

STATE OF MICHIGAN
COURT OF APPEALS

KEITH A. WAGONER,

Plaintiff-Appellant,

v

NORTHWEST AIRLINES, INC., AMERICAN
MOTORISTS INSURANCE COMPANY,
REPUBLIC AIRLINES, and NORTH RIVER
INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED

January 9, 2001

No. 215532

WCAC

LC No. 96-000525

ON REMAND

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

PER CURIAM.

This case is on remand from the Supreme Court for reconsideration in light of *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000). *Wagoner v Northwest Airlines*, 463 Mich 881 (2000). We again reverse the decision of the Worker's Compensation Appellate Commission (WCAC) because it erred in its conclusions regarding the scope of its administrative appellate review. We remand to the WCAC for reconsideration in light of *Mudel*, since courts do not engage in fact finding in worker's compensation cases.

Plaintiff was employed as a pilot by defendant Northwest Airlines and its predecessors since January 1979. He first experienced back pain on March 13, 1986, when he injured himself while carrying his equipment on board a flight. He treated with a chiropractor and missed three or four weeks of work. Plaintiff recovered and returned to work, and did not experience any further problems until May 1988, when he experienced radiating back pains after lifting his infant daughter. He was off work for about three months, and then returned to work. On May 6, 1989, plaintiff experienced severe pain in his lower back and down into his left leg, but was not sure of the reason. Following consultations with doctors and a CT scan, surgery was recommended; however, plaintiff declined to undergo surgery and engaged in an exercise program to strengthen his back. He returned to work in September 1989.

On May 16, 1993, plaintiff experienced severe back pain at work when he lifted a thirty-pound flight bag over a console and a seat. Plaintiff underwent physical therapy in August and September of 1993, which only worsened his condition. In August 1993, following a medical

examination mandated by the FAA, plaintiff lost his license to fly. Plaintiff has not worked as a pilot since May 16, 1993.

Trial was held before the magistrate on May 13, 1996. The parties stipulated to injury dates of March 13, 1986, and May 14, 1993. The parties further stipulated that plaintiff was paid worker's compensation benefits from August 9, 1993, through November 15, 1993 at the rate of \$457 a week. On July 2, 1996, the magistrate issued an order denying benefits to plaintiff, finding that plaintiff had not proved a work-related disability.

Plaintiff appealed to the WCAC, which issued its decision on October 6, 1998, and affirmed the magistrate, albeit reluctantly. The WCAC stated that while there was competent, material, and substantial evidence to support the magistrate's decision, there was just as much, *or more*,¹ competent, material, and substantial evidence supporting the position of plaintiff. The WCAC also noted that it was not necessarily convinced that it agreed with the magistrate's interpretation of Dr. Theodoulou's testimony on the whole. The WCAC, however, felt that the requisite evidence was present to support the magistrate's findings, and that it was bound by law to affirm, citing MCL 418.861a(3); MSA 17.237(861a)(3). The WCAC lastly concluded:

In acknowledging that a great deal of evidence was submitted that could be interpreted to support a conclusion of a work-related disabling injury, we note the constraints recently imposed by the Supreme Court in *Layman v Newkirk Electric Associates, Inc*, ___ Mich ___ (1998), abrogating the statutory authority of the Appellate Commission to perform limited fact-finding.

In *Mudel*, our Supreme Court reexamined the standards of review in worker's compensation cases. Judicial review by this Court is of the fact findings made by the WCAC, not by the magistrate. *Mudel, supra*, p 703, quoting *Holden v Ford Motor Co*, 439 Mich 257, 263; 484 NW2d 227 (1992). Findings of fact made by the WCAC acting within its powers, in the absence of fraud, shall be conclusive on judicial review. MCL 418.861a(14); MSA 17.237(861a)(14); *Mudel, supra*, p 700. The role of the judiciary is to ensure that the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate. As long as there exists in the record any evidence supporting the WCAC's decision, and as long as the WCAC did not misapprehend its administrative appellate role, then the judiciary must treat the WCAC's factual decisions as conclusive. *Id.*, pp 703-704.

In *Mudel, supra*, p 697, the Court explicitly overruled *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494; 581 NW2d 244 (1998), the case relied upon by the WCAC in the present case. The Court concluded that MCL 418.861a(13) and (14); MSA 17.237(861a)(13) and (14) grant the WCAC certain fact-finding powers and permit the WCAC 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*, pp

¹ We emphasize this statement by the WCAC because, as the Court stated in *Mudel, supra*, pp 702-703, the WCAC has the power to engage in both a qualitative and quantitative analysis of the whole record, "which means that the WCAC need not necessarily defer to all the magistrate's findings."

699-700. Therefore, we conclude that the WCAC misapprehended its administrative appellate role in concluding that it could not engage in its statutory authority to perform limited fact finding because of the Supreme Court's decision in *Layman*.

Consequently, we remand this case to the WCAC to reconsider the evidence in light of its fact-finding powers and the appropriate standard of reviewing the magistrate's decision as delineated in *Mudel*. We do not retain jurisdiction.

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