STATE OF MICHIGAN

COURT OF APPEALS

VICKI L. HOLLOWAY,

Plaintiff-Appellant,

v

UNITED PARCEL SERVICE and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
December 1, 2000

No. 211209
WCAC
LC No. 95-000866

Before: Jansen, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the Worker's Compensation Appellate Commission's (WCAC's) affirmance of the magistrate's determinations that plaintiff had fully recovered from a work related injury and therefore no longer suffered a disability for which she was entitled to worker's compensation benefits. MCL 418.301; MSA 17.237(301). We reverse and remand.

Plaintiff worked for defendant in various capacities from April 1976 through January 1984. Beginning in 1981, plaintiff worked in a Roseville office of defendant performing the duties of a clerk, which included the daily handling of hundreds of packages weighing as much as seventy pounds each. By January 11, 1984, plaintiff stopped reporting to work due to continuing back and leg pains. Plaintiff was diagnosed with a herniated disc and in April 1984 underwent a laminectomy. Plaintiff did not return to work for defendant.

In July 1984, plaintiff filed with the Workmen's Compensation Bureau a petition seeking benefits. In October 1987, a magistrate issued an opinion and order finding that plaintiff was totally disabled after suffering work related injuries in November 1983 and January 1984, and ordering that plaintiff receive an open award of benefits "until further order of the Bureau." In December 1991, the WCAC affirmed the magistrate's decision.

Sometime during 1991 or 1992, defendants filed a petition to stop and recoup plaintiff's benefits. After a July 1995 hearing,[1] the magistrate found as follows:

[1] In June 1994, the case underwent mediation, but did not achieve a settlement.

> This is one of the few times in my experience when medical experts from both sides appear to be in relatively substantial agreement regarding their respective clinical findings and conclusions involving a Plaintiff. Both doctors who testified agree that Plaintiff's laminectomy was successful, that she is asymptomatic and functioning well, and that she can return to work with limited restrictions. In regard to those restrictions, I find the testimony of Dr. Higginbotham to be the more persuasive evidence. Plaintiff's restrictions are merely prophylactic in nature. I am not persuaded that these cautionary restrictions constitute a "disability" under the Act. . . . This is particularly true in light of the fact that I believe Plaintiff, as owner/operator of two of her own package shipping stores, for seven or eight years during a period in which she was found to be "totally disabled" by Magistrate Cameron, did essentially the same activities as we were required by her job with Defendant.
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> Accordingly,
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> * * *
>
> I FIND Defendant has established by a preponderance of evidence that Plaintiff was no longer "totally disabled" as of March 3, 1993, the date Plaintiff's own expert examined Plaintiff and found her able to return to work with restrictions.
>
> I FURTHER FIND Defendant has established by a preponderance of evidence that as of that date, Plaintiff had recovered from the injuries for which she had been granted an open award of benefits.
>
> I FURTHER FIND, in light of the above, that the issue of whether of [sic] not Plaintiff may have regained a wage earning capacity is moot and, therefore, no specific findings are made in that regard.

The magistrate thus granted defendant's petition, and the WCAC subsequently affirmed the magistrate.

Plaintiff on appeal challenges the WCAC's findings that plaintiff recovered from her work related injuries and that plaintiff after her back surgery worked lifting packages weighing up to seventy pounds.

> The findings of fact made by the commission acting within its powers, in the absence of fraud, shall be conclusive. The court of appeals and the supreme court shall have the power to review questions of law involved with any final order of the commission . . . . [MCL 418.861a(14); MSA 17.237(861a).]

"Review by the Court of Appeals . . . 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 . . . then the courts must treat the WCAC's factual findings as conclusive." *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614

NW2d 607 (2000). This Court reviews de novo, however, questions of law involved in any WCAC order. *Id*. at 732.

In concluding that plaintiff had totally recovered from her back injury and surgery, the WCAC cited (1) the magistrate's finding that after her April 1984 back surgery plaintiff worked at the customer counter of a packaging business she owned lifting packages weighing up to seventy pounds, and (2) two medical experts' testimony that plaintiff's laminectomy appeared successful, plaintiff currently was asymptomatic and generally doing well, and that plaintiff could return to her former employment with defendant United Parcel Service (UPS) under preventative restrictions against excessive bending and lifting (over twenty-five to thirty pounds).

No evidence of record, however, supports the WCAC's finding that after her surgery plaintiff "work[ed] at the customer counter, including the lifting of packages weighing up to 70 pounds." At the June 17, 1995 hearing, plaintiff testified that "[t]oward [sic] the end" of her ownership of a packaging business in 1990 or 1991 she lifted some parcels, "[m]ost of [which] were just small mail order" whose "average weight would be under five pounds." Defense counsel then inquired whether plaintiff's business handled heavier parcels, to which plaintiff responded that the maximum weight shipped constituted seventy pounds. It seems clear that plaintiff merely testified that her store was involved in the shipping of packages up to seventy pounds, not that she personally had lifted any packages weighing that much. While plaintiff averred that *most* of the packages she lifted weighed approximately five pounds, the WCAC's finding that plaintiff herself lifted parcels weighing up to seventy pounds represents mere speculation unsubstantiated by the testimonial record. *Aquilina v General Motors Corp*, 403 Mich 206, 211, n 2; 267 NW2d 923 (1978) (noting the employer bears the burden of proof by a preponderance that a worker has recovered or that his dependency status has terminated); *Wiltse v Borden's Farm Products Co of Michigan*, 328 Mich 257, 265; 43 NW2d 842 (1950) (explaining that if an inference favorable to the applicant can only be arrived at by conjecture or speculation the applicant may not recover) (quotations omitted). The record is devoid of any evidence concerning the weight of any packages plaintiff might have lifted above the average weight of less than five pounds. Moreover, plaintiff specifically opined that she would not be capable of returning to her former UPS job, which required her to lift packages weighing up to seventy pounds.

With respect to plaintiff's successful back surgery, lack of symptoms, and ability to work under preventative restrictions, the WCAC accurately summarized the medical experts' testimony. The WCAC also correctly observed as a matter of law that "the prophylactic restrictions could have been a basis for disability," see *Thomas v Chrysler Corp*, 164 Mich App 549, 554-555; 418 NW2d 96 (1987) (explaining that medical advice against returning to work due to the possible recurrence of a medical condition may entitle a plaintiff to benefits, provided that the plaintiff's underlying disability was caused or advanced by the work),[2] but found the

[2] See also *Woody v Cello-Foil Products (After Remand)*, 450 Mich 588, 596; 546 NW2d 226 (1996) ("*Thomas*[, *supra*] stood for the proposition that an employer is liable for any disability that stems from the plaintiff's sensitivity to chemicals if that sensitivity arose out of her employment.").

existence of restrictions unpersuasive "because of the existence of additional evidence which persuaded the magistrate that plaintiff could return to her former employment." As we have explained, however, no evidence of plaintiff's post surgery lifting of seventy pound packages accompanied the medical evidence presented.

There is no question that the suggested restrictions guarded against plaintiff's increased susceptibility to reinjury of a previous, work related injury. Applying the correct standard of disability,[3] the fact that plaintiff had recovered from her original work injuries to the extent that she no longer experienced debilitating symptoms does not necessarily indicate the end of her disability status if it remained medically inadvisable for plaintiff to return to some work because her underlying back pathology remained more susceptible to reinjury than previously.[4] *Thomas*,

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[3] With respect to the existence of a disability, the WCAC correctly noted

> that the magistrate referred to the wrong [1987] statutory provision regarding disability and erroneously quoted the *Rea v Regency Olds*[*/Mazda/Volvo*], 450 Mich 1201 (1995) case. Because her date of injury is before 1987, neither the statutory provision nor the *Rea* case is applicable. In addition, since the magistrate's decision in this matter, the Supreme Court has supplanted its prior definition of disability in *Rea* with the analysis in *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628[; 566 NW2d 896] (1997).

The version of MCL 418.301(4); MSA 17.237(301)(4) in effect at the time of plaintiff's injury defined "disability" as "a limitation of an employee's wage earning capacity in the employee's general field of employment resulting from a personal injury or work related disease." *Wright v Vos Steel Co*, 205 Mich App 679, 682; 517 NW2d 880 (1994); *Corbett v Montgomery Ward & Co, Inc*, 194 Mich App 624, 628; 487 NW2d 825 (1992). The WCAC nonetheless found the magistrate's error harmless in light of its belief, discussed above, that the record demonstrated plaintiff's post surgery lifting of seventy pound parcels.

> [T]his error is harmless in the context of this case because the granting of the Petition to Stop was based on medical recovery from injury and was not dependent upon the definition of disability. The magistrate found that the prophylactic restrictions did not constitute disability because plaintiff had performed "essentially the same activities as were required by her job with Defendant." This is a determination that plaintiff has medically recovered to the point that she can perform her former employment. Thus, the erroneous application of the 1987 definition of disability does not require reversal.

[4] Although the WCAC recognized that prophylactic restrictions could represent a basis for disability, the WCAC then mentioned *Cann v Family Dollar Stores*, 1995 ACO 113, cited by the magistrate, as supportive of the magistrate's opinion. The WCAC compared its *Cann* decision and the instant case as follows:

> In that case [the] plaintiff was given prophylactic restrictions because she had been off work for a significant period of time. The restrictions were not considered to be indicative of a continuing disability. The termination of benefits

(continued…)

supra. Neither the WCAC nor the magistrate specifically determined whether the medical evidence presented, which both the WCAC and the magistrate credited, standing alone demonstrated plaintiff's disability or warranted the termination of plaintiff's benefits.[5] Thus, we must remand for the WCAC's reconsideration whether the available evidence signified plaintiff's disability according to the statutory provision in effect in 1984. *Mudel*, *supra* at 712. Given the lack of actual testimony concerning the maximum weights plaintiff lifted at her own store, we suggest that the WCAC remand to the magistrate for further development of this factual issue, or for the receipt of further evidence regarding the current status of plaintiff's condition.

We reverse the WCAC's order affirming the magistrate's grant of defendants' petition to stop payment of plaintiff's benefits, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Hilda R. Gage

(…continued)

> was affirmed in spite of restrictions given by various medical witnesses. In this case [the] magistrate's determination that plaintiff's restrictions did not mandate a finding of disability was appropriate in the context of the facts of this case and the testimony the magistrate found to be persuasive.

We do not, however, view the instant case as analogous to the WCAC's description of *Cann*. Here, the medical witnesses recommended work restrictions because of plaintiff's history of back injury and corrective surgery, not the amount of time plaintiff was off work. While neither the magistrate nor the WCAC was obliged to accept the proffered medical opinions, neither rejected the medical experts' recommendations as speculative or unwarranted, or concluded that it would be unreasonable for plaintiff to refuse or avoid work exceeding the restrictions.

[5] While defendant suggests that wage loss benefits are payable for disability only when a causal link exists between the disabling injury and the injured worker's continued unemployment, neither the WCAC nor the magistrate ever considered the reasons for plaintiff's continued unemployment. Furthermore, while defendant also spends much time arguing that plaintiff's wage earning capacity constitutes the focus of the instant case, neither the magistrate nor WCAC ever reached the issue of plaintiff's post injury wage earning capacity. The instant record does not reveal what wages, if any, plaintiff may have earned from post injury work.