

STATE OF MICHIGAN

COURT OF APPEALS

JOHN A. ALES,

Plaintiff-Appellant,

v

SNOWDEN, INCORPORATED and
NORTHBROOK PROPERTY & CASUALTY
COMPANY,

Defendants-Appellees.

UNPUBLISHED
September 8, 2000

No. 222240
WCAC
LC No. 97-000638

Before: Fitzgerald, P.J., and McDonald and Zahra, JJ.

PER CURIAM.

Plaintiff applies by leave granted the Worker's Compensation Appellate Commission's (WCAC) order concluding that plaintiff suffers only a partial disability. We reverse.

In 1986, plaintiff began working for defendant Snowden in general road construction. In September 1989, plaintiff fell while carrying a box of bolts out of a truck. He had problems walking right after the fall, but did not seek treatment that day. Within a day or two, defendant sent him to a chiropractor, who referred plaintiff to a physician. Plaintiff complained of pain from his waist down. He also experienced urological problems after his injury.

In November 1989, Dr. Stefan Glowacki diagnosed plaintiff with a herniated disc. A CT and myelogram supported the diagnosis. Glowacki performed surgery in December 1989. Plaintiff experienced difficulty walking after the surgery. Plaintiff remained in Glowacki's care, and he receives conservative treatment. A 1994 CT revealed scarring and a possible herniated disc. An MRI also revealed a herniated disc. As of May 1995, plaintiff complained of constant pain.

Glowacki determined that plaintiff is unable to return to work because of his condition. He indicated that changes in plaintiff's spinal column preclude rehabilitation of any kind. Glowacki stated that the MRI findings did not change over time and that a 1995 motorcycle accident had little or no consequence on plaintiff's lower back.

Dr. S. A. Colah examined plaintiff in August 1995, ten days before plaintiff was in his motorcycle accident. In Colah's opinion, plaintiff's disability is due solely to degenerative disc disease. It appeared to Colah that plaintiff's disability is work-related. Colah stated that plaintiff should be able to return to light sedentary work, but should avoid excessive bending and lifting over twenty pounds and should have the option to stand or sit.

Dr. E. Michael Krieg examined plaintiff in April 1996. He found no residuals from plaintiff's surgery. It is Krieg's opinion that plaintiff can return to work with no restrictions. However, the magistrate found Krieg's testimony less credible than that of Glowacki and Colah.

Although rehabilitation efforts were attempted from 1989 through 1994, in May 1990 a physician, Dr. Burke, advised plaintiff that he should not undergo vocational rehabilitation for two years. Glowacki recommended no rehabilitation training, but instead recommended that plaintiff undergo more physical reconditioning. Defendants submitted evidence that plaintiff was observed engaging in activities that contradicted his complaints.

The magistrate found that credible medical testimony supported a finding that plaintiff suffered a continuing disability. He found that plaintiff suffered a work-related injury, specifically a herniated disc that required surgery. The magistrate found that continuing residuals from that injury existed. The magistrate concluded that rehabilitation efforts were contrary to Glowacki's advice and that there was no evidence of any actual job being presented to plaintiff. The magistrate found:

Evidence of education and training would show that plaintiff is restricted to general common labor which would exceed his reasonably imposed restrictions due to the work-related injury. Therefore, plaintiff has shown by a preponderance of the evidence not only a work injury but also disability in accordance with 301(4), specifically a limitation in the plaintiff's wage earning capacity in work suitable to his qualifications and training which resulted from the work related injury.

The WCAC affirmed the magistrate's conclusion that plaintiff suffered a work-related injury. Plaintiff argued before the WCAC that he established a total disability. The WCAC disagreed, finding that plaintiff established only that he was partially disabled. Plaintiff appeals the WCAC's conclusion. We find that the WCAC erred in concluding that plaintiff established that he is only partially disabled.

Our Supreme Court recently clarified the standards of review applied in worker's compensation cases in *Mudel v Great Atlantic & Pacific Tea Co*, ___ Mich ___; ___ NW2d ___ (2000):

The WCAC must review the magistrate's decision under the "substantial evidence" standard, while the courts must review the WCAC's decision under the "any evidence" standard. Review by the Court of Appeals and this Court begins with the WCAC's decision, not the magistrate's. If there is any evidence supporting the WCAC's factual findings, and if the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate, then the courts must treat the WCAC's factual findings as conclusive. [*Mudel, supra* at slip op p 19.]

In reviewing the magistrate's decision, the WCAC must review "the whole record, analyzing all the evidence presented, and determining whether the magistrate's decision is supported by competent, material, and substantial evidence." *Id.* at 7. The WCAC is to conduct a qualitative and quantitative analysis of the whole record, MCL 418.851a(13); MSA 17.237(861a)(13). This provision, together with that providing that the WCAC's factual findings, in the absence of fraud, shall be considered conclusive, "grants the WCAC certain fact-finding powers and permits it in some circumstances to substitute its own findings of fact for those of the magistrate, if the WCAC accords different weight to the quality or quantity of the evidence presented." *Mudel, supra* at slip op p 8.

Further, as expressed in *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992):

If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal or, if it is granted, to affirm, in recognition that the Legislature provided for administrative appellate review by the seven-member WCAC of decisions of thirty magistrates, and bestowed on the WCAC final fact-finding responsibility subject to constitutionally limited judicial review.

This Court may review questions of law involved with any final order of the WCAC. MCL 418.861a(14); MSA 17.237(861a)(14); *Holden, supra* at 263. The WCAC's decision may be reversed if it operated within the wrong legal framework or based its decision on erroneous legal reasoning. *Illes v Jones Transfer Co (On Remand)*, 213 Mich App 44, 50; 539 NW2d 382 (1995).

Plaintiff argues that the magistrate and WCAC erred in concluding that plaintiff is partially disabled rather than totally disabled. The difference between total and partial disability is explained in *Haske v Transport Leasing Co*, 455 Mich 628, 655; 566 NW2d 896 (1997):

Total disability arises from an injury, i.e., "incapacity for work resulting from a personal injury is total" under subsection 351(1), when an employee proves that he is unable to perform all work suitable to his qualifications and training as a result of his injury. A partial disability arises from an injury, i.e., "incapacity for work resulting from a personal injury is partial" under section 361(1), when an employee proves that he is unable to perform a single position within his qualifications and training.

A careful reading of the magistrate's decision indicates that the magistrate found, without specifically stating, that based on plaintiff's education and training, he was restricted to the field of general common labor and that his restrictions prevented him from working in that field. Under *Haske*, these factual findings require a legal conclusion that plaintiff is totally disabled, because plaintiff is unable to perform work suitable to his qualifications and training as a result of his work-related injury.

The WCAC stated at the beginning of its opinion that it “affirm[s] the magistrate’s decision and adopt[s] his opinion, in its entirety, as our own,” citing MCL 418.861a(1); MSA 17.237(861a)(1). However, it ultimately rejected plaintiff’s argument:

We now address the issue raised by [plaintiff] in his cross-appeal, namely, that his disability is total. We believe that under the *Haske* standard, [plaintiff] is not correct. The *Haske* Court held that when an employee proves that he is unable to perform all work suitable to his qualifications and training, the disability is total. Partial disability is proven by the inability to perform a single position within the claimant’s qualifications and training. . . .

This record supports a finding that [plaintiff] cannot perform his job for [defendant]. As such, he is partially disabled.

The WCAC correctly noted that the *Haske* Court instructed that when an employee proves that he is unable to perform all work suitable to his qualifications and training, the disability is total. In adopting the magistrate’s findings of fact and concluding that plaintiff is only partially disabled, the WCAC erred as a matter of law. Based on the factual findings of the magistrate, adopted by the WCAC, plaintiff established that his disability is total.

Reversed.

/s/ E. Thomas Fitzgerald

/s/ Gary R. McDonald