

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DUANE MCGORMAN,

Plaintiff-Appellant,

v

NATIONAL MOTOR FREIGHT LINES, THE  
ACCIDENT FUND COMPANY, TRUCKING  
SERVICES, INC., AND AMERISURE COMPANY,

Defendant-Appellees.

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UNPUBLISHED  
June 25, 1996

No. 175891  
LC No. 00000074

Before: Young, P.J., and Gribbs and Ernst,\* JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an April 29, 1994 opinion and order of the Workers' Compensation Appellate Commission ("WCAC"), issued in accordance with a remand order from this Court, Docket No. 146524. Plaintiff argues that the WCAC erred as a matter of law by only granting a closed award of benefits. We vacate and remand.

I

Plaintiff was employed as a truck driver with defendant National Motor Freight. On February 22, 1984, plaintiff's right hand was crushed when he and a crane operator were loading coils of steel on to plaintiff's truck. Unable to return to work, plaintiff received workers' compensation benefits until April 1984. Shortly thereafter, plaintiff returned to defendant's employ in another position for several weeks until he was laid off on June 1, 1984. Afterwards, plaintiff was hired for brief periods by four different employers, but lost these jobs due to problems resulting from the pain in his right hand. In November 1984 while working as a truck driver, plaintiff injured his left hand and received workers' compensation benefits for two months. On April 28, 1985, plaintiff was hired as a truck driver by Trucking Services, and testified that he managed to perform his work by using his left hand to

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\* Circuit judge, sitting on the Court of Appeals by assignment.

compensate for the weakness in his right hand. Plaintiff allegedly sustained a head injury while in this position,<sup>1</sup> and left Trucking Services, in July 1985.

Plaintiff brought a claim for workers' compensation benefits against defendant and Trucking Services. At plaintiff's hearing in 1988, defendant stipulated to the occurrence of plaintiff's hand injury on February 22, 1984, but denied plaintiff's claim of continuing work-related disability. According to medical testimony, plaintiff had limitations in the use of his right hand. Plaintiff's treating physician opined that plaintiff's hand injury in 1984 contributed to his current limitations. However, defendant's expert was uncertain whether plaintiff's limitations resulted from the 1984 injury or from an injury prior to plaintiff's employment with defendant.

The hearing magistrate denied plaintiff's claim, which was affirmed by the Workers' Compensation Appeal Board (WCAB). This Court remanded the case to the WCAB for further consideration of plaintiff's disability claims and ordered that the WCAB issue "a supplemental written opinion indicating its findings in a manner sufficient to permit proper appellate review."

## II

On remand, the WCAC, as successor to the WCAB, conducted a de novo review<sup>2</sup> of plaintiff's claims and issued a written opinion and order on April 28, 1994. The WCAC found that plaintiff had a work-related disability based on an injury sustained on February 22, 1984, while plaintiff was employed with defendant National Motor Freight as a truck driver. Concluding that plaintiff was no longer disabled, the WCAC closed the award on April 28, 1985 when plaintiff began working as a truck driver for Trucking Services. The WCAC based its conclusion on the following reasons: (1) while employed with Trucking Services, plaintiff was able to perform essentially all the duties of a truck driver; (2) plaintiff testified that his hand was feeling "much better;" and (3) plaintiff testified that his subsequent head injury prevented him from working.

## III

Plaintiff argues that the WCAC erred as a matter of law by concluding that he was no longer disabled on the date he resumed work as a truck driver for Trucking Services. The WCAC's findings, absent fraud, are conclusive on appeal, such that we limit our review to the WCAC's application of the law. *Peck v General Motors*, 164 Mich App 580, 589; 417 NW2d 547 (1987). We hold that the WCAC applied the wrong legal analysis in concluding that plaintiff was no longer disabled in April 1985. Because plaintiff's injury occurred before March 14, 1987, plaintiff can be considered "disabled" if his injury results in a loss of wage-earning capacity in the entire field of unskilled common labor. *Turrentine v General Motors*, 198 Mich App 572, 574-576; 499 NW2d 411, lv den 443 Mich 889 (1993); *Adair v Metropolitan Building Co*, 38 Mich App 393, 403; 196 NW2d 335 (1972). The test is not whether the worker can return to the work he was performing when he was injured. *Garvie v Owens-Illinois, Inc*, 167 Mich App 133, 136; 421 NW2d 602 (1988). Rather, this

determination requires the examination of several factors: (1) the amount of wages the worker is able to earn; (2) the nature of the work performed; (3) the continuing availability of this work, and (4) the nature and the extent of the injury. *Pulley v Detroit Engineering and Machine Co*, 378 Mich 418, 423; 145 NW2d 40 (1966); *Bauer v Allied Supermarkets, Inc*, 139 Mich App 369, 377; 362 NW2d 283 (1984).

In addition, plaintiff is entitled to the following considerations. In *Medacco v Campbell, Wyant & Cannon Foundry Co*, 48 Mich App 217; 210 NW2d 360 (1973), this Court held that a worker is not precluded from receiving benefits when he or she performs at his or her pre-injury level by modifying work habits to mitigate the effect of the injury. *Medacco, supra*, 48 Mich App 221-222. This consideration, however, does not affect an employer's right to setoff. See MCL 418.371; MSA 17.237(371). Further, plaintiff correctly points out that a subsequent supervening non-occupational injury, for which the worker is not responsible, does not preclude the worker's entitlement to disability compensation. *Powell v Casco Nelmor Corp*, 406 Mich 332, 352; 279 NW2d 769 (1979); *Medacco, supra*, 48 Mich App 227-228.

In light of our decision to remand, it is unnecessary to resolve the other issues that plaintiff has raised on appeal.<sup>3</sup>

Vacated and remanded consistent with this opinion. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.

/s/ Roman S. Gribbs

/s/ J. Richard Ernst

<sup>1</sup> In his claim for benefits, plaintiff was seeking benefits related to this injury from Trucking Services, Inc. The WCAC and its predecessor, the WCAB, rejected this claim. Plaintiff does not challenge that determination in this appeal.

<sup>2</sup> The WCAC reviews any matters originally assigned to the WCAB in accordance with the standard of review applied by the WCAB, i.e., de novo review. See *Farrington v Total Petroleum*, 442 Mich 201, 212 n 13; 501 NW2d 76 (1993).

<sup>3</sup> Plaintiff claims that he remains entitled to compensation because his employment with Trucking Services did not exceed 100 weeks. See MCL 418.301(e); MSA 17.237(301)(e). Plaintiff also claims that the WCAC's finding that plaintiff's disability ceased in April 1985 was legally inconsistent with the medical testimony. These factual issues will be resolved by the WCAC on remand. Acting as successor to the WCAB, the WCAC determines the weight and credibility of testimony from lay and medical witnesses. See *Sanford v Ryerson & Haynes, Inc*, 396 Mich 630, 635; 242 NW2d 393 (1976).