STATE OF MICHIGAN

COURT OF APPEALS

RONALD F. HAMILTON,

Plaintiff-Appellant,

v

SEALED POWER CORPORATION and
LIBERTY MUTUAL INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
October 11, 1996

No. 181660
WCAC No. 00000152

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

By leave granted, plaintiff appeals a decision by the Worker's Compensation Appellate Commission (WCAC), in its capacity as successor to the now defunct Worker's Compensation Appeal Board (WCAB). The WCAC decision followed a remand for reconsideration previously ordered by this Court. On remand, and pursuant to *Sobotka v Chrysler Corp*, 447 Mich 1; 523 NW2d 454 (1994), the WCAC reversed plaintiff's open award of weekly wage loss benefits for partial disability. We reverse.

Plaintiff performed unskilled, common labor for defendant, Sealed Power Corporation, from November of 1972 until July 3, 1985, when he was fired for excessive absenteeism. According to plaintiff, his absenteeism was the result of continuing pain in his neck and shoulders attributable to a series of several work injuries since 1977, as well as the side effects of pain medication he was taking for those injuries. Plaintiff challenged the termination of his employment pursuant to a grievance which ultimately went to arbitration. The arbitrator ruled against plaintiff based upon the union contract which permitted termination based upon excessive absenteeism regardless of fault or whether the absences are excused or unexcused.

Plaintiff testified that this was the second time he had been terminated from his employment at Sealed Power, and that he had previously been fired in 1977 or 1978 for allegedly falsifying doctor's statements. In that situation, plaintiff also filed a grievance which went to arbitration, and the arbitrator returned plaintiff to work.

At the 1986 hearing in this case, plaintiff indicated that he was still having problems with pain in his neck and shoulders, but testified that he would still have been able to perform his former job at Sealed Power, "without limitation," had he not been terminated from his employment. However, plaintiff's medical expert witnesses, Drs. Dunn and LeClaire, recommended restrictions against the kind of repetitive lifting activities involved in plaintiff's former work duties. Dr. Mahaney, a medical expert witness for the defense, opined that plaintiff was capable of returning to unrestricted work.

On September 22, 1986, the hearing referee found plaintiff to be partially disabled through his last day of employment as a result of his work injuries. In concluding that plaintiff was incapable of working steadily on a full-time basis, the decision relied in part upon the evidence of plaintiff's 20% to 30% absenteeism rate during his last four years of employment:

> Plaintiff has been intermittently disabled since 6-77 with his shoulder and neck problems. Plaintiff's recurrent disabilities are substantiated by plaintiff's testimony, the 8-13-85 EMG (especially as explained by Dr. LeClaire after comparison with the 2-26-82 EMG), and the diminished left radial pulse when the left arm was raised above plaintiff's head by Dr. Mahaney. While plaintiff was and is capable of doing his regular job between 70% and 80% of the time, he cannot do it 40 hours a week, 48 weeks per year. This is a partial disability. In addition, there are other common labor jobs where plaintiff cannot compete equally with healthy laborers.

Although the referee found plaintiff only partially disabled, he granted an open award of wage loss benefits at the maximum weekly rate available, $295.74 per week, based upon plaintiff's average weekly wage and the date he last worked in 1985.

In a decision issued June 27, 1991, a panel of the former WCAB affirmed the referee's award of benefits. The WCAB applied essentially the same partial disability analysis as the hearing referee, relying in part upon plaintiff's excessive absenteeism and eventual job loss at Sealed Power as proof that plaintiff's work-related injuries prevent him from being able to perform full-time work on a sustained basis:

> The plaintiff need only preponderate a reasonable cause and effect relationship between the disability and the workplace. *Kepsel v McCready & Sons*, 345 Mich 335 [76 NW2d 30] (1956). We find the evidence overwhelmingly establishes plaintiff sustained an injury to his right shoulder when he was pushing parts and felt a sharp pain in his neck and shoulders. This is supported by plaintiff's medical records and the medical testimony in evidence. This injury was not questioned by defendant and caused plaintiff to miss a significant amount of time off work when the pain would become unbearable and he was unable to do the job. There is nothing in the record to suggest that defendant question[ed] plaintiff's injuries or that he did not have a legitimate excuse for taking time off. What the evidence does suggest is that defendant knew full well that

> plaintiff was off because of the shoulder injury and recognized the fact that it was work-related, but terminated him because he was unable to perform full-time work on a sustained basis. This fact was also acknowledged by the arbitrator who presided over plaintiff's grievance. Although the arbitrator ruled against plaintiff, based upon the collective bargaining agreement, the fact still remains that plaintiff lost time from work because of the shoulder injury, which we find was causally related to his work with defendant by way of initial cause and continuous aggravation while carrying out his daily duties. Plaintiff was experiencing work-related disabilities while attempting to perform his work for defendant; he remains partially disabled by his work-related condition.

Regarding the rate of plaintiff's weekly wage loss benefits for partial disability, the WCAB rejected the notion that plaintiff had failed to prove the degree of impairment of wage-earning capacity necessary for an award at the maximum weekly rate (or any lesser weekly rate) pursuant to §361(1) of the Worker's Disability Compensation Act (WDCA), MCL 418.361(1); MSA 28.361(1). Specifically, §361(1) requires that weekly wage loss benefits for partial disability equal 80% of the difference between the injured employee's after-tax average weekly wage before injury and the after-tax average weekly wage which the injured employee was able to earn after the injury. In this regard, the WCAB reasoned that plaintiff was entitled to an award at the maximum weekly benefit rate because the record failed to indicate that plaintiff had any post-injury wage-earning capacity at all. The WCAB noted the absence of proof that plaintiff has returned to any permanent post-injury work:

> Even though plaintiff thought he could perform work "[w]ithout limitation," the medical evidence demonstrates that plaintiff cannot perform his regular job at common labor and is restricted from performing heavy lifting or work that strains his shoulders. He is entitled to compensation benefits for his partial disability in accordance with Section 361 of the Act. On this record, plaintiff has not returned to any work with a condition of permanency. He has not established any post wage earning capacity at all.

Sealed Power and Liberty Mutual Insurance Company, the company's worker's compensation insurance carrier at the relevant time, applied with this Court for leave to appeal the WCAB's decision. In addition to other issues, the defendants challenged the WCAB's finding of compensable partial disability. The defendants also argued that, for purposes of setting plaintiff's weekly benefit rate under §361(1), the WCAB should have specifically determined the extent that plaintiff's partial disability impaired his wage earning capacity. Defendants argued that such a determination should have been made despite that plaintiff remained unemployed. This Court delayed adjudication of the defendants' application pending this Court's decision in *Sobotka v Chrysler Corp (On Rehearing)*, 198 Mich App 455; 499 NW2d 777 (1993), rev'd 447 Mich 1; 523 NW2d 454 (1994), which involved essentially the same issue regarding how weekly benefit rates are to be calculated for partially disabled employees who have not obtained post-injury employment.

In *Sobotka*, this Court rejected as improper the practice of automatically awarding partial disability benefits at the maximum applicable benefit rate unless and until the injured worker returns to or

refuses an offer of post-injury work. This Court reasoned that in all cases of partial disability, §361(1) requires calculation of the weekly benefit rate according to the proportionate extent of impairment in the employee's wage-earning capacity. The calculation is based upon a comparison of the employee's pre-injury and post-injury wage-earning capacities, regardless of whether the employee has returned to or refused any offer of post-injury work. In other words, this Court held that, even if a partially disabled worker has not obtained or refused post-injury employment, the extent of impairment of the worker's wage-earning capacity still must be specifically determined, in dollars and cents, according to an assessment of the worker's abstract or theoretical post-injury wage-earning capacity.

Shortly after this Court issued its final decision in the *Sobotka* case, this Court remanded for reconsideration a number of other cases which were pending before this Court on application for leave to appeal at that time, including the instant case. Specifically, by peremptory order issued June 18,1993, this Court remanded the instant case to the WCAC for reconsideration in light of this Court's decision in *Sobotka.* This Court also denied "for lack of merit in the grounds presented" the defendants' application for leave to appeal "in all other respects."

Before this case was decided on remand by the WCAC, this Court's decision in *Sobotka* was reversed by a plurality decision of the Michigan Supreme Court. *Sobotka v Chrysler Corp*, 447 Mich 1; 523 NW2d 454 (1994). There was some disagreement between the justices regarding whether and when a partially disabled worker who has not earned or refused post-injury wages may be awarded less than the maximum weekly benefit rate based upon a determination of the worker's residual wage-earning capacity. However, a majority of the justices agreed that a determination of residual wage-earning capacity is not required, that the absence of wages and evidence of a work-related injury permits an award of maximum benefits, and that the factfinder is free to accept or reject evidence of actual wages earned, avoided, or refused, or other factors affecting the worker's actual as opposed to theoretical employability. See, e.g., *McKissack v Comprehensive Health Services*, 447 Mich 57, 70-71; 523 NW2d 444 (1994) (summarizing the Court's holding in *Sobotka*).

In its opinion on remand, the WCAC recognized that this Court's decision in *Sobotka* had been superseded by the decision of the Michigan Supreme Court, and therefore the WCAC purported to apply *Sobotka* as "revised" or "modified" by the Michigan Supreme Court. Opining that *Sobotka* "requires" a determination of plaintiff's remaining ability to earn wages, the WCAC focused upon plaintiff's own testimony that he would be able to perform his former job duties without limitation if not for being fired. The WCAC concluded from that testimony that plaintiff had suffered no reduction in his ability to earn wages whatsoever, thus he was not entitled to any weekly benefits under §361(1) at all:

> Here, we have the unrebutted testimony of plaintiff himself. He can do the same job without restrictions. Even though the medical testimony in this case supported some objective findings, it is common knowledge that objective findings do not necessarily indicate a disability. Further, with regard to subjective findings, it is also common knowledge that some persons have higher pain thresholds than others and can work despite some level of discomfort.

> We further recognize the statutory dichotomy between disability and a reduction in wage earning capacity as expressed in MCL 418.301(4). "The establishment of disability does not create a presumption of wage loss." While there is some medical testimony documenting a problematic shoulder, plaintiff states that he is able to work and would be working, but for the termination of July 3, 1985.
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> Plaintiff was asked on three occasions essentially whether he was disabled and he denied it. Because he has testified to the ability to work the same job for the same employer we have no choice but to find no reduction of his ability to earn wages. Not only has plaintiff failed to demonstrate a reduction in his ability to compete anywhere in the field of common labor, he has not shown a reduced ability to perform his own job. Even the Administrative Law Judge's conclusion that plaintiff can only work 70-80% of the time must be overridden by plaintiff's testimony. Plaintiff's statements at trial must be given more weight than the work records of more than a year prior. Plaintiff best knows the current state of his condition.
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> Because of plaintiff's categorical and unrebutted testimony that he can work the very position in which he was injured and thus earn as much income after the development of the physical restriction as before, we are compelled to find as a matter of fact that plaintiff has no reduction in his ability to earn wages. Consequently, plaintiff is not eligible for weekly benefits by operation of §361(1) as interpreted by the Michigan Supreme Court in *Sobotka, supra*. However, because he did establish a work related injury, plaintiff is entitled to continuing reasonable and necessary medical benefits.

On appeal, plaintiff argues that the WCAC misinterpreted and misapplied the *Sobotka* decision and exceeded the bounds of its authority on remand, among other things. We agree, although we do not entirely agree with plaintiff's reasons for reaching this conclusion.

It is important to note that the WCAC decided this case in its capacity as the successor to the former WCAB, because this case was originally decided on appeal by a panel of the WCAB. This being so, the WCAC was entitled to engage in de novo review of the factual record in this case, without deference to the findings of the hearing referee, just as if it were a panel of the former WCAB. The de novo standard is in contrast to the more restrictive "substantial evidence" standard of review of MCL 418.861a(3); MSA 17.237(861a)(3) applicable to cases subject to the WCAC's own original appellate jurisdiction. See, e.g., *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212 n 13; 501 NW2d 76 (1993); *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 135; 234 NW2d 411 (1979). Accordingly, plaintiff's reliance upon the "substantial evidence" standard is misplaced. However, the WCAC was nevertheless bound by the doctrine of law of the case, as well as this Court's prior rejection of defendants' challenge to the WCAB's finding of partial disability "for lack of merit."

In this case, this Court's order of June 18, 1993, did not vacate the prior decision of the WCAB, but remanded the case for "reconsideration" light of this Court's decision in *Sobotka.* This Court gave no other express authority regarding the limits of what the WCAC could consider on remand. This being so, the WCAC was not free to reopen the entire matter on remand and in fact lacked jurisdiction to reverse the previous findings of the WCAB with respect to issues unrelated to the focus of the remand. *In re Loose (On Remand),* 212 Mich App 648, 653; 538 NW2d 92 (1995). By ordering reconsideration in light of this Court's *Sobotka* decision, the focus of this Court's remand order was the determination of plaintiff's residual wage-earning capacity for purposes of calculating plaintiff's weekly benefit rate for partial disability under §361(1) of the WDCA However, the underlying determination of whether plaintiff had established a partial disability within the meaning of §301(4) of the act as enacted at the time of plaintiff's 1985 injury date, i.e., whether plaintiff's injury resulted in a limitation of plaintiff's wage-earning capacity in his general field of employment, was not a question properly before the WCAC upon remand. The issues involved in the *Sobotka* case simply do not arise unless the worker has initially established partial disability within the meaning of §301(4).

Here, the WCAC took care to recognize the distinction between physical disability and diminished wage-earning capacity, as well as the statutory distinction between disability and wage loss under the WDCA. However, the WCAC actually exceeded the focus of remand by essentially finding that plaintiff had failed to establish any continuing disability within the meaning of §301(4) at all. In particular, the WCAC purported to rely upon plaintiff's testimony on the question of "whether he was disabled" and ultimately concluded that plaintiff "failed to demonstrate a reduction in his ability to compete anywhere in the field of common labor," a conclusion which is tantamount to a determination that plaintiff failed to establish any disability as defined by § 301(4). See, e.g., *Wilkins v General Motors Corp,* 204 Mich App 693, 699-700; 517 NW2d 40 (1994). Moreover, although the WCAC purported to apply the *Sobotka* decision as "modified" by the Michigan Supreme Court, the WCAC incorrectly concluded that *Sobotka* "requires" a determination of plaintiff's remaining ability to earn wages. To the contrary, our Supreme Court specifically held that a determination of residual wage earning capacity is *not* required where, as here, the worker has established an absence of wages and work-related injury. This Court's holding in *Sobotka* was reversed in this regard.[1]

Of course, we recognize that the WCAC was placed in a difficult position on remand, since the basis for this Court's remand order had been overturned by the Michigan Supreme Court before the WCAC rendered its decision. Due to the Supreme Court's reversal of our decision in *Sobotka,* it is now apparent in retrospect that this Court's decision to remand this case for reconsideration was improvident. Indeed, if plaintiff had sought leave to appeal this Court's June 18, 1993, remand order in this case to the Michigan Supreme Court, it seems clear that our Supreme Court would have peremptorily reversed this Court's remand directive after rendering its own decision in *Sobotka.* The Supreme Court has done so in numerous other cases where this Court had remanded for reconsideration in light of this Court's *Sobotka* decision. E.g., *Monroe v Teledyne Continental Motors Corp*, 447 Mich 996 (1994). Accordingly, we conclude that the appropriate disposition for this case at this juncture is to reverse the WCAC's decision on remand and to reinstate the open award

of partial disability benefits upheld by the previous decision of the WCAB in 1991. We do not retain jurisdiction.

Reversed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski

[1] Defendants correctly note that the *Sobotka* decision was based upon the law as it existed prior to numerous amendments to the WDCA which took effect in 1982, including the statutory definition of disability in §301(4). However, this Court has ruled that *Sobotka's* holding applies to cases involving post-1982 injury dates as well. *Brown v Contech*, 211 Mich App 256, 262; 535 NW2d 195 (1995).