STATE OF MICHIGAN

COURT OF APPEALS

JERRILYN CAMP,

Plaintiff-Appellant,

v

SEARS ROEBUCK COMPANY and ALLSTATE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
October 26, 1999

No. 210225
WCAC
LC No. 92-000685

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

PER CURIAM.

Leave was granted in this case to consider plaintiff's appeal of a February 11, 1998, decision of the Worker's Compensation Appellate Commission which denied plaintiff benefits after finding that plaintiff had avoided available work. The WCAC decided the case on remand from our Supreme Court which had remanded for reconsideration in light of *Haske v Transport Leasing, Inc*, 455 Mich 628; 566 NW2d 896 (1997). The case was before our Supreme Court on appeal from an October 11, 1996, unpublished decision of this Court which affirmed a prior, November 10, 1994, decision of the WCAC which had denied plaintiff benefits on the ground that she remained capable of maintaining the same earnings after her work injury. No. 181427.

Plaintiff was employed by defendant as a service records clerk for about nine years until she was laid off. As a service records clerk plaintiff took orders, answered phones, and operated a computer. Following her layoff plaintiff was in an assignment pool for about two years during which time she received various temporary assignments. Plaintiff eventually received a permanent position in defendant's warehouse as a checker. By 1988, plaintiff operated a hi-lo in this position. On July 5, 1990, while trying to open a warehouse door, plaintiff injured her back. Plaintiff reinjured her back on October 23, 1990. As of the hearing date on December 18, 1991, plaintiff had not returned to work. Plaintiff's back injury prevents her from performing at least the warehouse work, and plaintiff is at least partially disabled due to a work injury. At this point these facts are not in dispute.

This case has been before the WCAC three times. In each instance the WCAC reversed the award of benefits. In the WCAC's most recent decision the WCAC reaffirmed its prior holding that

plaintiff was not entitled to benefits because she avoided work. The WCAC also found that plaintiff "refused" to seek work with defendant which plaintiff should have known was available and which plaintiff was capable of performing. The WCAC was in part influenced by its view of this Court's prior opinion (No. 181427).

Our review of a WCAC decision is limited. Findings of fact by the WCAC are conclusive if there is any competent evidence to support them. MCL 418.861a(14); MSA 17.237(861a)(14); *Holden v Ford Motor Co*, 439 Mich 257, 263; 484 NW2d 227 (1992). A decision of the WCAC is subject to reversal if the WCAC operated within an incorrect legal framework or its decision was based on erroneous legal reasoning. *O'Connor v Binney Auto Parts*, 203 Mich App 522, 527; 513 NW2d 818 (1994), citing *Corbett v Montgomery Ward & Co, Inc*, 194 Mich App 624, 631; 487 NW2d 825 (1992). In the instant case we conclude that some critical findings – or at least factual assumptions – of the WCAC are unsupported by the record, and that the WCAC operated within an erroneous legal framework. Consequently, we reverse the WCAC's most recent decision and order the decision of the magistrate be reinstated.

Plaintiff established her entitlement to benefits. Based on substantial evidence the magistrate found that plaintiff suffered a work injury, experienced a subsequent loss in actual wages, and that there was a causal link between the injury and the wage loss. Under *Haske v Transport Leasing, Inc*, 455 Mich 628; 566 NW2d 896 (1997), plaintiff established a partial disability which entitled her to benefits. Once the magistrate credited plaintiff's testimony that there was a direct link between her wage loss and her work injury, plaintiff did not have to prove anything else. 455 Mich at 661.

However, the WCAC (but not the magistrate) found that plaintiff was not entitled to benefits because she avoided available employment. The WCAC relied upon our Supreme Court's recognition that there are cases where an injured employee's loss of wages is not causally linked to the injury but rather is due to some other factor, such as ailments unrelated to employment, malingering, or avoidance of work. See 455 Mich at 660, footnote 34, and 455 Mich at 662, footnote 38. It is the employer's burden to make such a showing. 455 Mich at 662, footnote 38. In order to deny benefits on the ground that an employee avoided work, it must be shown that the plaintiff avoided or rejected "actual" wages offered. 455 Mich at 658-659. Moreover, *Sobotka v Chrysler*, 447 Mich 1, 27; 523 NW2d 454 (1994) (J. Boyle), rejected the notion that an employer could establish the lack of a causal link by offering evidence of a plaintiff's ability "in the abstract to perform some employment. . . ."

The WCAC reasoned that plaintiff "avoided" work because she "refused" to bid on jobs that were "certainly . . . out there" and which she could perform. Missing from the analysis is a specific or actual job available to plaintiff which plaintiff avoided. It is not even clear whether the WCAC was limiting the "jobs out there" to jobs with defendant as opposed to jobs in the labor market in general. The only specific job possibility discussed in the record – the computer operator job or the service records clerk job – was shown by defendant's witness not to be available to plaintiff. Plaintiff indicated a desire to attempt the job, but the record is devoid of any evidence that the job was offered to her or that the job was available to anyone other than persons already performing the job. Plaintiff sent defendant a letter which indicated plaintiff's interest in the job, but there was no evidence that defendant

ever replied to plaintiff's letter. The record in this case does not show that plaintiff avoided or refused any job. There is no competent evidence supporting a finding to the contrary.

Defendant argues that plaintiff should have followed the mandate of the parties' collective bargaining agreement in seeking a job she could perform with defendant. This argument is a red herring. Giving defendant the benefit of the doubt regarding the significant issue of whether plaintiff had to pursue a job under the union contract after she had been found disabled, there is no meaningful evidence in the record of any specific job plaintiff was capable of performing which was posted and for which plaintiff did not sign up.

In addition, the WCAC appears to have operated within an incorrect legal framework. The WCAC's opinion reflects a continued belief that plaintiff was not entitled to benefits merely because she was capable of performing some job at which she could earn at least as much as she earned in the job in which she was injured. Under *Haske* the WCAC erred. Plaintiff was entitled to benefits unless defendant established that plaintiff did "reject actual wages reasonably offered or avoid or refuse actual wages." 455 Mich at 659. Plaintiff's residual wage-earning capacity was not relevant. Ibid. To the extent the WCAC relied upon language in this Court's prior unpublished opinion, the WCAC's reliance was misplaced in light of our Supreme Court's subsequent disposition in this case and that Court's subsequent decision in *Haske*.

The decision of the WCAC is reversed and the magistrate's decision is reinstated.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey