

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY MAYER,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
November 5, 1999

No. 218658
WCAC
LC No. 95-000478

Before: O'Connell, P.J. and Talbot and Zahra, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. 459 Mich 964-964; 591 NW2d 40 (1999).¹ Plaintiff appeals from the opinion and order of the Worker's Compensation Appellate Commission (WCAC) affirming the decision of the magistrate but modifying that decision to suspend benefits based on plaintiff's unreasonable refusal to perform reasonable employment. We vacate and remand to the magistrate for further findings of fact.

I Factual and Procedural Background

Plaintiff was an employee of defendant who worked as a salvage operator, sorting salvage for spark-plug shells. She injured her left hand during the course of her employment on July 2, 1984. She returned to work briefly one week after the injury, but then went on sick leave until March 1985, when she returned to work for one month, performing the same job as when she left. Plaintiff again left work on April 15, 1985. She was initially awarded worker's compensation benefits by an administrative-law judge, but on appeal the award was suspended as of April 15, 1985, because plaintiff had unreasonably refused to perform a job within her capacity to perform. Plaintiff returned to work on September 9, 1988, resuming her job as a salvage operator. She worked off and on until October 18, 1988, when she left work once again.

On January 10, 1992, plaintiff again returned to work. This time, however, she was eventually assigned a job in the "tool crib," where she was required to conduct an inventory of tools and parts. This job required plaintiff to count the tools and parts and log the information into a computer. She was required to climb a ladder, open drawers, and sometimes lift parts out of the drawers in order to

inventory them. Plaintiff's supervisor testified that most of the parts weighed less than two pounds and that plaintiff was not required to lift heavy parts. Although plaintiff was allowed to work at her own pace, she testified that she nonetheless continued to experience pain in her left side and had difficulty performing the work. On May 4, 1992, she injured her right thumb, and plaintiff left work on May 12, 1992.

Plaintiff filed another claim for worker's compensation benefits. The medical testimony consisted of depositions from three physicians, one testifying for plaintiff and two for defendant. Plaintiff's physician testified that the injury to plaintiff's left hand in 1984 caused her to develop reflex sympathetic dysfunction (RSD), a condition that affects the nervous system and can cause swelling, pain, and diminished blood flow. Additionally, plaintiff's physician diagnosed her with fibromyalgia syndrome, a condition describing the occurrence of tender, painful nodules in the body. The physician also testified that he would not recommend plaintiff returning to work without restrictions until plaintiff's medical problems were under control. Defendant's physicians testified that, after examining plaintiff, they did not believe that she suffered from either RSD or fibromyalgia syndrome, but both physicians admitted that they did not have an opportunity to review plaintiff's medical records.

The magistrate accepted the medical testimony of plaintiff's physician and expressly rejected the contrary opinions of defendant's physicians. The magistrate also accepted the opinion of plaintiff's physician that plaintiff was unable to perform any employment. However, the magistrate concluded that plaintiff's disability resulted only from the RSD and fibromyalgia syndrome related to the injury to her left hand, not from any injury to her right thumb. Plaintiff was awarded benefits retroactive to July 15, 1991, one year before the filing of the petition.

The WCAC accepted the magistrate's findings of fact and affirmed its decision with modification. Specifically, the WCAC concluded that plaintiff had refused an offer of reasonable employment because she was able to perform the inventory job. The WCAC found that plaintiff was performing her job and left after a minor thumb injury. Because the magistrate had specifically found that plaintiff's right-thumb injury was not disabling, the WCAC concluded that plaintiff was still able to perform the job. Therefore, the WCAC suspended benefits as of May 12, 1992, the date when plaintiff left work.

On appeal, plaintiff argues that the WCAC exceeded its authority by suspending benefits in this case because the magistrate's findings were supported by competent evidence and were therefore conclusive. The magistrate found that plaintiff was unable to perform any employment, and the WCAC expressly held that it accepted the magistrate's factual findings. Plaintiff argues that the WCAC nonetheless and inappropriately made its own findings, which were not supported by the evidence, that plaintiff was able to perform the inventory job. Plaintiff seeks a reinstatement of the magistrate's decision.

II Standard of Review

Our review of the factual findings of the WCAC is limited. If the WCAC is acting within the scope of its powers, its factual findings are conclusive, absent any fraud. MCL 418.861a(14); MSA

17.237(861a)(14); *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 512; 563 NW2d 214 (1997). The WCAC acts within the scope of its powers where it “act[s] in a manner consistent with the concept of administrative appellate review that is less than de novo review in finding that the magistrate’s decision was or was not supported by competent, material, and substantial evidence on the whole record.” *Id.* at 511, quoting *Holden v Ford Motor Co*, 439 Mich 257, 267-268; 484 NW2d 227 (1992). The WCAC exceeds its authority where it reverses the magistrate’s decision despite the fact that the decision was supported by competent, material, and substantial evidence. *Id.* at 513. “Substantial evidence is evidence that a reasonable person would accept as adequate to justify a conclusion.” *Camburn v Northwest School Dist (After Remand)*, 459 Mich 471, 477; 592 NW2d 46 (1999); MCL 418.861a(3); MSA 17.237(861a)(3).

However, we will ordinarily defer to the judgment of the WCAC unless it is manifest that the WCAC exceeded its power. *Goff, supra* at 516, quoting *Holden, supra* at 269. The following test articulates the judicial tendency to defer to the WCAC:

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 [*Holden, supra* at 269.]

III Reasonable Employment

Plaintiff claims that the WCAC exceeded its authority in modifying the magistrate’s decision because it was supported by the record. Plaintiff further claims that the WCAC therefore acted outside the scope of its reviewing power when it found that plaintiff refused an offer of reasonable employment, since she could have performed the job.

Where an employer offers an employee “reasonable employment,” the employee forfeits any right to worker’s compensation benefits if he or she unreasonably refuses to perform the work. MCL 418.301(5)(a); MSA 17.237(301)(5)(a); *Price v Westland*, 451 Mich 329, 335, 337; 547 NW2d 24 (1996); *Sonoc v University Convalescent & Nursing Home, Inc*, 235 Mich App 600, 611; 599 NW2d 563 (1999). “Reasonable employment” is defined as “work that is within the employee’s capacity to perform that poses no clear and proximate threat to that employee’s health and safety” MCL 418.301(9); MSA 17.237(301)(9). The purpose of this “reasonable-employment” doctrine is to encourage mitigation by allowing the employer to reduce or eliminate compensation payments by providing work that the injured employee can perform. *Sonoc, supra* at 613, quoting *Bower v Whitehall Leather Co*, 412 Mich 172, 182; 312 NW2d 640 (1981). To avoid forfeiture of benefits, the employee may only refuse the offer of reasonable employment “for good and reasonable cause.” MCL 418.301(5)(a); MSA 17.237(301)(5)(a). *McKissack v Comprehensive Health Services of Detroit*, 447 Mich 57, 68; 523 NW2d 444 (1994). Physical inability to perform the work constitutes good and reasonable cause. *Id.* Whether the employer made an offer of reasonable employment and whether the employee’s refusal was for good and reasonable cause are questions of fact. *Price, supra*

at 336; *Pulver v Dundee Cement Co*, 445 Mich 68, 81; 515 NW2d 728 (1994); *Sonoc*, *supra* at 611. We therefore bear in mind the principles discussed above that govern our review of factual findings in worker's compensation cases.

IV Findings of Fact

In this case, the magistrate concluded that plaintiff suffered from RSD and fibromyalgia syndrome on her left side as a result of her left-hand injury and that this supported a finding of total disability. The magistrate also stated, "I accept the opinion offered by plaintiff's treating physician that she is unable to perform any employment at the current time." The magistrate therefore entered an order of benefits. The WCAC correctly noted that its task was to determine whether the magistrate's findings of fact were supported by competent, material, and substantial evidence on the whole record. The WCAC expressly concluded that the findings were supported by the requisite evidence. Nonetheless, the WCAC further concluded that plaintiff was able to perform the inventory job and that she therefore forfeited her right to benefits when she unreasonably refused to perform that job. Correctly noting that the magistrate found that plaintiff's right-thumb injury was not disabling, the WCAC concluded that plaintiff left her job as a result of that non-disabling injury. Therefore, the WCAC suspended benefits as of the date plaintiff left work.

In concluding that plaintiff unreasonably refused to perform the inventory job, the WCAC found that plaintiff was able to perform the job at her own pace and that she was not required to lift anything that she was incapable of lifting. The WCAC found that "plaintiff was free to perform this job with virtually no constraints on the manner or time frame of performance." Furthermore, according to the WCAC, plaintiff claimed that she was incapable of performing the job only after she suffered the minor injury to her right thumb.

Although the WCAC correctly noted that the magistrate found that plaintiff was not disabled as a result of the injury to her right thumb, it was inappropriate for the WCAC to make findings of fact regarding the capacity of plaintiff to perform the inventory job. The magistrate never specifically addressed the issue whether plaintiff could perform the job and whether the job therefore constituted "reasonable employment," such that plaintiff's right to benefits would be suspended for an unreasonable refusal to perform the job. In fact, the magistrate noted that plaintiff was unable to perform *any* employment. The lack of specific factual findings by the magistrate on the ability of plaintiff to perform the inventory job precluded the WCAC from making its own factual findings on this issue. In *Layman v Newkirk Electric Associates, Inc*, 458 Mich 494, 503-504; 581 NW2d 244 (1998), our Supreme Court held that the WCAC impermissibly engaged in fact-finding when it concluded that the plaintiff's arthritis was age-related, where the magistrate did not make a specific finding regarding whether the plaintiff's arthritis was age-related. The Court held that, in the absence of findings by the magistrate, the WCAC may not make its own factual findings. *Id.* at 507. The Court then vacated the WCAC's decision and remanded to the magistrate for further factual findings on the disputed issue. *Id.* at 509-510.

We conclude that the instant case is similar to *Layman*. The magistrate did not make specific findings of fact regarding whether plaintiff was capable of performing the inventory job, and the WCAC

impermissibly made its own factual findings. “Where a factual finding needs to be made, but has not been rendered by the magistrate, the case should be remanded to the magistrate.” *Id.* at 509. Therefore, as in *Layman*, we vacate the decision of the WCAC and remand to the magistrate for findings regarding whether plaintiff was capable of performing the inventory job. The magistrate must determine whether the inventory job constituted reasonable employment and, if so, whether plaintiff had good and reasonable cause to refuse to perform the job. If the magistrate concludes that plaintiff unreasonably refused to perform the job, it must suspend benefits as of the date plaintiff left work.

Vacated and remanded to the magistrate for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O’Connell

/s/ Michael J. Talbot

/s/ Brian K. Zahra

¹ This Court had previously denied plaintiff’s application for leave to appeal. *Mayer v General Motors Corp*, unpublished order of the Court of Appeals, entered April 8, 1998 (Docket No. 208998).