STATE OF MICHIGAN

COURT OF APPEALS

ALI A. BAZZY,

Plaintiff-Appellee,

v

ANTONS GENTLEMEN'S APPAREL and CNA INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
November 19, 1999

No. 208493
WCAC
LC No. 96-000386

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendants appeal by leave granted the decision of the Worker's Compensation Appellate Commission affirming the magistrate's open award of disability benefits. We reverse and remand for further proceedings.

Plaintiff worked as a salesperson in a men's clothing store. He sought worker's compensation benefits alleging he sustained heart related injuries in March 1991 and November 1993, due to stress and work load on the job. Plaintiff testified regarding two occasions where he was hospitalized and underwent heart surgery following incidents where he experienced chest pains and shortness of breath at work. Plaintiff did not present hospital records or the testimony of his treating physicians.

Plaintiff relied solely on his own testimony, and the testimony of Dr. Barry Moss, who conducted an examination of plaintiff on October 22, 1994. An electrocardiogram showed results consistent with a prior lateral wall myocardial infarction. The primary diagnostic impression of Dr. Moss was coronary artery disease with a prior myocardial infarction. None of the standard risk factors for heart disease were present, other than job stress. Dr. Moss opined that the infarction was caused by physical labor at work. He opined that plaintiff was permanently disabled. Defendant presented the report of Dr. John R. Simpson, who opined that plaintiff had been successfully treated for coronary artery disease, and was not disabled from all active employment. Dr. Simpson concluded that plaintiff's coronary artery disease was unrelated to his employment.

The magistrate gave credence to the testimony of plaintiff and Dr. Moss, and found that Dr. Simpson's report was contradicted by the facts presented. Applying the standards set forth in *Farrington v Total Petroleum, Inc,* 442 Mich 201; 501 NW2d 76 (1993), the magistrate found that plaintiff had none of the standard risk factors identified as contributing to heart disease, and that his testimony supported a finding of disability. The magistrate awarded benefits from March 23, 1991 through September 1991, and an open award of benefits from November 23, 1993 until further order.

Defendants appealed to the Worker's Compensation Appellate Commission, which affirmed the magistrate's decision with modification. The commission characterized defendants' argument as contesting the magistrate's decision to rely on plaintiff's expert rather than defendants' expert. The commission found that the magistrate explained the basis for his decision, and properly applied the analysis mandated in heart cases by *Farrington, supra*. The commission modified the benefit rate awarded, finding that the magistrate used an erroneous wage rate. It concluded that defendants waived application of the two year back rule, MCL 418.381(2); MSA 17.237(381)(2) by failing to raise this issue below. This Court granted leave to appeal.

We find that the commission failed to address the essence of several of defendants' arguments, and remand for further proceedings. This Court's review in worker's compensation cases is limited to questions of law. Findings of fact made or adopted by the WCAC are conclusive on appeal, absent fraud, if there is any competent evidence in the record to support them. *Layman v Newkirk Electric Associates, Inc,* 458 Mich 494, 498; 581 NW2d 244 (1998). A decision of the WCAC is subject to reversal if the commission operated within the wrong legal framework or if the decision was based on erroneous legal reasoning. *Bates v Mercier,* 224 Mich App 122, 124; 568 NW2d 362 (1997).

Defendants first assert that there was no evidence of a specific heart injury, and the appellate commission erred in awarding benefits. Our review is hampered by the absence of medical evidence from plaintiff's treating physician and hospital. While there was evidence presented showing that plaintiff suffered a myocardial infarction, there is little evidence that would establish when this damage was sustained. This determination is particularly important given the issues raised by defendant. We remand this matter to the Board of Magistrates for further factual findings as to the date of the myocardial infarction. *Layman, supra,* 505. The parties may submit additional evidence to the magistrate in support of their positions.

Defendants next argue that the commission erred in finding that they waived the application of the two year back rule, MCL 418.381(2); MSA 17.237(381)(2), by failing to raise this issue before the magistrate. Although plaintiff listed the 1991 injury in his application for hearing, defendants assert that there was no indication that he was seeking benefits for the earlier period of disability. There is no basis for finding a waiver of the two year back rule if defendants lacked notice that plaintiff sought benefits based on the prior injury. *Howard v General Motors Corp,* 427 Mich 358; 399 NW2d 10 (1986). Defendants may raise the application of this section on remand before the magistrate to allow for a factual determination of whether defendants had notice that plaintiff sought benefits based on the 1991 injury.

Finally, defendants argue that the magistrate failed to reconcile conflicting evidence as to the proper benefit rate. Plaintiff testified that his income prior to the 1991 injury was $4,000 per month. He testified that when he returned to work in 1993, his income was approximately $2,000 per month. However, he also testified that his income was reduced to one-third of his previous earnings. The magistrate failed to acknowledge or resolve this inconsistency, and our review is again hampered by the lack of more specific evidence as to plaintiff's earnings. On remand, the parties may present further evidence to establish the proper level of benefits.

Remanded to the Board of Magistrates for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra