

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE F. HATCHEW,

Plaintiff-Appellant,

v

PENINSULAR MANAGEMENT and
HARTFORD ACCIDENT & INDEMNITY,

Defendants-Appellees.

UNPUBLISHED
December 12, 1997

No. 206401
WCAC
LC No. 92-000163

ON REMAND

Before: Corrigan, C.J., McDonald and Doctoroff, JJ.

PER CURIAM.

In an unpublished decision dated December 21, 1994, this Court affirmed the decision of the Worker's Compensation Appellate Commission modifying the magistrate's open award of disability benefits to a closed award. This Court determined that there was competent evidence to support the decision to close the award.

Plaintiff applied to our Supreme Court for leave to appeal. On August 29, 1997, the Supreme Court in lieu of granting leave to appeal remanded to this Court for reconsideration in light of *Goff v Bil-Mar Foods, Inc (After Rem)*, 454 Mich 507; 563 NW2d 214 (1997).

The relevant facts and proceedings are summarized in this Court's previous opinion.

In *Goff*, the Supreme Court clarified the function of the WCAC in reviewing magistrate decisions and this Court's review of WCAC decisions. In brief, the WCAC must review the whole record to determine if the magistrate's factual findings are reasonably supported by any competent, material and substantial evidence. If so, then those findings are conclusive. In reviewing the magistrate's decision, the "WCAC must do so with sensitivity and deference toward the findings and conclusions of the magistrate in its assessment of the record." *Id.* at 538. If the WCAC finds after careful review that the magistrate's decision is not based on substantial evidence, it is then free to make its own findings. *Id.* In reviewing the WCAC's decision, this Court does not independently assess whether the magistrate's decision is supported by substantial evidence, but rather determines "whether the WCAC acted in a manner consistent with the concept of administrative appellate review that is less than *de novo* review in finding that the magistrate's decision was or was not supported by competent,

material and substantial evidence

on the whole record.” *Id.* at 516, quoting *Holden v Ford Motor Co*, 439 Mich 257, 267-268; 484 NW2d 227 (1992). If the WCAC carefully examined the record, gave proper deference to the magistrate’s decision, did not misapprehend or grossly misapply the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, then this Court should deny leave to appeal or affirm. If the WCAC has acted within its powers, i.e., if it properly reversed the magistrate and did not simply substitute its own judgment for that of the magistrate, then any findings made by the WCAC are conclusive if supported by any evidence. *Goff, supra* at 538.

In this case, the magistrate entered an open award of benefits in part because he found plaintiff to be a persuasive and credible witness. The magistrate noted plaintiff’s testimony that he continues to suffer problems connected with his back injury, such as numbness in his foot, and would therefore have difficulty performing all of the jobs of a carpenter, such as hammering, lifting beams, and other physical work. In addition, the magistrate noted that although plaintiff’s treating physician indicated in April, 1990, that plaintiff had made an excellent recovery from surgery in January, 1989, he also opined in his September, 1990 deposition that plaintiff may need limitations on the type of work he can perform depending upon the amount of pain that he can tolerate. Both of the other doctors whose depositions were admitted into evidence, including defendants’ expert, agreed that plaintiff could only return to work with certain restrictions, such as limitations on the amount of weight he can lift and the amount of bending and twisting that he can do. The magistrate concluded that plaintiff remains at least partially disabled and is therefore entitled to benefits.

In reversing the magistrate, the WCAC relied in part on a decision by this Court which was subsequently reversed. *Paschke v Retool Industries (On Reh)*, 198 Mich App 702; 499 NW2d 453 (1993), rev’d 445 Mich 502; 519 NW2d 441 (1994). The only other reason given by the WCAC for reversing the magistrate is plaintiff’s statement at the time he applied for unemployment benefits that he felt capable of returning to work in June, 1990. The WCAC concluded, as a matter of fact, that this representation by plaintiff, “combined with his treating physician’s release from care and opinion that he could return to work, provides overwhelming evidence that plaintiff was no longer disabled as of early June 1990.”

We now hold that the WCAC exceeded its authority in reversing the magistrate. The WCAC merely substituted its interpretation of the evidence for that of the magistrate. Contrary to the conclusory statement of the WCAC, it is not the case that “overwhelming evidence” demonstrates that plaintiff was no longer disabled as of early June, 1990. Plaintiff’s testimony and the testimony of the three experts provide ample reasons for concluding otherwise. More to the point, the WCAC’s decision fails to show any sensitivity or deference to the findings and conclusions of the magistrate. For example, the WCAC did not even note the magistrate’s assessment of plaintiff’s credibility or plaintiff’s testimony regarding the continuing problems caused by his work-related injury. Finally, the WCAC misapprehended or grossly misapplied the substantial evidence test by reversing the magistrate’s finding that plaintiff remains disabled on the basis of evidence already cited by and taken into account by the magistrate in reaching the opposite conclusion, without any assessment of the quantity and quality of the evidence supporting the magistrate’s decision.

We therefore reverse the WCAC's decision and reinstate the decision of the magistrate granting plaintiff an open award of benefits.

Reversed.

/s/ Maura D. Corrigan
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff