STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY THEUNICK,

Plaintiff-Appellant/Cross-Appellee,

v

EVART PRODUCTS/TEXTRON, INC. and CONSTITUTION STATE/TRAVELERS a/k/a KEMPER INSURANCE CO.,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
May 24, 2002

No. 230857
WCAC
LC No. 99-000083

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals by leave granted and defendants cross-appeal as of right from an order of the Worker's Compensation Appellate Commission (WCAC) suspending plaintiff's entitlement to benefits and thereby reversing in part the magistrate's decision on second remand granting plaintiff wage-loss benefits. We affirm.

On appeal, plaintiff's issues presented concern his challenge to the WCAC's reversal of the magistrate's finding that he did not refuse reasonable employment on his last day of work. Under the circumstances, we disagree with plaintiff that reversal of the WCAC's decision is necessary.

As our Supreme Court has recognized, an employee who unreasonably refuses a bona fide offer of reasonable employment loses his entitlement to worker's compensation benefits during the period of such unreasonable refusal. *Russell v Whirlpool Financial Corp*, 461 Mich 579, 586-587; 608 NW2d 52 (2000); *Perez v Keeler Brass Co*, 461 Mich 602, 611; 608 NW2d 45 (2000). Our Supreme Court has also clearly held that the question whether an employer "made a bona fide offer of [reasonable employment] is generally a factual issue." *Price v City of Westland*, 451 Mich 329, 336; 547 NW2d 24 (1996). Further, "[w]hether an employee's refusal of reasonable employment is for good and reasonable cause is a question of fact." *Pulver v Dundee Cement Co*, 445 Mich 68, 71; 515 NW2d 728 (1994); see also *Sonoc v Univ Convalescent & Nursing Home, Inc*, 235 Mich App 600, 611; 599 NW2d 563 (1999). More recently, in *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 702; 614 NW2d 607 (2000), Justice Markman, writing for a majority of the Court, acknowledged that "[t]he judiciary . . . must accept the WCAC's factual findings as conclusive, in the absence of fraud."

A review of the WCAC's ruling reflects its findings that Evart offered plaintiff reasonable employment, and that plaintiff refused this offer without "good and reasonable cause." On appeal to this Court, plaintiff apparently disagrees with the WCAC's ultimate conclusion, and invites this Court to engage in fact-finding anew, an impermissible exercise according to the clear dictates of *Mudel*. Because the WCAC's findings of fact are supported by "any" evidence in the record, *id*. at 703,[1] we decline plaintiff's invitation to second-guess the WCAC's factual findings.

On cross-appeal,[2] defendants argue that the WCAC erred in affirming the magistrate's determination that plaintiff's employment following his injury did not establish a new wage-earning capacity. See MCL 418.301(5)(d)(i); *Maier v General Telephone Co of Michigan*, 247 Mich App 655, 660-661; 637 NW2d 263 (2001). Whether a worker's compensation claimant's post-injury work created a new wage earning capacity is a question of fact. *Lawrence v Toys R Us*, 453 Mich 112, 123; 551 NW2d 155 (1996) (Levin J.); *Spencer v Clark Twp*, 142 Mich App 63, 70; 368 NW2d 897 (1985). As noted above, absent a showing of fraud, the WCAC's factual finding that plaintiff's post-injury work did not establish a new wage-earning capacity is binding on this Court. Second, defendants assert that the WCAC erred in affirming the magistrate's determination that plaintiff's employment aggravated in a significant manner plaintiff's preexisting degenerative back condition. See MCL 418.301(2). However, this also presents a factual question within the province of the WCAC that is binding on this Court in the absence of fraud. *Gardner v Van Buren Public Schools*, 445 Mich 23, 47; 517 NW2d 1 (1994), overruled on other grounds *Robertson v Daimler Chrysler Corp*, ___ Mich ____; ___ NW2d ___ (Docket No. 116276, decided 4/9/02); *Mattison v Pontiac Osteopathic Hosp*, 242 Mich App 664, 673; 620 NW2d 313 (2000).

After undertaking a proper qualitative and quantitative review of the record, *Mudel, supra* at 699-700, and weighing both occupational and non-occupational factors, *Farrington v Total Petroleum, Inc*, 442 Mich 201, 216-217; 501 NW2d 76 (1993); *Woodman v Meijer Companies, Ltd, Inc*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 231133, issued 4/9/02), slip op p 8, the WCAC concluded that plaintiff's employment significantly aggravated his preexisting back condition. Under the circumstances, we are not persuaded that the WCAC relied on the wrong legal reasoning or framework in analyzing whether plaintiff's employment significantly aggravated his back condition to the extent that reversal is warranted. *DiBenedetto v West Shore*

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[1] Specifically, the record reflects that on November 23, 1998, Evart sent plaintiff a letter offering reasonable employment in conformance with Dr. Holda's restrictions, to begin November 30, 1998. This letter followed an October 14, 1998, letter to plaintiff in which Evart manifested its intent to not adhere to Dr. Chin's October 1, 1998, recommendation restricting plaintiff to three hours of work. Further, Dr. Chin's November 25, 1998, attending physician statement, entered into evidence at trial, reflected that plaintiff was able to return to work, and did not list a three-hour restriction. Thus, the WCAC's finding that plaintiff refused work without good and reasonable cause is supported by the record.

[2] However, defendants note in their brief on cross-appeal that they seek remand on these issues "only if th[is] Court grants plaintiff relief with respect to his assignment of error [on appeal]."

Hosp, 461 Mich 394, 403; 605 NW2d 300 (2000).

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell