STATE OF MICHIGAN

COURT OF APPEALS

WENDELL G. TOLBERT,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
February 3, 1998

No. 194969
WCAC
LC No. WCAB 107

Before: Markman, P.J., McDonald and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an April 15, 1996 opinion and order of the Worker's Compensation Appellate Commission (WCAC), as successor to the Worker's Compensation Appeal Board, on remand from this Court's peremptory order in Docket No. 181964. We reverse.

Plaintiff began working at defendant's Fisher Body plant in November of 1964. Beginning in 1971, he performed skilled work as a "millwright." The heavier physical aspects of this work included climbing, lifting up to 100 pounds, frequent bending, and prolonged walking and standing. On November 26, 1979, plaintiff fell approximately 25 feet from a ladder at work, landing on a guard rail and fracturing bones in his vertebrae. He was hospitalized for two to three weeks and disabled from his employment for approximately one year, receiving voluntary payments of compensation from defendant. He then returned to work as a "millwright," but with medical restrictions against lifting over 25 pounds, repeated bending at the waist, and climbing of heights over six feet.

Plaintiff testified that occasionally his supervisors would give him millwright work beyond his medical restrictions, and that "a couple times" he went ahead and did the work anyway. However, he also testified that he reinjured his back by performing work beyond his restrictions as well. Specifically, plaintiff testified that he reinjured his back in July of 1983 and February of 1984. In March of 1985, plaintiff was transferred from defendant's Fisher Body plant to defendant's "Buick City" plant. Plaintiff claimed that his supervisors at the Buick plant started routinely assigning him millwright duties beyond his medical restrictions. He missed work for approximately three weeks in early August of 1985, and was laid off for approximately one year beginning in September of 1985. Plaintiff said that he was told that

he was laid off because defendant no longer had any jobs available within his medical restrictions. Although plaintiff received voluntary worker's compensation payments from defendant during his layoff, he petitioned for an increase in his weekly benefit rate, alleging new injury dates in July 1983, February 1984, and September 1985, in addition to his original November 1979 injury. Prior to the hearing on plaintiff's petition, he returned to work for defendant on September 11, 1986. Initially, plaintiff was assigned to production line/assembly jobs, but those jobs bothered his back because of the bending involved. After approximately one week, he was again assigned to his former job as a "millwright." As of the time of the hearing in April of 1987, plaintiff testified that he was still regularly working as a millwright, but on a job in which he did not have to lift a lot of weight.

In addition to plaintiff's testimony, plaintiff's treating physician, Dr. Villarreal, and defendant's medical expert, Dr. Wolf, provided expert medical testimony. Dr. Villarreal testified that plaintiff's fractured sacrum had never fully healed and explained that any assignment to work beyond his restrictions could have aggravated his condition by tearing and straining the muscles surrounding the area of his fracture. He opined that plaintiff's reports of increased back pain upon performing work beyond his restrictions in 1983 and 1985 resulted from a strain or tear of these muscles. In contrast, Dr. Wolf examined plaintiff on February 25, 1986 and found no objective indications of any orthopedic disability, other than plaintiff's old fracture of the sacrum, which according to Dr. Wolf was fully healed. Dr. Wolf opined that plaintiff could return to work without restrictions.

In a decision issued July 22, 1987, the hearing magistrate denied plaintiff's claim for benefits. Plaintiff timely appealed the magistrate's decision to the WCAB. In their briefs, both sides not only addressed whether plaintiff had established new injury or aggravation dates but whether he had established any continuing work-related injury at all. In a split decision, the WCAC modified the magistrate's decision to provide for a closed award of benefits during plaintiff's July 31 to August 19, 1995 sick leave and his subsequent layoff from September 1985 until September 11, 1986, based upon a new 1985 injury aggravation date entitling plaintiff to wage loss benefits at the 1985 rate of $358 per week, instead of the original 1979 benefit rate of $161 per week. However, according to the controlling opinion of the WCAC majority, this was only a temporary soft-tissue aggravation of plaintiff's pre-existing back injury which did not last the entire duration of plaintiff's 1985-1986 layoff, but ended as of plaintiff's February 25, 1986 examination by Dr. Wolf. The majority opinion specifically recognized that since plaintiff had returned to restricted work as a millwright, he remained at least partially disabled in his field of skill. However, in the WCAB's dispositive order accompanying its opinion, the WCAB awarded continuing benefits at the original 1979 rate only from February 26, 1986 until plaintiff's return to work on September 11, 1986, without providing an open award of continuing benefits thereafter subject to a credit or setoff for any wages plaintiff earned.

Both sides applied for leave to appeal the appeal board's decision to this Court. Plaintiff objected to the WCAB's failure to grant an open award of continuing benefits at the 1979 benefit rate and defendant objected that $161 is not the appropriate 1979 weekly benefit rate in this case. This Court denied defendant's application for lack of merit, based upon the fact that defendant had in fact stipulated to the $161 weekly benefit rate in 1979. In lieu of granting plaintiff's application for leave to appeal, this Court peremptorily remanded the case to the WCAB for clarification of its reasons for

failing to grant plaintiff an open award of benefits for a continuing disability attributable to plaintiff's original 1979 injury date. In an opinion and order issued November 23, 1995, the WCAC opined that plaintiff's continued entitlement to disability benefits at the 1979 benefit rate was really never at issue in this case. Plaintiff then sought leave to appeal in this Court, and again, in lieu of granting plaintiff's application for leave to appeal, this Court peremptorily remanded the case to the WCAC to address the issue of plaintiff's ongoing disability based upon his original 1979 injury date, noting that while the parties may not have raised that issue for the magistrate, they did raise the issue on *de novo* review by the appeal board. In its April 15, 1996 opinion and order on remand, the WCAC concluded that plaintiff does in fact remain partially disabled due to his 1979 work injury, but that plaintiff is not entitled to any continuing wage loss benefits subsequent to his return to work on September 11, 1986 because he has established a new wage-earning capacity by virtue of his performance of his restricted millwright duties for defendant subsequent to his 1979 injury. In this regard, the WCAC found that plaintiff's new wage-earning capacity had been established according to both the "reasonable employment" provisions of MCL 418.301(5); MSA 17.237(301)(5) and the pre-statutory, common law doctrine of re-established wage-earning capacity as set forth in *Markey v SS Peter & Paul's Parish*, 281 Mich 292; 274 NW 797 (1937). Specifically, the WCAC found:

> Although plaintiff did sustain a disabling injury to his sacrum and subsequently experienced closed periods of compensated full disability, he was able to continue his skilled employment as a millwright with defendant after his 1979 injury. Of course, plaintiff was working under restrictions established by his treating physician that restricted him from work requiring lifting over 25 pounds, repeated bending at the waist, and climbing over six feet in height. However, the record indicates that plaintiff's work under these restrictions was neither unique nor limited in respect to the duties performed and its availability. In fact, the record indicates that the rather rudimentary restrictions placed on plaintiff's work were regularly disregarded. The activities preceding each closed period of disability experienced by plaintiff demonstrate this. They also show the rather common nature of plaintiff's ostensibly restricted millwright duties. Accepting plaintiff's partial disability and the restrictions placed on his work by his treating physical does nothing to diminish the fact that plaintiff, at the time of hearing, was working as a millwright in essentially the same capacity for defendant as he had since 1971.
>
> Keeping in mind the rather limited restrictions actually needed on plaintiff's work as a millwright, it is still clear that plaintiff established a new wage earning capacity in his work as a millwright under either §301(5) or the earlier standard in *Markey*. . . . We find plaintiff to be partially disabled under applicable case law and §361(1) as a result of his November 27, 1979, injury to his sacrum. Such partial disability existed throughout the period of plaintiff's performance of his millwright duties subsequent to his injury, including after September 11, 1986 and at the time of hearing. Plaintiff, however, has since established a new wage earning capacity through his continuing work as a millwright for defendant under both §301(5) and the earlier case law standard articulated in *Markey*. Consequently, any wage loss experienced by plaintiff not due to his original partially disabling injury or to a new injury is not compensable under the act.

> As a result, plaintiff is not entitled to any weekly benefits as of the time he returned to work on September 11, 1986 through the time of hearing.

In reviewing decisions of the WCAC, appellate courts are to review legal questions, determine if any fraud exists in connection with fact findings, and decide if fact findings are supported by competent evidence. *Aquilina v General Motors Corp*, 403 Mich 206, 213; 267 NW2d 923 (1978). With respect to factual findings, appellate courts are to

> determine "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." . . . [Appellate courts] should "ordinarily defer to the collective judgment of the WCAC unless it is manifest that it exceeded its reviewing power." [*Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 516; 563 NW2d 214 (1997); citations omitted. See also *York v Wayne County Sheriff's Dep't*, 219 Mich App 370; 556 NW2d 882 (1996).]

The gravamen of plaintiff's appeal is that the WCAC erred in concluding that plaintiff had established a new wage-earning capacity by performing post-injury millwright work for defendant because plaintiff's post-injury millwright work was "favored" work subject to his medical restrictions. "It has long been the rule in Michigan that in workers' compensation cases the law in effect at the time of the relevant injury must be applied unless the Legislature clearly indicates a contrary intention." *Nicholson v Lansing Bd of Education*, 423 Mich 89, 93; 377 NW2d 292 (1985). The "reasonable employment" provisions of § 301(5) were enacted after plaintiff's 1979 injury. Section 301 does not clearly indicate that it is to apply retroactively. Accordingly, § 301(5) is inapplicable to the present matter. To the extent that the WCAC relied on § 301(5), it erred as a matter of law.

The WCAC alternatively relied on the common law concept of establishment of a new wage-earning capacity. In *Markey*, *supra* at 299-300, the Court stated:

> When an employee accepts work and receives wages therefor in a recognized regular employment, with the ordinary conditions of permanency, as here, there is no room for argument that he has not thereby established a present earning capacity equal to such wages, whatever may be his physical condition. It is the intent of the quoted proviso that, while he is thus earning wages, they shall operate to reduce or eliminate the compensation award by way of sort of set-off against it, if they are sufficient in amount.

However, in *Bower v Whitehall Leather Co*, 412 Mich 172, 182; 312 NW2d 640 (1981), the Court concluded that favored work does not re-establish a wage-earning capacity:

> The favored-work doctrine is a purely judicial creation. Favored, or light, work can be loosely defined as less strenuous post-injury work. Wages from favored work may be used as a setoff against an employer's compensation liability, MCL 418.361(1); MSA 17.237(361)(1), but favored work wages do not establish an earning capacity,

> and when such wages cease, they neither suspend nor bar compensation. *Powell v Casco Nelmor Corp*, 406 Mich 332; 279 NW2d 769 (1979).

Further, recent cases decided under § 301, rather than under the common law rule, similarly indicate that work that is restricted or modified due to a work-related disability does not re-establish a wage-earning capacity. See *Wade v General Motors Corp*, 199 Mich App 267, 268, 272; 501 NW2d 248 (1993) (post-injury tow-motor operator job did not establish new wage-earning capacity because the employee frequently received help from fellow employees in handling racks); *Doom v Brunswick Corp*, 211 Mich App 189, 198-199; 535 NW2d 244 (1995) (post-injury nonrestricted electrical bench job did not mandate new wage earning capacity where employee remained physically incapable of performing any other job at plant).

Here, in its April 15, 1996 opinion, the WCAC clearly found that plaintiff remained partially disabled and that his work as a millwright was "favored" work that included restrictions established by his treating physician. The WCAC attempts to minimize these restrictions by describing them as "rudimentary" and pointing to evidence that they were sometimes disregarded. It then concludes that plaintiff established a new wage earning capacity because he was working as a millwright "in essentially the same capacity for defendant as he had since 1971." That plaintiff may be doing "essentially" the same work as before his 1979 injury is not the issue. Under *Powell* and *Bower* (as well as *Wade* and *Doom*), work subject to medical restrictions is favored work that does not re-establish a wage-earning capacity. Accordingly, the WCAC erred as a matter of law in determining that plaintiff's favored work established a wage-earning capacity. We therefore reverse the portion of the WCAC's April 15, 1996 opinion and order that concludes that plaintiff has established a new wage-earning capacity. In accordance with the WCAC's findings that plaintiff remains partially disabled and that he works subject to medical restrictions, we hereby clarify that he is entitled to an open award of benefits subject, of course, to a setoff for wages earned in his "favored" work.[1]

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh

[1] In light of the prolonged history of this matter and the WCAC's clear articulation of its factual findings, we believe it is preferable to clarify the WCAC's opinion and order in light of its legal error rather than to remand this matter a third time.