

STATE OF MICHIGAN
COURT OF APPEALS

DONALD LANCING,

Plaintiff-Appellant,

v

BURNS INTERNATIONAL SECURITY
SERVICES, CONSTITUTION STATE
SERVICING COMPANY, and NATIONAL
UNION FIRE INSURANCE,

Defendants-Appellees.

UNPUBLISHED
October 15, 1999

No. 205141
WCAC
LC No. 95-000417

Before: Hood, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals a July 9, 1997 order of the Worker's Compensation Appellate Commission (WCAC), which affirmed the magistrate's decision granting plaintiff a closed aware of benefits. We reverse and remand.

Plaintiff began working for defendant Burns Security in September 1991 operating a truck scale. He testified that the job involved sitting most of the time, some computer work, and answering telephones. Although plaintiff admitted that he had had back problems since at least 1969, he testified that it had never been more troublesome than requiring an occasional day off. However, in February 1992 plaintiff and another employee moved a full 50 gallon plastic waste basket of wood chips. Plaintiff testified that emptying the basket after performing some sort of test on the wood chips was a part of his job duties. Plaintiff slipped and fell, injuring his back. Plaintiff was off work for several months and received worker's compensation benefits. He returned to work in May 1992 at his old job, but did not empty the wood chip barrel any longer. In December 1993 he left work complaining of increasing back pain.

In March 1994 Burns Security contacted plaintiff and asked when he could return to work. Plaintiff reported that his back was still too sore to do the old job. Plaintiff was told that if he could not return that day then his employment was terminated.

A number of medical depositions were admitted into evidence. All medical experts agree that plaintiff is unable to do certain things as a result of his back injury. For example, his treating physician, Dr. Turner, opined that plaintiff should not lift more than 30 pounds and should not engage in repetitive bending or twisting activities. However, when given a hypothetical describing plaintiff's former job but excluding the emptying of the wood chip barrel, Dr. Turner and the other medical experts opined that plaintiff could probably return to that job.

The magistrate found that plaintiff had sustained an injury at work on February 17, 1992, and that he was disabled for a closed period of time. The magistrate found that plaintiff's disability ended on June 2, 1994, the date his treating physician Dr. Turner indicated that plaintiff should be able to perform his old job duties.

On appeal the WCAC affirmed. The WCAC rejected plaintiff's argument that there is no competent evidence to support closing the award on June 2, 1994. The WCAC also rejected plaintiff's contention that he has proved that he suffers from a continuing disability for the following reasons:

In *Rea v Regency Olds/Mazda/Volvo*, 204 Mich App 516 (1994), the Court held that an individual is disabled under the 1987 amended definition of disability, quoted above, if the employee suffers any limitation in wage-earning capacity in work suitable to his qualifications and training. The Court concluded that the physician-imposed lifting restriction disabled Mr. Rea "even though he may be capable of performing other unskilled work which falls within his medical restrictions." *Id.*, p 24.

In an order remanding *Rea* to the Court of Appeals for additional fact-finding, 450 Mich 1201 (1995), the Supreme Court stated:

A majority of this Court is of the opinion that the 1987 definition of disability in the workers' disability compensation act requires a claimant to demonstrate how a physical limitation affects wage earning capacity in work suitable to the claimant's qualifications and training. It is not enough for the claimant claiming partial disability to show an inability to return to the same or similar work.

If the claimant's physical limitation does not affect the ability to earn wages in work in which the claimant is qualified and trained, the claimant is not disabled.

Likewise in *Michales v Morton Salt Co*, 450 Mich 479 (1995), the Supreme Court held that the plaintiff who has suffered a work-related hearing loss had "not sustained a disability because he has not met his burden of establishing that his *wage-earning capacity* has been limited by his hearing loss." [Emphasis added.]

In the matter before us, plaintiff returned to the same position after his injury with no diminution in wage-earning capacity. The record also demonstrates that all the medical experts who testified were of the opinion that plaintiff was capable of performing the scale house clerk job as of June, 1994.

Thus there exists the requisite support for the magistrate's finding that plaintiff had recovered and did not prove a continuing disability.

Finally, the WCAC rejected plaintiff's claim that he was performing favored work after his back injury and after his last day of employment. The WCAC agreed with defendants that the issue had not been properly raised below and so was not preserved for appellate consideration. Moreover, the WCAC found that the record did not support plaintiff's claim that he had returned to favored work, inasmuch as by his own testimony he returned to the same job and unilaterally decided not to empty barrels of wood chips.

Plaintiff applied for leave to appeal and this Court peremptorily reversed, holding that on the facts found by the magistrate plaintiff is entitled to an open award of benefits. Defendants applied to the Supreme Court for leave to appeal. In lieu of granting leave, the Supreme Court remanded to this Court for plenary consideration. We now reverse and remand.

