial of its petitions to stop was no longer consolidated with the proceedings on plaintiff's claim for compensation at this point since the sole issue on remand in the latter proceedings was now resolved. Moreover, consolidation is merely a procedural device that permits two or more separate cases to be heard and decided in a single proceeding. Consolidation of the proceedings before the WCAC do not merge the substantive issues to be decided nor expand the limited scope of the remand in the proceedings on plaintiff's claim for compensation.

² Because we find this issue to be outcome-determinative, it is unnecessary for us to address plaintiff's remaining issues regarding the legal standards utilized by the WCAC.