

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT M. CAIN,

Plaintiff-Appellant,

v

WASTE MANAGEMENT, INC.,
TRANSPORTATION INSURANCE COMPANY,
and SECOND INJURY FUND (TOTAL AND
PERMANENT DISABILITY PROVISION),

Defendants-Appellees.

UNPUBLISHED
May 2, 2000

No. 214445
WCAC
LC No. 94-000010

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. Plaintiff appeals a decision of the Worker's Compensation Appellate Commission (WCAC) reversing the magistrate and denying him benefits. We affirm in part, reverse in part, vacate in part, and remand for further proceedings.

I. FACTS AND PROCEEDINGS

Plaintiff sustained traumatic injuries to both legs during the course of his employment for defendant Waste Management, Inc. His right leg was amputated above the knee. His left leg was crushed, and required extensive surgeries and a permanent brace. A right leg prosthesis allowed plaintiff to walk. Defendant paid worker's compensation benefits for the specific loss of plaintiff's right leg. MCL 418.361(2)(k); MSA 17.237(361)(2)(k). Plaintiff returned to work for defendant as a salesman. Subsequently, plaintiff sustained further injuries to his left leg during the course of his employment. Following surgery and physical therapy, he returned to work.

Plaintiff sought total and permanent (T & P) disability benefits pursuant to MCL 418.361(3); MSA 17.237(361)(3). His petition stated:

My legs were crushed in a motor vehicle accident resulting in amputation above the knee of my right leg. The severity of my injuries to my left leg result [sic] in the industrial loss of use of both legs. I am, therefore, entitled to permanent and total disability benefits.

The magistrate denied plaintiff's request to amend his petition to add a claim for specific loss of his left leg. Plaintiff filed an amended petition following the conclusion of the hearing.

The magistrate granted plaintiff both specific loss benefits and T & P disability benefits. The magistrate concluded that plaintiff had pled a claim for specific loss of the left leg, and that plaintiff had demonstrated loss of his left leg tantamount to anatomical loss.

The WCAC reversed and denied plaintiff benefits. The WCAC found that plaintiff had not properly pled a claim for specific loss of his left leg, and that a claim for specific loss must be pled separately from a claim for T & P disability benefits. The WCAC concluded that while specific loss benefits, provided for in subsection 361(2), are intended to compensate for an anatomical loss, T & P disability benefits, provided for in subsection 361(3), are intended to compensate for loss of function resulting in an inability to earn a living. The WCAC noted that while the test for specific loss is an uncorrected test in that the use of any device, i.e., prosthesis, etc., cannot be considered, *Hakala v Burroughs Corp (After Remand)*, 417 Mich 359, 364; 338 NW2d 165 (1983); *Tew v Hillsdale Tool & Mfg Co*, 142 Mich App 29, 35; 369 NW2d 254 (1985), the test for T & P disability benefits requires consideration of devices when evaluating the disability. *Id.*, 36-37; *O'Connor v Binney Auto Parts*, 203 Mich App 522, 534; 513 NW2d 818 (1994). The WCAC reversed the award of specific loss benefits on the ground that plaintiff's allegation of loss of industrial use of both legs did not constitute a legally cognizable claim for specific loss benefits. The WCAC reversed the award of T & P disability benefits on the ground that the evidence showed that although plaintiff suffered discomfort, he retained the ability to use his legs when aided by a prosthesis and a brace.

II. ANALYSIS

Findings of fact made by a magistrate are conclusive on the WCAC if they are supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); MSA 17.237(861a)(3). If a magistrate's decision is supported by the requisite evidence, the WCAC need go no further in its review. *Goff v Bil-Mar Foods, Inc. (After Remand)*, 454 Mich 507, 538; 563 NW2d 214 (1997). If the WCAC finds that that magistrate did not rely on competent evidence, it must detail its findings and the reasons therefore as grounded in the record. *Id.* The WCAC may then make its own findings. *Id.* Those findings are conclusive if the WCAC was acting within its powers. *Id.* Appellate review is limited to a determination of whether the WCAC exceeded its authority. *Id.* The WCAC exceeds its authority when it makes impermissible findings of fact in the absence of findings of fact made by the magistrate. *Layman v Newkirk Electric Associates, Inc.*, 458 Mich 494, 509; 581 NW2d 244 (1998). If a necessary factual finding has not been made by the magistrate, the case must be remanded to the magistrate. *Id.* We review a question of law raised by any final order of the WCAC on a de novo basis. *Oxley v Dep't of Military Affairs*, 460 Mich 536, 540-541; 597 NW2d 89 (1999).

A

Plaintiff argues that the WCAC erred by reversing the magistrate and denying him benefits. We affirm in part, reverse in part, and remand for further proceedings. The WCAC correctly concluded that plaintiff did not plead a claim for benefits for specific loss of his left leg. MCL 418.361; MSA 17.237(361) clearly distinguishes between claims for specific loss benefits and claims for T & P disability benefits, and the procedures for proving the claims differ. Proving a specific loss claim entails showing actual anatomical loss, or loss tantamount to anatomical loss, while proving loss of industrial use entails showing that as a result of the injury the claimant can no longer function in industry. *Johnson v Harnischfeger Corp*, 414 Mich 102, 116; 323 NW2d 912 (1982). The language in plaintiff's petition for benefits, quoted above, parallels the language in subsection 361(3)(g), which provides for payment of T & P disability benefits based on industrial loss of use of two members. The language in plaintiff's petition does not allege loss of use of the left leg tantamount to anatomical loss, and thus does not plead a claim for specific loss benefits. *Hutsko v Chrysler Corp*, 381 Mich 99, 102-103; 158 NW2d 874 (1968). We affirm that portion of the WCAC's decision reversing the award of specific loss benefits.

B

We reverse that portion of the WCAC's decision which holds that a claim for T & P disability benefits must be analyzed under the corrected test. While use of the corrected test is mandated in vision cases, *Hakala, supra*, and has been expanded to cases involving implants, *O'Connor, supra*, its use has not been extended to cases involving prosthetics or braces. In the instant case, plaintiff wears a prosthetic right leg and a brace on his left leg. The brace is not permanently attached to plaintiff's leg. In holding that use of the corrected test was required in this case, the WCAC read *Hakala, supra*, and *O'Connor, supra*, too broadly.

The issue of whether a claimant has suffered loss of industrial use is one of fact. *Pipe v Leese Tool & Die Co*, 410 Mich 510, 527; 302 NW2d 526 (1981). We hold that the WCAC exceeded its authority by applying the corrected test to make initial findings of fact regarding whether plaintiff had suffered the loss of industrial use of his legs. Such initial findings are within the exclusive province of the magistrate. *Layman, supra*. We vacate that portion of the WCAC's decision denying plaintiff's claim for T & P disability benefits and remand with instructions that the WCAC apply the uncorrected test to plaintiff's claim. If necessary, the WCAC may further remand the case to the magistrate for additional findings of fact. *Id.*; MCL 418.861a(12); MSA 17.237(861a)(12).

Affirmed in part, reversed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck