

STATE OF MICHIGAN  
COURT OF APPEALS

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ARLENE A. RUSSELL,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 191892

WCAC

WHIRLPOOL FINANCIAL CORPORATION and  
GALLAGHER BASSET,

LC No. 94-000955

Defendants-Appellees.

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Before: Saad, P.J., and Neff and Reilly, JJ.

NEFF, J. (dissenting).

I respectfully dissent and would reverse and remand for reinstatement of the magistrate's award of benefits.

I

The majority opinion of this Court and the WCAC committed legal error in applying the principles of favored work to the facts of this case, or more accurately, in failing to apply well-established rules of favored work to the facts of this case.

The majority opinion casts this case as one of discharge for misconduct, when it is nothing more or less than an unreasonable refusal on the part of plaintiff to continue favored work. Under those circumstances, plaintiff is entitled to benefits because she can demonstrate that she suffers a work-related disability and there has been no offer of favored work within her ability to perform. Accordingly, her refusal of favored work is no longer unreasonable. *Derr v Murphy Motor Freight Lines*, 452 Mich 375, 387, 392; 550 NW2d 759 (1996); *Nederhood v Cadillac Malleable Iron Co.*, 445 Mich 234, 241, 248; 518 NW2d 390 (1994); *McJunkin v Cellasto Plastics Corp*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ [Docket No. 198732, issued 10/31/97].

There is no dispute that plaintiff was attempting to perform favored work when she began to experience additional physical problems. There is a dispute whether the additional problems were work-related. The magistrate determined that plaintiff's disability was work-related although she left

work for a combination of work-related and non-work-related physical problems. Plaintiff's lone failure was in leaving work when she could not continue and not providing her employer with the proper medical documentation of her inability to continue the favored work until a month later.

In setting aside the magistrate's award of benefits after the disqualification period the WCAC majority operated within the wrong legal framework, an error the majority opinion here perpetuates. In *Nederhood* our Supreme Court clearly held that dismissal from favored work for misconduct (in that case a strike) will not serve as a permanent bar to receipt of workers' compensation benefits, but only as a suspension. The Supreme Court in *Derr* reconfirmed this concept. Even if plaintiff's conduct in leaving work without a medical excuse can be construed as misconduct she was only subject to a suspension of her benefits until she remedied the omission a month later. The attempt to distinguish controlling precedent is not persuasive: *Derr* and *Nederhood* mandate that benefits be reinstated. Plaintiff left work at least in part because of continuing work-related problems and provided medical proof within a month when her doctor supported her claim that she could no longer perform the offered favored work. She is subject only to suspension of benefits, not permanent loss of them.

## II

In addition to the legal error, I find that the WCAC also exceeded its standard of review in rejecting the factual findings of the magistrate. As noted in the WCAC opinion, the magistrate's opinion is very thorough (running to 18 pages) and reached the conclusion that plaintiff left work for both work-related and non-work-related reasons. Her testimony and medical records supported this conclusion: she told her physician that she was missing work because of hand problems (her underlying disability is based on carpal tunnel syndrome for which she has had surgery) and gastrointestinal problems related to work-place stress. While the WCAC reviewed plaintiff's testimony at length, its opinion failed to mention her statements that her left hand was worsening and that her other physical problems were related to stress on the job. Plaintiff's testimony leaves the undeniable conclusion that her problems were at least partially caused by her job and, as a result, the conclusion of the WCAC to the contrary is not supported by competent evidence.

I would reverse and reinstate the magistrate's award of benefits.

/s/ Janet T. Neff