

STATE OF MICHIGAN
COURT OF APPEALS

KATHY PANCONI,

Plaintiff-Appellee,

v

MONROE CHARTER TOWNSHIP and CITIZENS
INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
August 15, 1997

No. 189298
WCAC
LC No. 91-000531

Before: Cavanagh, P.J., and Gage and D.A. Burrell,* JJ.

PER CURIAM.

Defendant Monroe Charter Township appeals by leave granted a decision on remand by the Worker's Compensation Appellate Commission (WCAC) granting plaintiff Kathy Pancone a maximum award of benefits. We affirm.

Plaintiff worked for defendant as its treasurer. Her office duties required both sitting and standing. On September 16, 1988 plaintiff injured her back while lifting a box. Although she continued to work, she was required to sit down more frequently.

Plaintiff left office on November 20, 1988, when her term expired. Earlier in the year plaintiff had decided to forego running for reelection as treasurer and sought election to the position of township clerk. She lost the primary race for that position.

Plaintiff sought worker's compensation benefits. She contended that she continued to experience severe back pain, that she often had to lie down for a time, that she could not sit for more than fifteen minutes at a time, and that her activities were limited. The magistrate found that plaintiff's injury resulted in a limitation of her wage-earning capacity in work suitable to her training and qualifications, and entered an open award of benefits. On the green sheet the magistrate checked the box indicating a finding of total disability; however, in the opinion the magistrate indicated that pursuant

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

to MCL 418.361(1); MSA 17.237(361)(1), which addresses partial disability, defendant was to have credit for wages earned.

The WCAC concluded that the magistrate's reference to § 361(1) indicated that the magistrate found that plaintiff retained some residual wage-earning capacity. The WCAC remanded the matter for reassignment with instructions that the new magistrate was to calculate, in dollars and cents, plaintiff's residual wage-earning capacity. The WCAC retained jurisdiction.

In a decision on remand, the magistrate concluded that plaintiff retained no residual wage-earning capacity. The magistrate indicated that he was unaware of any employment opportunity that would allow an employee to sit, stand, or lie down as necessary.

The WCAC vacated the magistrate's decision on remand and modified the original decision. Relying on medical testimony that plaintiff could perform her former duties, the WCAC found that plaintiff was precluded from receiving benefits because she could earn the same wage after her injury as she could before her injury.

Plaintiff sought leave to appeal to this Court (Docket No. 177305). We vacated the WCAC's decision and remanded for reconsideration in light of *Sobotka v Chrysler Corp (After Remand)*, 447 Mich 1; 523 NW2d 454 (1994). In the order of remand, we stated that the WCAC could remand the matter to a magistrate for the purpose of supplying a complete record if necessary. See MCL 418.861a(12); MSA 17.237(861a)(12).

The WCAC did not remand the matter to a magistrate. In its decision on remand, the WCAC found that plaintiff was entitled to a maximum award. The WCAC relied on the following principles gleaned from *Sobotka*. The employee need only show a link between wage loss and a work-related injury. Once the employee has made such a showing, the factfinder may infer that the employee cannot find a job due to the injury. If the factfinder is not so persuaded, other evidence regarding the link between unemployment and the injury may be considered. The employer can introduce evidence to refute the inference that can be made by the factfinder. This evidence must relate to real jobs in the real world, and not to hypothetical jobs for which the employee's ability to perform is nondescript. The employee does not bear the burden of unfavorable economic conditions. If no jobs that the employee is still capable of performing are available due to economic downturn, the employee is entitled to maximum benefits, at least until economic conditions improve. If the employer produces evidence that real jobs exist and that the employee could perform them, and the factfinder determines that lack of application, refusal, or other factors caused the employee's continued unemployment, then the factfinder is entitled to find that the employee retains a post-injury wage-earning capacity.

Applying these principles to the instant case, the WCAC found that the only evidence concerning a real job in the real world which plaintiff could perform was the job as defendant's treasurer. While some medical evidence indicated that plaintiff could perform clerical work if others were tolerant of her condition, the WCAC found that such evidence did not meet the requirements of *Sobotka*. The record did not show that clerical jobs that would allow plaintiff to sit, stand, or lie down

as needed actually existed. Plaintiff was not unemployed due to malingering or an economic downturn. The job that plaintiff was able to perform, treasurer for defendant, was not available to her; therefore, she was entitled to maximum benefits.

Findings of fact made by a magistrate are conclusive on the WCAC if they are supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); MSA 17.237(861a)(3). Judicial review is of the findings of fact made by the WCAC, not those made by the magistrate. The findings of fact made by the WCAC are conclusive if there is any competent evidence in the record to support them. *Holden v Ford Motor Co*, 439 Mich 257, 263; 484 NW2d 227 (1992).

Initially, defendant argues that the WCAC erred by finding that plaintiff was entitled to an award of maximum benefits. The WCAC found that while the job of treasurer was a real job in the real world, and that plaintiff could perform the job, her situation was more similar to the economic layoff scenario than circumstances in which an employee is unemployed due to malingering. Defendant emphasizes that *Sobotka* does not hold that malingering is the only factor in determining whether a real job in the real world is available. In this case, plaintiff left a job she was capable of performing.

We disagree. The WCAC previously found that plaintiff was capable of performing the job of treasurer; therefore, the issue on remand was whether a real job in the real world that plaintiff was capable of performing was available to her. In this case, plaintiff chose to not seek reelection to the post of treasurer, and instead sought election to another post. Plaintiff lost the primary election for the other post in August, 1988, prior to injuring her back in September, 1988. Plaintiff's tenure in the position of treasurer was limited prior to her injury. This is not a case in which plaintiff sustained an injury, continued to work in a job within her capabilities, and then simply walked away from that job. The job which plaintiff was capable of performing was unavailable to her. The WCAC properly applied *Sobotka* and awarded maximum benefits.

Next, defendant argues that the WCAC erred by failing to remand this case for further factfinding pursuant to § 861a(12). Defendant asserts that it showed that plaintiff retained the ability to perform work within her qualifications and training. Specifically, it showed that plaintiff could perform the job of treasurer and could do general clerical work. Defendant reasons that it could not have anticipated the need to offer proofs regarding the availability of such clerical jobs because *Sobotka* had not been decided at the time of the original trial in this case.

This issue is without merit. The proofs at the original trial established that plaintiff could perform a clerical job if her needs to sit, stand, and lie down when necessary were accommodated. Defendant presented no proofs that such jobs actually existed and were available to plaintiff. Had the proofs shown that plaintiff was capable of performing clerical work without such restrictions, a remand would have been appropriate. The WCAC applied its remand guides, as found in *Whitaker v Whitaker Electric Co*, 1995 WCAO 256, consistently in this case.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Daniel A. Burrell