

STATE OF MICHIGAN
COURT OF APPEALS

KEITH S. ULIN,

Plaintiff-Appellee,

v

GENERAL MOTORS, L.L.C.,

Defendant-Appellant.

UNPUBLISHED
October 25, 2012

No. 302864
WCAC
LC No. 08-000102

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

GLEICHER, P.J. (*dissenting*).

The question presented is whether the magistrates properly terminated plaintiff Keith S. Ulin's 1990 open award of benefits. In my view, the Workers' Compensation Appellate Commission (WCAC) correctly determined that because defendant General Motors Corporation never filed a petition to stop the open award, the magistrates should not have considered whether Ulin had achieved a wage-earning capacity. Rather than remanding for additional fact-finding on this issue, I would simply affirm the WCAC.

I.

In 1980, Ulin injured his back while working for Detroit Diesel and was unable to return to employment. Detroit Diesel voluntarily paid Ulin workers' compensation benefits. In 1989, Detroit Diesel filed a petition to stop Ulin's benefits, asserting: "Liability is denied and the payment of compensation is disputed as the claimant has been deemed to have been vocationally rehabilitated pursuant to MCL 418.319 and accordingly is considered to have established a wage earning capacity."¹

In May 1990, Magistrate Lawrence D. Egan issued an opinion rejecting GM's vocational rehabilitation claim. Egan found "wholly unsupported by the evidence" that Ulin had been vocationally rehabilitated and had thereby established a wage earning capacity. GM claimed an appeal from this decision to the Appellate Commission but subsequently withdrew it. Thus,

¹ In approximately this time frame, GM purchased Detroit Diesel and became Ulin's employer.

Magistrate Egan's finding that Ulin had not gained a wage earning capacity remained unchallenged.

In 1997, Ulin returned to work at a GM facility as a "chipper." This job accommodated Ulin's back injury.² Between 1997 and 2004, Ulin sustained several new work-related injuries and aggravated his preexisting back condition. In 1998, he hurt his knee when he stepped into a hole on a catwalk. In 2001, Ulin reported back pain after pulling a 55-gallon drum. In 2002, Ulin injured his neck after hitting his head while walking under a workplace stairwell. In May 2004, Ulin stopped working due to those injuries, and three months later he had neck surgery.

Ulin tried to return to work in February 2005, but GM was unable to find him a position consistent with his neck and back restrictions. A plant representative recommended that Ulin retire on a disability pension, and Ulin did so.

Meanwhile, Ulin filed a petition seeking workers' compensation benefits. The petition alleged as follows:

In 1980, (approximately), employee injured his low back requiring surgery and has been performing restricted work since that time. Injury to right knee in June of 1998 requiring surgery in December of 1998. On May 10, 1982 he was then sent to return to work and re-injured his back. On August 8, 2001, employee suffered injury to cervical spine. On May 7, 2004, (LDW) employee alleges aggravation of low back condition. Injury to upper back and neck including herniated cervical disc, carpal tunnel syndrome to the right hand as a result of heavy lifting, chipping and springing operations, right epicondylitis as a result of the work activity including operating power spring.

GM filed a general denial and asserted a variety of defenses, including that Ulin had "suffered no accident," "suffers no compensable disability or disease which is the result of any accidental personal injury," and that Ulin had established "a new wage earning capacity since his injury[.]" Despite alleging that Ulin had gained a new wage-earning capacity, GM did not file a petition to stop the 1990 open award.

Magistrate Andrew G. Sloss found that Ulin failed to prove that he suffered any new back injury or that his other post-1997 injuries qualified as permanently disabling. In addition to rejecting Ulin's claim for benefits arising from the post-1997 injuries, Sloss closed Ulin's 1990 open-award. In his opinion, Sloss specifically acknowledged that Ulin had previously "received an open award of benefits" for "a low back injury," but found that Ulin "ha[d] established a residual wage-earning capacity of at least \$787.71 and is therefore not entitled to any further wage-loss benefits for the October 3, 1980, injury date." Sloss grounded the latter finding in MCL 418.301(5).

² Charles LoPresti, a GM labor relations supervisor, testified that the "chipper" position "was within" Ulin's back restrictions, which the parties referred to in summary fashion as "25 pounds limited bending and twisting."

Ulin filed a claim for review with the WCAC, asserting among other arguments that Sloss “improperly applied post-1980 law in closing plaintiff’s 1980 open award.” The WCAC remanded “for supplemental findings and a supplemental decision that applies the law as it existed in 1980.” Sloss’s supplemental opinion on remand addressed only the formula for computing wage loss, MCL 418.371(1). The WCAC remanded a second time, finding that Sloss “simply failed to provide any findings or analysis consistent with the law in 1980.” The WCAC further noted that GM “never filed a petition to stop plaintiff’s benefits resulting from his 19[9]0 open award,” and invited further briefing of this issue.

Ulin’s supplemental brief averred, “there is a serious question as to whether it is even appropriate to consider” terminating the 1990 open award absent a petition to stop. GM countered that this argument had been “forfeited.” Magistrate John P. Baril addressed the WCAC’s remand order as follows:

On page 11 of his first decision, Magistrate Sloss wrote: “Plaintiff and Mr. LoPresti testified that Plaintiff’s employment from November 13, 1997, through his last day of work on May 7 [sic], 2004, was at a regular job, not a ‘favored’ or ‘make work’ position.” Magistrate Sloss thus found that the final six and one-half years of plaintiff’s employment did not constitute favored work. Given this finding, plaintiff is not entitled to benefits under the law as it existed in 1980. Defendant cites *Pulley v Detroit Engineering & Machine [Co]*, 378 Mich 418; 145 NW2d 40] (1966). The Michigan Supreme Court in *Pulley* affirmed the denial of disability benefits where plaintiff demonstrated post-injury ability to work and where the cessation of that work was not due to a work injury. [First alteration in original.]

Ulin again appealed to the WCAC. The WCAC majority held that if GM had intended to place at issue Ulin’s entitlement to benefits under the 1990 open award, it should have filed a petition to stop those benefits. In the absence of a petition requesting cessation of the benefits, the WCAC explained, “The authority of the magistrate to stop the payment of benefits that defendant had previously been ordered to pay on an ongoing basis was never properly invoked.”

The lead opinion holds that by referencing his 1980 back injury, Ulin’s 2006 petition for benefits implicitly placed at issue the 1990 open benefit award. I agree with the WCAC majority that if GM sought to overturn the 1990 open award, it was required to formally place Ulin on notice of that fact by filing a petition to stop.

II.

In *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 257 (1992), the Supreme Court described as follows the principles guiding this Court’s review of WCAC opinions:

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.

The WCAC's findings of fact are conclusive if any competent evidence supports them. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 703-704; 614 NW2d 607 (2000). “[T]he ‘any evidence’ standard, governing the judiciary’s review of the WCAC’s findings of fact, provides for less searching review—one that is deferential to the skill and experience of the WCAC in this highly technical area of the law.” *Id.* at 703.

The lead opinion asserts, “There is nothing in the language of MCL 418.841(1) and MCL 418.847(1) that required defendant to file a petition to stop payment, i.e., an application for a hearing, to invoke the magistrate’s authority to address plaintiff’s entitlement to continuing benefits for the 1980 back injury.” Because “MCL 418.847 simply sets forth a procedure for resolving issues under the Act generally,” the lead opinion posits that the WCAC’s interpretation of the statute as a bar to the magistrate’s consideration of the 1990 open award was “clearly wrong.” I respectfully submit that the lead opinion has read the statutory provisions relied upon by the WCAC far too narrowly and outside their proper context. The statutes governing the initiation of workers’ compensation proceedings contemplate that a party places a dispute at issue only by filing a petition specifically identifying the nature of the claim. Adherence to this procedure affords the other side with notice of the contested issues. Absent a petition setting forth GM’s intent to overturn an otherwise binding open award, the magistrate erred by evaluating whether Ulin had been vocationally rehabilitated.

The WCAC majority explained that the Workers Compensation Act “sets forth a cohesive, comprehensive process which *any* party must follow to invoke the authority of the magistrate in seeking an adjudication of their rights and responsibilities.” (Emphasis in original). The majority then turned to the statutory provisions governing the procedure for commencing a workers’ compensation claim: “MCL 418.847(1) and MCL 418.841 provide the *ONLY* means applicable . . . to obtain a hearing before the magistrate.” (Emphasis in original). “Read together,” the majority elaborated, “MCL 418.841 and MCL 418.847 require a party to file something so as to provide notice of whatever the contentions might be that are believed to justify the entry of an order.” Under the Act, the majority continued, “The party seeking . . . relief must first apply for a hearing with a document containing the required information, the document must be served upon the opposing party, and an opportunity to respond must be allowed.” In Ulin’s case, the WCAC majority emphasized, “nothing was filed. Nothing was served.”

MCL 418.841(1) provides: “Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker’s compensation magistrate.” When an interested party files “an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, the case shall be set for mediation or hearing, as applicable.” MCL 418.847(1). Simply put, these are notice provisions. Read together, these statutes signal that a party seeking to resolve a workers’ compensation dispute must place the other side on notice of

the nature of the dispute. Alternatively stated, our workers' compensation system contemplates trials conducted after specific identification of contested issues rather than by ambush.

In my view the WCAC majority appropriately harmonized MCL 418.847(1) and MCL 418.841, interpreting them to require that the party seeking affirmative relief notify the opposing party of the specific judgment sought. As the WCAC put it, "Here, defendant was obligated to pay ongoing benefits under the Act until further order. To obtain that further order, MCL 418.841 and MCL 418.841(1) require a request for a hearing. No hearing was requested by defendant; therefore, no further order may be entered in defendant's favor." The WCAC's interpretation of the statutes is plausible and consistent with their literal language. As its interpretation does not "conflict with the Legislature's intent as expressed in the" statutory language, *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), I believe this Court should defer "to the skill and experience of the WCAC in this highly technical area of the law." *Mudel*, 462 Mich at 703.

The WCAC majority highlighted that because the initial petition sets forth the specific nature of the dispute to be litigated, its content defines the scope of the proceedings. While an answer raising an affirmative defense places the defense at issue in an ordinary civil case, the Michigan Court Rules do not apply to workers' compensation proceedings, *East Jordan Iron Works v Workers' Compensation Appeal Bd*, 124 Mich App 324, 327; 335 NW2d 23 (1983), and "common-law procedural rules must not be automatically applied in such proceedings." *Brown v Beckwith Evans Co*, 192 Mich App 158, 167 n 2; 480 NW2d 311 (1991). Thus, the fact that GM mentioned in its boilerplate defenses that Ulin "has reestablished a new earning capacity since his or her injury, thereby relieving defendant of liability" does not suffice to automatically enlarge the scope of the proofs.

Moreover, the nature of the issue to be tried not only controls the relevance of the evidence presented, but also determines the burden of proof. A workers' compensation claimant must prove entitlement to compensation by a preponderance of the evidence. MCL 418.851. "On a petition to stop compensation, however, the burden of proof is upon the petitioner." *Johnson v Pearson*, 264 Mich 319, 320; 249 NW 865 (1933). "[I]f the employee's condition improves, his employer may file a petition to reduce or terminate payments." *Pike v City of Wyoming*, 431 Mich 589, 600-601; 433 NW2d 768 (1988). See also *Barham v Workers' Compensation Appeal Bd*, 184 Mich App 121, 134; 457 NW2d 349 (1990) ("[A]n employer may seek to stop payment of benefits if the claimant's disability has changed."). The administrative rules governing the Bureau of Workers' Disability Compensation make specific mention of a petition to stop. Mich Admin Code, R 408.40 addresses the stoppage, reduction, or suspension of compensation. It provides:

- (1) If compensation is being paid under an order or award of the magistrate or workers' compensation appellate commission, then compensation shall not be discontinued or reduced without a further order or award, except as

provided in subrules (3) and (4)^[3] of this rule and sections 301(5)(b) and 361(1) of the act. A petition to stop compensation shall include both of the following:

(a) Proof of payment of compensation to within 15 days of the date of the filing of a petition to stop compensation.

(b) An affidavit stating that the employee has returned to gainful employment and substantially describing the nature of the employment, or a signed statement from a physician stating that the employee is able to return to employment.

Thus, a petition to stop is filed when an employer seeks to revisit a prior order or award. When a petition to stop is filed, the parties understand that the burden of proving that circumstances have changed falls squarely on the employer.⁴

Here, GM never filed a petition to stop. Moreover, GM never introduced affirmative evidence at the hearing that Ulin had been vocationally rehabilitated. The WCAC majority found, “During the three days of hearings in this matter, no mention was made of the claim that plaintiff had reestablished any kind of wage earning capacity.”⁵ In my view, this fact conclusively demonstrates that the parties did not contemplate that the hearing would encompass the validity of the 1990 open award. Had GM truly intended to place that award at issue, likely the parties would have presented the testimony of vocational rehabilitation experts, and placed into evidence detailed information concerning the nature of the work otherwise available to Ulin and within his physical restrictions.⁶

As the WCAC put it, “It is beyond dispute that the employer did not meet any of the requirements of the Act in seeking to stop the payment of benefits it had previously been ordered

³ Neither of these exceptions applies in this case.

⁴ I respectfully disagree with the lead opinion’s conclusion that under MCL 418.222, the “written response of the carrier” suffices to describe the legal issues to be tried. MCL 418.222(4) requires a carrier responding to a petition to specify the “legal grounds supporting its position,” but simply does not address whether an employer seeking to *affirmatively* challenge an open award of benefits may do so without filing a petition to stop.

⁵ “The findings of fact made by the commission acting within its powers, in the absence of fraud, shall be conclusive.” MCL 418.861a(14).

⁶ For this reason, I respectfully disagree that this Court should remand for a hearing consistent with *Pulley*, 378 Mich at 423. *Pulley* instructs that the determination of an employee’s earning capacity “is a complex of fact issues which are concerned with the nature of the work performed and the continuing availability of work of that kind, and the nature and extent of the disability and the wages earned.” That evidence is simply not to be found in this record.

to pay. The 1990 order remains in full force and effect.” On this basis, I would affirm the WCAC.⁷

/s/ Elizabeth L. Gleicher

⁷ Of course, GM remains free to file a petition to stop payment of Ulin’s workers’ compensation benefits and could present evidence in support of its case.