

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JEWEL KAY ASHER,

Plaintiff-Appellant,

v

GRANDVUE MEDICAL CARE FACILITY and  
CITIZENS INSURANCE COMPANY,

Defendants-Appellees.

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UNPUBLISHED

May 9, 2000

No. 211398

WCAC

LC No. 95-000777

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the Worker's Compensation Appellate Commission (WCAC)'s opinion and order affirming the magistrate's determination to deny plaintiff an open award of worker's compensation benefits. We affirm.

In August 1993, plaintiff began working for defendant Grandvue Medical Care Facility as a certified nurse's assistant. On October 4, 1993, while assisting in the transfer of a patient from her bed into her wheel chair, plaintiff injured her left wrist. In approximately mid March 1994, plaintiff returned to work, having accepted a reasonable offer of employment that integrated certain restrictions recommended by plaintiff's treating physician. Plaintiff's favored work duties included serving food trays, monitoring patients' vital signs, brushing patients' teeth, and assisting patients in dressing themselves. Shortly after returning to work, however, apparently within several days, plaintiff stopped reporting for work due to continued pain and swelling in her wrist. Plaintiff alleged that she presented defendant with a doctor's note, presumably one which excused her attendance at work, but no note was admitted into evidence.

Also in mid March 1994, plaintiff entered a bar and was subsequently charged with violating the terms of her probation, for which she received a brief jail sentence.<sup>1</sup> By late July 1994, plaintiff had completed serving her sentence, and defendant had terminated plaintiff's employment.

The magistrate found that plaintiff had suffered a work-related injury in October 1993, and that she subsequently returned to work pursuant to defendant's offer of reasonable employment/ favored

work. The magistrate concluded, however, that “[t]hrough her own unjustified conduct Plaintiff removed herself from favored work in March of 1994,” “without good and proper justification.” According to the magistrate, plaintiff’s disability ended on January 10, 1995 when she indicated to her doctor that her pain had diminished. The magistrate ultimately awarded plaintiff an award of closed benefits for the period from October 4, 1993 to March 15, 1994.

The WCAC affirmed the magistrate in all respects, rejecting plaintiff’s many allegations of error. One of plaintiff’s contentions was that the magistrate improperly limited her award of benefits because defendant’s termination of her employment constituted a withdrawal of the offer of reasonable employment that necessarily reestablished her eligibility for benefits. The WCAC concluded that defendant’s termination of plaintiff’s employment for just cause barred any reinstatement of plaintiff’s benefits.

This Court granted plaintiff’s application for leave to appeal and in September 1999 heard the parties’ oral arguments. In October 1999, the Michigan Supreme Court heard oral arguments in the case of *Perez v Keeler Brass Co*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 112107, decided March 29, 2000), which case the WCAC had cited as supporting its conclusion that defendant’s termination of plaintiff precluded her further recovery of worker’s compensation benefits. We therefore delayed our decision during the pendency of *Perez*, in light of which we now consider plaintiff’s appeal.

On judicial appellate review, we must consider “whether the WCAC acted in a manner consistent with the concept of administrative appellate review that is less than de novo review in finding that the magistrate’s decision was or was not supported by competent, material, and substantial evidence on the whole record.” *Hagerman v Gencorp Automotive*, 457 Mich 720, 727; 579 NW2d 347 (1998).<sup>2</sup> A decision of the WCAC is subject to reversal if the WCAC operated within the wrong legal framework or its decision was based on erroneous legal reasoning. *Jones-Jennings v Hutzler Hosp (On Remand)*, 223 Mich App 94, 105; 565 NW2d 680 (1997). Absent an indication of fraud, we must consider the WCAC’s factual findings conclusive. MCL 418.861a(14); MSA 17.237(861a)(14). This Court should affirm the WCAC if it (1) carefully examined the record, (2) was duly cognizant of the deference to be given to the magistrate’s decision, (3) and did not misapprehend or grossly misapply the substantial evidence standard by which the WCAC must review the magistrate’s decision. *Connaway v Welded Constr Co*, 233 Mich App 150, 169-170; 592 NW2d 414 (1998).

Plaintiff first contends that the magistrate improperly relied in his opinion on medical findings by Dr. Melvyn Wolf, who did not testify and whose records were not admitted into evidence, and that the WCAC erred in finding harmless the magistrate’s citation of the improper testimony. Our review reveals that the WCAC correctly noted in its opinion that the magistrate’s references to Dr. Wolf’s findings were limited to Dr. Wolf’s diagnosis of a tear in plaintiff’s wrist, more specifically known as triangular fibro cartilage complex. This same diagnosis also was made by physicians whose depositions or reports the magistrate properly had admitted into evidence, including the deposition of plaintiff’s treating physician, Dr. Mark S. Leslie. The WCAC astutely noted that this diagnosis, which we observe that plaintiff cited in her briefs on appeal to the WCAC and this Court, tended to favor plaintiff’s position that she continues to suffer a disability. Because Dr. Wolf’s diagnosis tended to support plaintiff’s claim, the WCAC correctly rejected plaintiff’s assertion that she was deprived of the

opportunity to have the magistrate draw an adverse inference from defendants' failure to produce Dr. Wolf or his records. We conclude that the WCAC carefully reviewed the record, properly reviewed the magistrate's findings, and committed no legal error in determining that plaintiff suffered no prejudice arising from the magistrate's mention of Dr. Wolf. *Connaway, supra*. See also *Duke v American Olean Title Co*, 155 Mich App 555, 572; 400 NW2d 677 (1986) ("The erroneous admission of hearsay testimony is harmless error where the same facts are shown by other competent testimony.").

Plaintiff also charges that despite evidence of some improvement in her condition, the magistrate ignored the absence of any doctor's opinion that plaintiff could work without restrictions, and improperly found that plaintiff "should effectively be able to 'suck it up' and find work somewhere in our 'robust economy.'" Plaintiff suggests that because Dr. Leslie and other physicians recommended ongoing restrictions, her continuing disability was established as a matter of law. Plaintiff thus argues that the magistrate erred in concluding that as of January 10, 1995 plaintiff was no longer disabled, and that the WCAC employed erroneous legal reasoning regarding the definition of "disability" in affirming the magistrate's analysis.

Plaintiff apparently grounds her argument on the erroneous premise that the magistrate could find that her disability had ended only if medical testimony indicated that she had fully recovered, not merely improved. We note initially that contrary to plaintiff's suggestion, the magistrate was not bound in any respect by the medical expert testimony presented. *Koschay v Barnett Pontiac, Inc*, 386 Mich 223, 230; 191 NW2d 334 (1971). Moreover, in light of the magistrate's finding that plaintiff's subjective complaints regarding her injury were exaggerated and unreliable, the recommendations of Dr. Leslie and others based on plaintiff's subjective complaints were likewise undermined. The magistrate did not conclude that plaintiff was free of any pain, but apparently determined that the level of pain plaintiff experienced was not so significant that it disabled her from returning to any work. While plaintiff's arguments on appeal overlook the importance of the magistrate's credibility determination, *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 511, 516, 536; 563 NW2d 214 (1997), the following portions of the WCAC's opinion demonstrate that it did not.

In reality, the magistrate determined that plaintiff's credibility was highly suspect and that there was little objective basis for her complaints of continuing, disabling pain. From this he concluded that her subjective complaints were not to be taken at face value. He then found as fact that even though plaintiff complains of pain in her wrist, she was capable of returning to her regular work because she had improved as of January 10, 1995. This conclusion was based on plaintiff's own report of symptoms to her treating doctor, Dr. Leslie.

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[T]he existence of some objective support for plaintiff's condition does not invalidate the magistrate's credibility determination and the conclusions which flowed from it. The magistrate agreed that plaintiff had some pathology in the wrist but concluded based on the testimony of Dr. Leslie that plaintiff's symptoms were in excess of the objective findings. This is a reasonable analysis of the record in this case

supported by ample testimony in the record. We find no error in this factual disposition of the disability issue.

Our review of the challenged portion of the WCAC's opinion again reveals that the WCAC properly and carefully examined the relevant record concerning the existence of plaintiff's disability, was duly cognizant of the deference to be given to the magistrate's decision, and did not misapprehend or grossly misapply the substantial evidence standard by which it reviews the magistrate's decision. *Connaway, supra*.

We further reject plaintiff's argument that the trial court and WCAC incorrectly relied on the residual wage earning capacity doctrine disavowed in *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628, 634-635, 653-662; 566 NW2d 896 (1997), or Michigan's robust economy in determining that plaintiff was no longer disabled. The WCAC recognized that "[t]he magistrate expressly discounted [a] witness' testimony regarding general availability of jobs and did not rely on it in his determination that plaintiff was not disabled." When viewed in context, the magistrate's reference to Michigan's "robust economy" represents his effort to encourage plaintiff to resolve her nondisabling pain issues by returning to work, which intent the WCAC also correctly discerned. Because we find no erroneous legal reasoning within the WCAC's affirmation of the magistrate's finding that plaintiff no longer suffered a disability as of January 10, 1995, the WCAC's decision in this respect is not subject to reversal. *Jones-Jennings, supra*.

Plaintiff next asserts as error the magistrate's finding and the WCAC's affirmation that defendant's March 1994 offer of employment constituted reasonable employment/favored work that plaintiff was capable of performing. Plaintiff incorrectly avers, however, that no evidence supported the magistrate's conclusion. Plaintiff's testimony acknowledging the offered position's various restrictions, Dr. Leslie's deposition testimony opining that these restrictions appeared reasonable, and the fact that plaintiff briefly did perform the restricted duties required by the position<sup>3</sup> represent competent proof that the employment offered by defendant remained within plaintiff's capacity to perform. To the extent that the WCAC's opinion addresses this argument of plaintiff, it again reflects the WCAC's review of the record and appropriate deference to the magistrate's determination, which we will not reverse on appeal. *Connaway, supra*.

Lastly, plaintiff contends that even accepting that defendant's offer constituted reasonable employment that plaintiff unreasonably refused, the magistrate and WCAC erred in limiting plaintiff's recoverable benefit period to March 14, 1994 because defendant's July 1994 termination of plaintiff's employment constituted a withdrawal of the reasonable employment offer that ended the period of plaintiff's refusal. We note that plaintiff correctly argues that the WCAC erroneously applied the law in concluding that defendant's termination of plaintiff's employment for just cause permanently foreclosed plaintiff's right to recover benefits under MCL 418.301(5)(a); MSA 17.237(301)(5)(a). The Michigan Supreme Court has observed that MCL 418.301(5)(e); MSA 17.237(301)(5)(e) applies when an employer terminates even for just cause an employee who is performing favored work and has performed the favored work for less than 100 weeks. According to the Court, the plain language of subsection 301(5)(e) makes clear that an employee who has established benefit entitlement pursuant to the terms of subsection 301(5)

has a right to benefit continuation even if the employee is terminated for just cause. *Russell v Whirlpool Financial Corp*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 111255, decided March 29, 2000), slip op at 8-10.

Although the WCAC employed erroneous legal reasoning, we nonetheless affirm the magistrate's and WCAC's award of closed benefits because the magistrate and WCAC reached the correct result. *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997). As we have concluded, the magistrate and WCAC correctly and properly found that as of March 15, 1994 plaintiff unreasonably refused defendant's offer of reasonable employment. Under these circumstances, plaintiff did not permanently forfeit her entitlement to worker's compensation benefits. Subsection 301(5)(a) applies to limit plaintiff's recovery of worker's compensation benefits only during the period of plaintiff's unreasonable refusal. *Perez*, *supra* at 9-11. While plaintiff contends that the period of her unreasonable refusal of reasonable employment ceased when defendant terminated her employment in July 1994, the Supreme Court in *Perez* expressly rejected this suggestion, holding that "the withdrawal of an offer does not end the employee's 'period of refusal' under the Worker's Disability Compensation Act, and, therefore, that the withdrawal of an offer does not entitle the employee to benefits." *Id.* at 1-2.

The *Perez* Court explained that the availability of a particular job is irrelevant to the question whether a disabled worker remains voluntarily removed from the work force because the plain language of subsection 301(5)(a) makes the dispositive question whether the employee's refusal to work has ended. *Id.* at 14. "The power to end the period of refusal lies solely with the employee, regardless of the circumstances of the particular employer or the job market as a whole." *Id.* at 15. In the instant case, the period of plaintiff's unreasonable refusal commenced on March 15, 1994. Plaintiff offers no indication whatsoever that after this point in time and before January 10, 1995, the date on which the magistrate and WCAC determined that plaintiff's disability ended, she exhibited a desire to reenter the work force. Because no indication exists that plaintiff sought to end her period of refusal while she remained disabled and otherwise eligible to receive worker's compensation benefits, the magistrate and the WCAC correctly permitted plaintiff's recovery of benefits only between the October 4, 1993 date of her disabling injury and her March 15, 1994 unreasonable refusal of reasonable employment.

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

<sup>1</sup> Plaintiff's entry into the bar violated a term of the probation she had received for a drunk driving conviction. According to plaintiff's testimony, she received a sentence of forty-five days in jail, but was released on July 23, 1994 after serving only thirty-seven days.

<sup>2</sup> The *Hagerman* Court quoted *Goff v Bil-Mar Foods (After Remand)*, 454 Mich 507, 511; 563 NW2d 214 (1997), which had quoted *Holden v Ford Motor Co*, 439 Mich 257, 267-268; 484 NW2d 227 (1992).

<sup>3</sup> While plaintiff testified that the restricted work became too painful to perform, we note that the magistrate was not obligated to, and clearly did not, credit plaintiff's assessment of her continuing pain.