STATE OF MICHIGAN

COURT OF APPEALS

DAVID L. TOMPKINS,

Plaintiff-Appellee,

v

STOW & DAVIS FURNITURE and WAUSAU INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
November 22, 1996

No. 183590
LC No. 92-780

Before: Saad, P.J., and Holbrook, Jr., and G.S. Buth,* JJ.

PER CURIAM.

This case has been remanded for consideration as on leave granted. Defendant Stow & Davis Furniture appeals a decision entered by the Worker's Compensation Appellate Commission (WCAC) affirming the decision of the magistrate and granting benefits to plaintiff David Tompkins. We reverse and remand for further proceedings.

Plaintiff injured his right shoulder during the course of his employment for defendant. He was placed on light duty, but eventually went off work and underwent rotator cuff surgery. Plaintiff returned and after a time resumed unrestricted work. While engaged in heavy lifting, plaintiff felt pain in his shoulder. He underwent further surgery. He resumed unrestricted work, but again developed problems in his shoulder. After a third surgery and a period of light duty, plaintiff returned to unrestricted work. When he again developed pain in his shoulder, his physician placed him under restrictions. Eventually, plaintiff was terminated from his employment for violating defendant's attendance policy.

Plaintiff sought worker's compensation benefits. The magistrate found that plaintiff established that he suffered from a work-related shoulder disability. Relying on MCL 418.301(5)(e); MSA 17.237(301)(5)(e), which states that an employee performing favored work who loses that work "for whatever reason" after less than 100 weeks is entitled to benefits, the magistrate rejected defendant's contention that plaintiff was not entitled to benefits because he was terminated for good cause. The

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

magistrate acknowledged that the lack of a fault requirement in § 301(5)(e) distinguished that section from MCL 418.401(3)(d) and (e); MSA 17.237(401)(3)(d) and (e).

The WCAC affirmed the magistrate's decision. The WCAC found that while as a general rule good cause termination did not defeat entitlement to benefits under § 301(5)(e), it had held that that section did not protect the benefits of a worker who intentionally committed acts with the knowledge that those acts would result in the loss of employment and the resumption of benefits. Such actions would be deemed refusal of employment without good and reasonable cause under MCL 418.301(5)(a); MSA 17.237(301)(5)(a). No such showing was made in this case. The record reflected that plaintiff's absenteeism was due to factors such as drug and alcohol abuse and incarceration. The WCAC declined to address defendant's argument regarding the constitutionality of § 301(5)(e), finding that it lacked jurisdiction to do so.

Section 301(5) reads in part:

> (5) If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:
>
> (a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.
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> * * *
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> (e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury.

On appeal, defendant challenges the constitutionality of § 301(5)(e), and the WCAC's requirement of proof of intentional, wrongful conduct in order for § 301(5)(a) to apply. Defendant argues that § 301(5)(e) is unconstitutional as a violation of equal protection because, unlike §§ 401(3)(d) and (e), it does not allow an employer to terminate an employee for just cause without incurring liability for benefits. In addition, defendant asserts that plaintiff's absenteeism was conduct clearly intended to result in termination, and thus constituted refusal of work without good and reasonable cause.

This Court has addressed the issue of the relationship between § 301(5)(a) and § 301(5)(e). In *Brown v Contech*, 211 Mich App 256; 535 NW2d 195 (1995), the plaintiff was terminated for violating the defendant's drug policy. At the time of his termination, the plaintiff was performing favored work. This Court reversed the WCAC's decision affirming an award of benefits. Rejecting the plaintiff's contention that pursuant to § 301(5)(e) the reason he lost his favored work should be deemed

irrelevant, this Court stated that the plaintiff's interpretation of § 301(5)(e) ignored the fact that § 301(5)(a) was controlling. That subsection allowed an employee who refused favored work without good cause to be terminated and to be precluded from receiving benefits. This Court reversed the WCAC's decision and remanded for a determination of whether the plaintiff was terminated from his employment for good cause. *Id.* at 263-264.

In *Dimcevski v Utica Packing Co (On Remand)*, 215 Mich App 332; 544 NW2d 763 (1996), the plaintiff quit his favored work position, claiming that he was unable to perform his duties. The magistrate determined that § 301(5)(e), and not § 301(5)(a), governed, and awarded benefits. In reversing the decision and denying benefits, the WCAC held that under § 301(5)(e), the reasons for the plaintiff's departure were relevant. Following *Brown*, *supra*, the *Dimcevski* Court held that the question of whether a claimant is entitled to receive benefits under § 301(5)(e) is relevant only if he is otherwise qualified to receive benefits under § 301(5)(a). The *Dimcevski* Court held that § 301(5)(a) applies both when an employee refuses an offer of favored work and when an employee voluntarily terminates favored work previously accepted.

We hold that pursuant to *Brown*, *supra*, and *Dimcevski*, *supra*, the WCAC's decision must be reversed and this case must be remanded for further proceedings. The plaintiff here was terminated from a favored work position for reasons unrelated to his disability. Under the holding in *Brown*, *supra*, termination for good cause precludes receipt of benefits. Given these facts, § 301(5)(a), and not § 301(5)(e), controls the question of whether plaintiff is entitled to benefits. Whether plaintiff is entitled to receive benefits under § 301(5)(e) depends on whether he is otherwise qualified to receive benefits under § 301(5)(a). *Dimcevski*, *supra*. On remand, the WCAC is to determine whether plaintiff was terminated for good cause. A finding of termination for good cause would constitute a finding that plaintiff refused favored work without good and reasonable cause, and thus would preclude plaintiff from receiving benefits. *Brown*, *supra*. Because *Brown*, *supra*, and *Dimcevski*, *supra*, control, defendant's constitutional challenge to § 301(5)(e) need not be resolved.

Defendant's final argument, that this matter should be remanded for a calculation of the proportionate impairment of plaintiff's wage-earning capacity pursuant to *Sobotka v Chrysler Corp (After Remand)*, 447 Mich 1; 523 NW2d 454 (1994), was not presented to the WCAC and thus is not properly before this Court. This Court reviews questions of law involved with a final order of the WCAC. MCL 418.861a(14); MSA 17.237(861a)(14). This issue was not addressed by the WCAC; thus, this Court need not consider it.

Reversed and remanded for further proceedings consistent with this opinion.

/s/ Henry W. Saad
/s/ Donald E. Holbrook, Jr.
/s/ George S. Buth