STATE OF MICHIGAN

COURT OF APPEALS

RICK L. McRATH,

Plaintiff-Appellee,

v

AON CORPORATION and COMBINED INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
October 4, 1996

No. 186744
LC No. 94-452

Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

In this worker's disability compensation case, defendants appeal by leave granted the opinion and order of the Worker's Compensation Appellate Commission affirming a magistrate's award of disability compensation benefits to plaintiff. We affirm.

Plaintiff was an insurance salesman and regional manager for defendant Combined Insurance Company. In early 1990, plaintiff, who weighed more than 300 pounds, sat on a chair in the home of a client, breaking the chair. He fell backwards, injuring his back. Defendant paid disability compensation benefits for more than a year, but, when defendant's examining physician certified that plaintiff was able to return to work, defendant filed a Notice of Stopping Compensation Payments.

Plaintiff contested defendant's action, and the matter was heard by a Bureau of Workers' Disability Compensation Magistrate. Medical testimony contradicting the conclusions of defendant's physician was presented. In a thorough and well written opinion, the magistrate found that plaintiff still suffered debilitating effects from his injury, and that, because of this, plaintiff had no remaining wage-earning capacity. The magistrate's decision was upheld by Workers' Compensation Appellate Commission. Defendants applied for leave to appeal to this Court, which application was granted.

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

On appeal, defendants first contend that the Appellate Commission's findings of fact with respect to plaintiff's disability are not supported by competent evidence. The Commission's findings of fact "are conclusive if there is any competent evidence to support them." *Weems v Chrysler Corp*, 448 Mich 679, 688; 533 NW2d 287 (1995). This is a difficult standard of review for an appellant to overcome, and defendants have not succeeded. All of the factual conclusions of the Commission are either directly supported by competent record evidence, or rest upon inescapable inference. Therefore, we find no error with respect to the Commission's factual findings.

Second, defendants argue that even if one assumes that the factual findings of the Commission are correct, plaintiff is still not "disabled" as that term is used in the Worker's Disability Compensation Act. MCL 418.101 *et seq.*; MSA 17.237(101) *et seq*. In § 301(4) of the Act, the term "disability" is defined to be a "limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training." Defendants submit that because plaintiff acted primarily in a supervisory capacity, he could tailor his work schedule and activities in accordance with the suggestions of his medical experts, thereby retaining his job and maintaining his income level, albeit at the cost of a longer work day. In short, defendants contend that because plaintiff had the authority to take breaks whenever his back injury acted up, he could still perform his job and receive the same compensation, though it would probably take him longer.

This Court has interpreted § 301(4) of the act to mean that "an employee is 'disabled' . . . if the employee suffers from *any* limitation in wage-earning capacity in work suitable to the employee's qualifications and training." *Rea v Regency Olds/Mazda/Volvo*, 204 Mich App 516, 523; 517 NW2d 251 (emphasis supplied), lv granted 447 Mich 996 (1994). While defendants' suggested interpretation of the statute in issue is not untenable, we are constrained to follow prior precedent on this matter. See Supreme Court Adm. Order 1996-4 (1996).[1] Given that plaintiff also acted as a salesman, any injury that caused him to take longer performing sales functions necessarily limited his wage-earning capacity, and plaintiff testified to this effect. Plaintiff agreed that his income was largely dependent on the number of policies he sold, which in turn was dependent on the amount of time he devoted to selling policies. Thus, an injury which caused him to take longer in his sales activities reduced the number of sales he could make. Therefore, we find no error of law in the Commission's decision where plaintiff's injury served to limit his wage-earning capacity to some extent.

Finally, defendants claim that because plaintiff is capable of performing some type of work, he is not totally disabled, and is entitled to only partial disability compensation. Because defendants raised this issue neither before the magistrate nor before the Appellate Commission, we decline to address it now. See *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). In any event, the Commission's finding of total disability as opposed to

partial disability is a factual conclusion, and, as stated above, competent evidence supports the Commission's factual findings.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kenneth W. Schmidt

I concur in result only.

/s/ Michael J. Kelly

[1] We note that the Supreme Court has granted leave to appeal in *Rea*. 447 Mich 996 (1994).