

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT LOWERY,

Plaintiff-Appellant,

v

MILL SHEET & COIL COMPANY and
ACCIDENT FUND COMPANY,

Defendants-Appellees.

UNPUBLISHED

December 26, 2000

No. 217880

WCAC

LC No. 97-000669

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the order of the Worker's Compensation Appellate Commission (WCAC) that reversed the magistrate and granted defendants' petition to recoup benefits and stop payment of benefits. We reverse that portion of the order that grants the petition to stop benefits.

Plaintiff filed a petition for benefits, claiming that he suffered injuries to his back while working for Machinery Mart on or about January 24, 1980. He filed an amended petition alleging that he suffered a disability to his left hand and finger on or about December 10, 1980, while working for defendant Mill Sheet & Coil. The hearing officer denied benefits and plaintiff appealed. In an opinion and order dated November 30, 1989, the Worker's Compensation Appeal Board (WCAB) reversed, granting a closed award of benefits as against Machinery Mart, and an open award of benefits as against defendant. The WCAB found that plaintiff suffered an injury to his left middle finger, as a result of which he could no longer perform his duties as a crane operator.

In December 1994, defendants filed a motion to stop payment of benefits and to recoup benefits, claiming that plaintiff is no longer disabled from employment as a crane operator. In an opinion and order mailed September 2, 1997, the magistrate denied the petition to stop. The magistrate focused on whether there had been a change of condition. In his written decision the magistrate noted plaintiff's testimony that he remains unable to use his left hand properly and so cannot work as a crane operator. The magistrate discounted a videotape allegedly showing plaintiff engaged in activities inconsistent with his injury, finding that the tape showed plaintiff "doing minimal tasks" and did not demonstrate a change of condition. The magistrate noted the

testimony of Dr. Jeffries, to the effect that plaintiff's left finger and hand have less gripping power. Finally, the magistrate stated that defendants' medical expert, Dr. Gowda, did not find any change of condition with regard to plaintiff's left hand problems. The magistrate did not address the petition to recoup.

Defendants appealed, and in an opinion and order dated January 29, 1999, the WCAC reversed. The WCAC found that there is no dispute that plaintiff earned \$522 for post-injury work, and held that defendants are entitled to recoup benefits paid during the period plaintiff was earning wages. The WCAC also found that the magistrate's decision to deny the petition to stop was not supported by substantial evidence. In large part, the WCAC reached this conclusion by finding that there was ample reason to question plaintiff's credibility. The WCAC also questioned the magistrate's interpretation of the expert opinions. The WCAC noted that Dr. Gowda opined that plaintiff could return to his crane operator job without restrictions. The WCAC found that this was consistent with a change in condition, even if Dr. Gowda did not actually use those words, because plaintiff had previously been found to be unable to work as a crane operator as a result of his hand problem. Finally, the WCAC noted that plaintiff had been seen by Dr. Jeffries for a shoulder problem unrelated to his work for defendant. The WCAC implied that Dr. Jeffries had no opinion regarding plaintiff's left hand. The WCAC concluded that substantial evidence does not support the magistrate's findings, and accordingly reversed and granted defendants' petition to stop payment of benefits.

This Court granted plaintiff's application for leave to appeal, and we now reverse the WCAC's decision to stop payment benefits.

The WCAC must consider the magistrate's findings of fact conclusive if they are supported by competent, material, and substantial evidence on the whole record. Substantial evidence is evidence that a reasonable person would accept as adequate to justify a conclusion. This Court's review of a decision by the WCAC is limited. In the absence of fraud, findings of fact made by the WCAC acting within its powers shall be conclusive. This Court may review questions of law involved with any final order of the WCAC. MCL 418.861a(3) & (14); MSA 17.237(861a), *Holden v Ford Motor Co*, 439 Mich 257; 484 NW2d 227 (1992). However, this Court does not independently review the question whether the magistrate's findings of fact are supported by substantial evidence. Instead, this Court's review is at an end once it is satisfied that the WCAC has understood and properly applied its own standard of review. So long as the WCAC did not "misapprehend or grossly misapply" the substantial evidence test and gave adequate reasons grounded in the record in the event it reversed the magistrate, this Court should deny leave to appeal or if leave is granted should affirm. *York v Wayne Co Sheriff's Dept*, 219 Mich App 370, 378-379; 556 NW2d 882 (1996), cited with approval in *Goff v Bil-Mar Foods (After Remand)*, 454 Mich 507, 528 n 16; 563 NW2d 214 (1997). However, the WCAC must be cognizant of the deference due the magistrate, and must not give mere lip service to this requirement. This is particularly true in evaluating the credibility of witnesses who appear before the magistrate. *Id.* at 536.

In this case the WCAC cited to and quoted from the record in questioning the magistrate's implicit decision to credit plaintiff's testimony. However, the WCAC did not

explain its reasons for finding that the record cannot support the magistrate's credibility determination. Further, the reasons given by the WCAC for rejecting plaintiff's testimony were largely directed towards the credibility of plaintiff's initial claim for benefits, and not towards the question whether there had been change of condition so that plaintiff was no longer disabled from employment.¹

¹ Indeed, the WCAC's opinion clearly reflects that it doubted the merits of plaintiff's initial claim for benefits. The WCAC stated:

The issues before us cannot be properly addressed without an exploration of the history of this somewhat troubling case. Plaintiff brought his original complaint against two employers back in the early 1980's based on separate injuries. On September 15, 1983, Referee William Bly Edwards found that plaintiff had failed to prove the injury to his left hand had disabled him from his job as a crane operator with Mill Sheet and Coil.

On November 30, 1989, in a split decision,² the Worker's Compensation Appeal Board reversed the magistrate, granting plaintiff's award against this defendant for "liability limited to plaintiff's December 10, 1980 injury to his left middle finger." Despite the fact plaintiff only attempted to return to his job for a little over one hour,³ the two-person majority at the Appeal Board exercised their broad de novo review powers, and found:

We would find the testimony of plaintiff as it related to his hand as being credible. We would further find that plaintiff's testimony that he was unable to perform his job as crane operator when he attempted to go back and use the crane was credible. We would find that this testimony is persuasive notwithstanding the fact that he was only there for a few hours and ten or fifteen minutes attempting to utilize the crane with his hand.

² See 1989 WCABO 1295.

³ The dissenting appeal board member notes the injury to plaintiff's finger is not the type which would present a problem operating a crane:

Dr. Robert Larsen testified that plaintiff was not disabled as a crane operator. Dr. Larsen opined that the damage to plaintiff's finger was of the digital sensory nerves. Dr. Larsen testified that plaintiff would have difficulty with tasks requiring dexterity in the task involving the use of the middle finger, such as playing a piano or rapid typing. He further testified that plaintiff's finger in its present form was permanent.

Based on the testimony of the witnesses, I find that plaintiff had difficulty operating the crane when he went back to work, however, I find that plaintiff is no longer disabled as a crane operator. I accept the more persuasive testimony of Dr. Larsen that plaintiff is no longer disabled, and should have no difficulty operating

The WCAC first noted that defense counsel questioned plaintiff regarding a history of work taken by a doctor, which apparently indicates that plaintiff was “involved in sandblasting, spray painting, repair maintenance of spray pumps and paint pumps.” Plaintiff testified that he was so involved, but only as a supervisor of others doing such work. He testified that this is what he told the doctor, and that if the doctor wrote something else down the doctor was mistaken. After noting this testimony, the WCAC went on to consider other questions regarding credibility. The WCAC did not, however, note any other evidence tending to show that plaintiff in fact did such work, as opposed to supervising it. Although the discrepancy between the history given the doctor and plaintiff’s testimony does bear on his credibility, the work was performed long before the WCAB’s initial determination of disability and the WCAC did not show that the magistrate’s decision to believe plaintiff was unreasonable.

The WCAC also noted that plaintiff was questioned regarding alleged misstatements or lies made by him when filling out his original petition for benefits in 1982. Again, the mere fact that there may be some question whether plaintiff told the truth in 1982 does not mean that the magistrate would have erred if he rejected that contention. Moreover, this credibility issue also preceded the WCAB’s initial determination of disability.

Plaintiff was also asked whether he had ever been convicted of a felony. Although he answered no, he admitted that he had been placed on probation after being convicted of attempted breaking and entering of a vacant building. Once again, the WCAC simply noted the questions and answers, but failed to explain why the magistrate erred in finding plaintiff credible in light of the questions and answers. Moreover, our review of the questions and answers leads us to conclude that they do not necessarily impugn plaintiff’s credibility. It is at least as likely that plaintiff was confused or was ignorant of the nature of a felony. His answers indicate that he meant to make clear that he was not convicted of breaking and entering an occupied building. Further, it appears that this activity preceded the WCAB’s decision as well.

Questions were also raised regarding plaintiff’s address. We find that the discrepancy between addresses given by plaintiff was adequately explained on the record. Plaintiff moved once or twice, and had mail forwarded to a different address because of concerns regarding theft of the mail.

Finally, the WCAC was concerned about plaintiff’s income from dealing in antiques in partnership with his brother. Although defense counsel attempted to get plaintiff to admit that he

the crane at defendant’s plant. While I do not discount the testimony of plaintiff, I note that plaintiff attempted to operate the crane for a short time (one hour, and about ten minutes). I would, therefore, find factually that although plaintiff may have had some initial “difficulty” operating the crane with his finger extended, the crane could be operated with this type of injury. I note further that the operation of the crane does not require fine motor coordination or rapid flexion....

actually did work in the business, plaintiff testified that he was a partner only in the sense that he invested money in the business, which he obtained as a result of an accident settlement.

We conclude that the WCAC failed in part to articulate *reasons* for second-guessing the magistrate's credibility determination, and failed to give *adequate* reasons grounded in the record for doing so.

We also conclude that the WCAC mischaracterized or misunderstood the testimony of Dr. Jeffries. Although it is true that Dr. Jeffries testified that he saw plaintiff largely on account of shoulder problems, he also testified that although he is not a hand surgeon, plaintiff still had "a stiff, insensate finger you would have to be careful about using—or, being involved with hot objects, poker, that kind of stuff. Certainly couldn't type very well. There are certain things you couldn't do because of that." He also testified that although plaintiff had surgery on the finger which was technically successful, "it was still stiff and numb." The magistrate is generally entitled to choose the medical opinion he finds most persuasive. *Miklik v Michigan Special Machine Co*, 415 Mich 364, 367; 329 NW2d 713 (1982).

It appears that the magistrate started from the premise that plaintiff suffered a particular injury in December 1980, which, as found by the WCAB, left him disabled from his job as a crane operator. The magistrate listened to plaintiff's testimony that he was still disabled and found that defendants' impeachment of plaintiff did not render that testimony incredible, and found that the medical testimony did not establish a change in the condition of plaintiff's finger that would undermine the WCAB's determination that the injury caused a disabling condition. The WCAC, on the other hand, seems to have made a determination that plaintiff is incredible, based predominantly on factors that were present during the initial decision, and that Dr. Gowda's testimony that plaintiff was not disabled from his job as a crane operator was credible, and therefore there was a change of condition since plaintiff had earlier been determined to be disabled.

The WCAC, in a footnote to its decision, acknowledged the deference due to the magistrate's determination of credibility, but explained that it may reject that determination when "contradicted by serious inconsistencies and incongruities." Our review of the record leads us to conclude that such serious inconsistencies and incongruities were not present and, in fact, the asserted bases for the credibility determination were largely collateral and stale, and that the WCAC simply substituted its credibility determination for the magistrate's, which is not permitted. *Goff, supra* at 514.

Plaintiff does not challenge the WCAC's holding that defendants are entitled to recoup benefits as set forth in the WCAC's opinion, and we express no opinion in this regard.

Reversed in part and remanded for entry of an order denying the petition to stop payment of benefits.

/s/ Michael J. Kelly

/s/ Helene N. White

/s/ Kurtis T. Wilder