

STATE OF MICHIGAN
COURT OF APPEALS

LARRY H. GOLDSTEIN,

Plaintiff-Appellant,

v

DAIRY MART and ROYAL INSURANCE
COMPANY,

Defendants-Appellees,

and

MICHIGAN DEFENSE TRIAL COUNSEL,

Amicus Curiae.

UNPUBLISHED

December 13, 2002

No. 234330

WCAC

LC No. 99-000514

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order of the Worker's Compensation Appellate Commission (WCAC) reversing a magistrate's award of benefits. In light of this Court's disposition in *McComber v McGuire Steel Erection, Inc*, 251 Mich App 491; 650 NW2d 416 (2002), lv pending, we vacate the April 27, 2001, opinion of the WCAC and remand the case to the WCAC for additional analysis pursuant to the standards enunciated in *McComber*.¹

This case involves plaintiff's failure to comply with certain requirements when applying for benefits under the worker's disability compensation act (the act). MCL 418.101, *et seq.* At issue is the requirements in MCL 418.222 that an application for hearing or mediation contain information regarding any employment the claimant had subsequent to the date of the injury and that the claimant provide the carrier with any relevant medical records in the claimant's possession at time of the filing of an application. A party who willfully fails to comply with § 222 is prohibited from proceeding under the act.

¹ Although our dissenting colleague states that "the parties agreed during oral argument that the record is adequate for review," we respectfully disagree because we do not feel that the record is adequate to allow a meaningful *McComber* analysis.

Plaintiff claimed a work-related aggravation of his right upper extremity and injury to his back, spine, and neck. Plaintiff's application for benefits did not reference an earlier neck injury for which he had undergone surgery and which disabled him from work for eighteen months. Plaintiff provided defendants with the medical records for that injury nearly two years after he applied for benefits in the present case. Defendants moved to have the application dismissed on the basis of a § 222 violation, but the magistrate denied that request.

After remanding the matter to the magistrate, the WCAC rejected the magistrate's findings and denied plaintiff's request for benefits for violating § 222 by failing to disclose the names of his initial medical providers. This Court granted plaintiff's application and consolidated it with the then-pending *McComber* appeal. The instant appeal, however, was stayed upon notice of Dairy Mart's filing of bankruptcy. The cases were disconsolidated and the opinion in *McComber* was issued. In the meantime, this Court reopened the instant matter upon request of the parties.

This Court's review of worker's compensation cases is limited. *Woodman v Meijer Companies Ltd, Inc*, 250 Mich App 598, 603; 649 NW2d 109 (2002). While the WCAC reviews the magistrate's decision under the "substantial evidence" standard, this Court reviews the WCAC's decision under the "any evidence" standard. *Mudel v Great A & P Tea Co*, 462 Mich 691, 709; 614 NW2d 607 (2000). This Court's review begins with the WCAC's decision, not the decision of the magistrate. *Id.* If any evidence exists to support the WCAC's factual findings, and if the WCAC did not misapprehend its administrative role in reviewing decisions of the magistrate, then the courts must treat the WCAC's factual findings as conclusive. *Id.* at 709-710.

Whether a willful violation occurred constitutes a question of fact. See *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 754; 593 NW2d 219 (1999). The magistrate here found that plaintiff's noncompliance was not willful. The WCAC must consider the magistrate's findings of fact conclusive if they are supported by competent, material and substantial evidence on the entire record. MCL 418.861a(3); *Mudel, supra* 698-699. Nonetheless, the WCAC may substitute its own finding of fact where substantial evidence on the whole record does not exist to support the magistrate's finding. *Id.*

This Court recently interpreted § 222's phrase "the willful failure of a party to comply" in relation to a plaintiff's failure to comply in *McComber, supra*. This Court gave that phrase its plain and ordinary meaning and determined that a party is prohibited from proceeding under the act "should a party consciously, intentionally or deliberately fail to provide information or materials required by § 222." *McComber, supra* at 499. The *McComber* Court rejected the plaintiff's argument that "willfulness" requires a pattern of repeated nondisclosure. This Court decided that a conscious, intentional, or deliberate nondisclosure should not be excused simply because it was the first act of noncompliance. *Id.*

The *McComber* plaintiff had failed to include on his application for benefits the fact that he had worked for less than one month for another employer after he had sustained his injury at his employment with the defendant-employer. The record reflected, however, that the plaintiff had disclosed that employment with his legal counsel and apparently counsel had neglected to include that information on the plaintiff's application. The record evidence did not show that the plaintiff knew that the application did not disclose the employment information. *Id.* at 493-494.

This Court determined that in the absence of evidence that the plaintiff had known of the omission, it was equally plausible that the plaintiff had made a mistake or was careless in reviewing the application. This Court declined to rule that willful noncompliance existed where no evidence supported the WCAC's finding that the plaintiff had willfully failed to disclose his subsequent employment. *Id.* at 500-501. Because the WCAC in the present case did not have the benefit of the *McComber* analysis, we vacate the WCAC's order and remand to the WCAC for reconsideration in light of *McComber*.

Vacated and remanded to the WCAC for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald