

STATE OF MICHIGAN
COURT OF APPEALS

EUGENE A. HARDY,

Plaintiff-Appellee,

v

CHRYSLER CORPORATION,

Defendant-Appellant.

UNPUBLISHED

September 15, 2000

No. 222360

WCAC

LC No. 95-000294

Before: Fitzgerald, P.J., and Holbrook, Jr. and McDonald, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. Defendant appeals the decision of the Worker's Compensation Appellate Commission (WCAC) affirming the magistrate's decision and awarding benefits to plaintiff. We affirm.

Plaintiff injured his knee during the course of his employment for defendant. While recovering from surgery, he accepted a non-disability retirement package, and did not return to work. Thereafter, he sought worker's compensation benefits. The magistrate found plaintiff totally disabled, based on his inability to perform activities required by his job, and granted him an open award of benefits. The magistrate rejected defendant's assertion that plaintiff terminated active employment when he retired and was therefore precluded by the "retiree presumption" from receiving benefits. MCL 418.373(1); MSA 17.237(373)(1).

The WCAC affirmed the magistrate's decision and rejected defendant's contention that an employee who is recovering from surgery should be considered actively employed for a reasonable time following the surgery, and thus subject to the retiree presumption. In addition, the WCAC upheld the magistrate finding that plaintiff was totally disabled, MCL 418.301(4); MSA 17.237(301)(4), and entitled to an open award of benefits.

The WCAC does not review a magistrate's decision de novo; nevertheless, it must undertake both a qualitative and quantitative analysis of the evidence to ensure a full, thorough, and fair review. MCL 418.861a(13); MSA 17.237(861a)(13); *Mudel v Great Atlantic & Pacific Tea Co*, ___ Mich ___; ___ NW2d ___ (No. 111702, decided July 25, 2000), slip op at 6-8. The WCAC is required to

determine whether the magistrate's findings were supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); MSA 17.237(861a)(3); *Michales v Morton Salt Co*, 450 Mich 479, 484; 538 NW2d 11 (1995). If the WCAC finds that the magistrate did not rely on competent evidence, it may then make its own findings. *Mudel, supra*, slip op at 8. Judicial review is limited to the findings made by the WCAC, and those findings are conclusive if there is any competent evidence to support them. *Id.*, slip op at 9-10. If it appears that the WCAC carefully examined the record, 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, the judicial tendency should be to affirm the WCAC's decision. *Id.*, slip op at 12. We review a question of law raised by any final order of the WCAC on a de novo basis. *Oxley v Dep't of Military Affairs*, 460 Mich 536, 540-541; 597 NW2d 89 (1999).

MCL 418.373(1); MSA 17.237(373)(1), the retiree presumption, reads in pertinent part:

An employee who terminates active employment and is receiving nondisability or retirement benefits under either a private or governmental pension or retirement program, . . . that was paid by or on behalf of an employer from whom weekly benefits under this act are sought shall be presumed not to have a loss of earnings or earning capacity as the result of a compensable injury or disease under either this chapter or chapter 4. This presumption may be rebutted only by a preponderance of the evidence that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience.

Defendant argues that the WCAC erred as a matter of law by concluding that the retiree presumption did not apply in this case. We disagree and affirm the WCAC's decision. In *Frasier v Model Coverall Service, Inc*, 182 Mich App 741, 744; 453 NW2d 301 (1990), the claimant was off work due to a work-related disability when he accepted a non-disability retirement. The *Frasier* Court, noting that the rules of statutory construction required it to give the phrase "active employment" in § 373(1) its ordinary meaning, held that because the claimant was off work due to a work-related injury and was not performing his customary duties at the time he retired, he was not engaged in active employment at that time. Here, plaintiff was off work due to a work-related disability. He could not resume his customary duties at the time he chose to retire. The WCAC correctly applied *Frasier, supra*, which is controlling, and held that the retiree presumption was inapplicable in this case. Defendant's assertion that the WCAC's decision compels the conclusion that an employee who is off work for any reason, such as vacation, could retire and escape application of the retiree presumption by claiming no active employment at the time of retirement is without merit. An employee who is off work for a reason such as a vacation or a factory shutdown is not off work due to an inability to perform his customary duties at work. Such a scenario would support the application of § 373(1). See *Mason v Chrysler Corp*, 201 Mich App 17; 506 NW2d 240 (1993), modified 444 Mich 875; 511 NW2d 676 (1993).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald