

STATE OF MICHIGAN
COURT OF APPEALS

NABIL MANSOUR,

Plaintiff-Appellant,

v

CHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED

January 24, 1997

No. 190367

WCAC

LC No. 00 000140

Before: Doctoroff, P.J., and Hood and Paul J. Sullivan,* JJ.

PER CURIAM.

After remand from this Court, the Worker's Compensation Appellate Commission (WCAC) reduced plaintiff's benefits to zero in an opinion issued on October 11, 1995. Plaintiff now appeals. We reverse.

In 1984, plaintiff filed a claim with the Bureau of Worker's Compensation, contending that he suffered from a work-related disability. Plaintiff testified before a hearing referee that he injured his back when he tripped and fell on the cement floor at work. He stated that the injury made it impossible for him to continue to perform his previous job. He further testified that he attempted to return to work three times, but could not perform his job duties due to pain he experienced when moving to either side or bending at the waist.

At the hearing, plaintiff's chiropractor testified that plaintiff had suffered a back injury as a result of his work and, in his opinion, plaintiff should refrain from heavy lifting, prolonged standing, reaching up, and sideways bending or twisting. Defendant's experts disagreed and opined that plaintiff was medically capable of returning to any work for which he was qualified. Defendant's experts found a lack of any objective evidence of continuing physical limitations.

In a decision and order of September 23, 1986, the hearing referee denied plaintiff's claim for benefits, finding that he failed to prove either that he had sustained a personal injury or that he was

* Circuit judge, sitting on the Court of Appeals by assignment.

disabled. The hearing referee found that plaintiff lacked credibility, and found the opinions of defendant's medical experts more persuasive than that of plaintiff's expert.

Plaintiff appealed, and in an opinion and order dated March 5, 1991, the Worker's Compensation Appeal Board (WCAB) (Predecessor to the WCAC), reversed. The WCAB found that, on January 25, 1984, plaintiff had sustained a single event injury arising out of and during the course of his employment, resulting in a partial disability. The WCAB attributed seeming inconsistencies and absurdities in plaintiff's testimony to the fact that he did not read or write English and that he testified at the hearing without an interpreter. After taking these facts into account, the WCAB found plaintiff to be credible, and credited the testimony of his treating physician over that of defendant's experts, who examined plaintiff for purposes of litigation only.

Defendant applied for leave to appeal with this Court, arguing in part that the WCAB had ordered payment of benefits in the wrong amount. Defendant argued that because the WCAB had found plaintiff to be partially but not totally disabled, it erred in failing to determine the proportionate reduction in his wage-earning capacity and in failing to order payment of benefits at the proportionate rate. By order dated April 14, 1993, this Court remanded for reconsideration in light of *Sobotka v Chrysler Corp (On Rehearing)*, 198 Mich App 455; 499 NW2d 777 (1993).

While the case was pending on remand, the Supreme Court issued its decision in *Sobotka v Chrysler Corp*, 447 Mich 1; 523 NW2d 454 (1994), reversing this Court's decision. Plaintiff then moved for dismissal, arguing that the basis for the remand no longer existed. The WCAC denied the motion, stating that it would review the case on remand in light of the Supreme Court's decision in *Sobotka*, as well as a subsequent WCAC decision interpreting *Sobotka*.

On October 11, 1995, the WCAC issued its opinion and order on remand. The WCAC stated that because it stands in the shoes of the WCAB in a case such as this, it must conduct a de novo review of any relevant issues. The WCAC noted that it was bound by the factual determinations previously made by the WCAB, but was free to make any additional findings of fact as needed to respond to this Court's remand order. The WCAC then made findings to the effect that plaintiff is capable of performing both general common labor and at least some of the jobs available at his former plant even in light of his disability. The WCAC thus found that, under *Sobotka*, plaintiff is not entitled to any benefits:

We make this finding based both on our assessment of plaintiff's lack of credibility, and the testimony of the medical experts. Supporting this conclusion is the testimony of Dr. Sturman, a neurosurgeon, who based his opinion on his examination of the plaintiff, which consisted not only of taking a medical history, but also performing a physical examination, and reviewing existing reports of objective medical tests. Dr. Sturman saw no reason why plaintiff could not perform any job he was qualified to do, including physical labor. Dr. Weingarden, a board certified orthopedic surgeon, also performed a physical examination and reviewed objective medical tests. He also felt

that plaintiff could work as a common laborer, and perform any job at Chrysler for which he was qualified.

Contrary to the Appeal Board, we find no inconsistency, lack of attentiveness or observation in either of these doctors' depositions. Thus, for the purposes of our *de novo* review as it relates to plaintiff's postinjury ability to work and earn wages, we find them persuasive.

In the same light, we do not find the testimony of either Dr. McCollough or the chiropractor, Dr. Moses, to be persuasive. Dr. McCollough refused midway through his deposition to review a series of x-rays taken of plaintiff's back which would bear on its condition. This, coupled with his admission that the neurological examination of plaintiff was within normal limits, leads us to reject his opinion regarding arthritic change in plaintiff's spine and the resulting claimed limitations on his ability to work.

We also do not find the opinion of the chiropractor to be persuasive. His interpretation of the objective evidence relating to plaintiff's spine is inconsistent with that of all the other radiologists and doctors. Thus, we place little weight on his testimony.

Finally, we note that plaintiff, who basically suffered a soft tissue injury to his lower back some eleven years ago, claimed to be unable to return to work on any of the three occasions on which he was asked to return postinjury. However, as soon as defendant terminated him, he petitioned through his union to get his old job back. We find it to be persuasive evidence that, at least by the time he filed that petition many months after his injury, plaintiff felt his soft tissue injury had healed to the point it would allow him to return to work at the Chrysler plant.

Based on these findings, the WCAC ordered that plaintiff's benefit rate be reduced to zero in light of his residual wage-earning capacity.

Initially, we reject plaintiff's argument that after the Supreme Court reversed this Court's decision in *Sobotka*, the WCAC no longer had anything to review on remand. The WCAC properly complied with the spirit of this Court's remand order by reviewing the case in light of the Supreme Court's decision in *Sobotka*.

However, we agree with plaintiff's claim that the WCAC erred by improperly making findings contradictory to the findings of fact previously made by the WCAB. In its opinion, the WCAB reversed the hearing referee's credibility determination and explicitly found plaintiff to be credible. Contrary to these findings, the WCAC based its decision on remand in part on plaintiff's lack of credibility. Whereas the WCAB found reason to discount the testimony of defendant's medical experts and credited the testimony of plaintiff's treating chiropractor, the WCAC made the opposite findings. Under the doctrine of law of the case, the WCAC was bound by the previous findings of fact made by

the WCAB, and thus erred in reaching different conclusions. *In re Loose (On Remand)*, 212 Mich App 648, 653; 538 NW2d 92 (1995). Although the WCAC acknowledged that it was bound to follow the factual findings of the WCAB, it clearly failed to do so.

These errors were not harmless. The WCAC's reinterpretation of the evidence was the basis for its conclusion that plaintiff retains a residual wage-earning capacity. Had the WCAB's factual findings been properly followed, plaintiff's restrictions would be such as to eliminate most if not all unskilled jobs. Although the WCAC stated in a conclusory fashion that plaintiff could do common labor work, it did not specify the type of jobs plaintiff could perform. We note that on remand defendant filed a brief with the WCAC requesting that the case be remanded to a magistrate so that the record could be expanded to include an inquiry into plaintiff's residual wage-earning capacity. We agree with defendant that the current record contains no evidence that he is employable given his medical restrictions and his qualifications. Accordingly, upon remand, defendant's residual wage-earning capacity should be determined.

We conclude that the WCAC erred in reducing plaintiff's benefit rate to zero, because the WCAC's determination was improperly based on findings of fact which contradicted findings previously made by the WCAB. We therefore find it unnecessary to address plaintiff's claim that the WCAC committed fraud on remand. We note, however, that plaintiff's fraud claim is essentially a restatement of the previous issue.

Reversed and remanded for entry of an order granting weekly wage-loss benefits.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Paul J. Sullivan