II

Plaintiff argues that the magistrate erred in closing the award of benefits because he is clearly disabled from performing his former duties. We agree that the record demonstrates that he is disabled, but we must remand for a determination whether his disability is compensable.

This Court's review of a decision by the WCAC is limited. In the absence of fraud, findings of fact made by the WCAC acting within its powers shall be conclusive. This Court may review questions of law involved with any final order of the WCAC. MCL 418.861a(3) & (14); MSA 17.237(861a), *Holden v Ford Motor Co*, 439 Mich 257; 484 NW2d 227 (1992). However, this Court does not independently review the question whether the magistrate's findings of fact are supported by substantial evidence. Instead, this Court's review is at an end once it is satisfied that the WCAC has understood and properly applied its own standard of review. So long as the WCAC did not "misapprehend or grossly misapply" the substantial evidence test and gave adequate reasons grounded in the record in the event it reversed the magistrate, this Court should deny leave to appeal or if leave is granted should affirm. *York v Wayne Co Sheriff's Dept*, 219 Mich App 370, 378-379; 556 NW2d 882 (1996), cited with approval in *Goff v Bil-Mar Foods (After Rem)*, 454 Mich 507, 528 n 16; 563 NW2d 214 (1997).

The WCAC affirmed the magistrate's decision to close the award as of the date plaintiff's treating physician agreed that plaintiff could return to his old job, except for the heavy lifting of the wood chips, based on the Supreme Court's peremptory order in *Rea v Regency Olds*, 450 Mich 1201; 536 NW2d 542 (1995), which the WCAC reasonably interpreted as signaling the imminent reversal of this

Court's interpretation of the statutory definition of disability in *Rea*. 204 Mich App 516; 517 NW2d 251 (1994). However, the Supreme Court subsequently reversed its position and agreed with this Court's decision in *Rea. Haske v Transport Leasing, Inc*, 455 Mich 628; 566 NW2d 896 (1997). Under *Haske* an employee is partially disabled and entitled to full benefits if he suffers any limitation in work suitable to his qualifications and training. *Id.* at 655. However, "disability does not create a presumption of wage loss." *Id.* In order to prove a compensable disability, an employee must show (1) a work-related injury, (2) subsequent loss of actual wages, and (3) that the injury caused the subsequent wage loss. "Where the employee has carried his burden of proving wage loss, he will, as a practical matter, have proved that he is unable to perform a single job within his qualifications and training, and, therefore, that he is disabled." *Id.* at 662.

In this case the magistrate found that plaintiff sustained a work-related injury in February 1992. The magistrate also found that plaintiff's disability ended by June 2, 1994, the date on which his treating physician opined that he could return to the job, so long as no heavy lifting was involved. This is clear error in light of *Haske*, inasmuch as all the medical witnesses agreed that plaintiff's physical abilities are more limited as a result of his work-related injury, and in particular that he can no longer do any heavy lifting, such as emptying barrels of wood chips.

Although the record demonstrates that plaintiff is disabled, it is not clear that his disability is compensable, i.e., that his loss of wages is causally related to the injury. The magistrate noted plaintiff's testimony that emptying the wood chips container was part of his job duties, although he was subsequently able to avoid this part of his job for reasons unknown to this Court. The magistrate also noted that a videotape sponsored by defendants appeared to show that the duties of the job were entirely sedentary. Because the magistrate did not have the benefit of *Haske*, we remand for reconsideration of plaintiff's claim for an open award. On remand the magistrate should decide whether plaintiff's wage loss was caused by the injury. In doing so the magistrate should determine whether plaintiff's job included duties he could no longer perform, and whether his refusal to return to work in March 1994 was reasonable or the result of malingering. The magistrate should also make findings of fact and conclusions of law regarding the significance, if any, of plaintiff's ability to avoid heavy lifting when he returned to work after the injury.

III

Plaintiff claims that when he returned to work in May 1992 he returned to favored work or reasonable employment. MCL 418.301(5) and (9). See also *Dimcevski v Utica Packing Co (On Remand)*, 215 Mich App 332, 335-337; 544 NW2d 763 (1996). We agree with the WCAC and defendant that the issue was not explicitly raised before the magistrate. We also agree that there is no evidence that the employer explicitly modified plaintiff's job in order to accommodate his medical restrictions. An employee's unilateral decision not to do certain tasks he previously performed does not necessarily convert regular employment into reasonable employment. However, we believe it is possible for an employer to acquiesce in an employee's otherwise unilateral modification of his job duties, and thereby convert regular employment into reasonable employment. On remand the magistrate shall take this possibility into consideration.

Reversed and remanded to the magistrate for reconsideration of plaintiff's claim for an open award of benefits in light of *Haske, supra*. We do not retain jurisdiction.

/s/ Harold Hood

/s/ E. Thomas Fitzgerald

/s/ Michael R. Smolenski