

STATE OF MICHIGAN
COURT OF APPEALS

LUELLA BROWN,

Plaintiff-Appellee,

v

MICHIGAN HEALTH CARE CORPORATION,

Defendant-Appellant,

and

SECOND INJURY FUND,

Defendant-Appellee.

UNPUBLISHED
October 19, 1999

No. 211631
WCAC
LC No. 95-000784

Before: Neff, P.J., and Murphy and J. B. Sullivan*, JJ.

PER CURIAM.

Defendant employer Michigan Health Care Corporation [MHCC] appeals by leave granted a decision of the Worker's Compensation Appellate Commission that awarded plaintiff benefits and relieved defendant Second Injury Fund of any obligation to pay benefits under MCL 418.921; MSA 17.237(921). We affirm.

In the 1970s plaintiff worked at Olympia Stadium doing janitorial work. She injured her back on the job in 1978, and received workers' compensation disability payments for that injury until 1985, when she was deemed to have recovered. At some point after 1985, plaintiff began doing volunteer work at defendant MHCC's hospital. During the same time she worked as a housekeeper for two private individuals. In April 1989, plaintiff applied for a full-time housekeeping job at MHCC. On her April 18, 1989, application for that job, plaintiff listed that she currently worked as a housekeeper for one woman, and had recently stopped working as a housekeeper for another. Plaintiff testified that she had no back problems at the time she applied for the job with MHCC. However, due to plaintiff's 1978 injury and disability, MHCC told her to

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

obtain vocational handicap certification under Chapter 9 of the WDCA, MCL 418.901 *et seq*; MSA 17.237(901) *et seq*. Under MCL 418.921; MSA 17.237(921), the employer of a person certified as vocationally handicapped is only liable for worker's compensation benefits accrued during the first fifty-two weeks after the injury, with the Second Injury Fund liable for all benefits accrued afterward. Plaintiff applied for and received handicapped worker certification from the Department of Education's division of vocational rehabilitation.

After receiving the handicapped worker certification, plaintiff was hired by MHCC and worked there until she sustained a back injury on April 8, 1992. Plaintiff applied for disability benefits based on her April 1992 injury, and defendant MHCC applied to add the Second Injury Fund under MCL 418.921; MSA 17.237(921).

In support of her claim of injury and disability, plaintiff presented deposition testimony from her treating physician, Dr. David McSwain, D.O. McSwain concluded that plaintiff was disabled due to lumbar myositis caused by the April 1992 incident. McSwain agreed that at least 80 to 85 percent of lumbosacral strains resolve within eight to twelve weeks and could not explain plaintiff's continuing symptoms. However, McSwain did not believe that plaintiff exaggerated her symptoms.

Defendant's expert, Dr. William Higgenbotham, M.D., examined plaintiff and denied seeing any sign of lumbar myositis. Higgenbotham believed that plaintiff's ongoing problems were due to her obesity and degenerative changes due to aging rather than an injury. Higgenbotham did not believe that plaintiff was disabled from working.

The magistrate concluded that plaintiff was disabled due to her April 1992 injury. The magistrate found plaintiff to be a credible witness, and noted that she appeared to be in genuine discomfort during the hearing. Despite the lack of objective evidence, the magistrate found that plaintiff continues to suffer from the injury based on plaintiff's testimony, her continuing treatment, and the opinion of plaintiff's treating physician.

The magistrate concluded that defendant MHCC was liable for payment of continuing benefits, and that defendant Second Injury Fund was "absolved of any liability in this matter." The magistrate pointed out that under MCL 418.905; MSA 17.237(905) an applicant for a vocational handicap certificate cannot be employed at the time of certification. The magistrate pointed out that plaintiff was employed as a housekeeper at the time she applied for her job with MHCC, and listed that job on her application, and so was not unemployed under § 905. The magistrate did not believe that plaintiff acted with fraudulent intent, but instead applied for the certificate because defendant told her she could not be hired without it. The magistrate further noted that plaintiff claimed no back disability on her employment application, and denied any back problems or treatment for several years before April 1992. Therefore the magistrate concluded that plaintiff "had no medical certifiable back impairment as an obstacle to employment when she obtained certification. Rather, the obstacle was her prior worker's compensation claim for a long since resolved back injury."

Defendant MHCC appealed to the WCAC, raising the same arguments asserted in this appeal. Citing *Tracer v Southgate*, 184 Mich App 811; 459 NW2d 321 (1990), and unpublished opinions

relying on *Tracer*, the WCAC wrote “The Court of Appeals has told us unequivocally that employment is an absolute bar to valid certification, and, since we agree with the magistrate that plaintiff’s part-time employment as a housekeeper is “employment” within the meaning of the act, we affirm her on that issue.” The WCAC rejected defendant MHCC’s argument that the word “unemployed” in § 905 meant only that plaintiff was not employed by defendant, finding that “unemployed means unemployed.” The WCAC rejected MHCC’s argument that the Fund was estopped from challenging the certificate issued by the Department of Education, finding that in order for defendant MHCC to have its liability limited by § 921, the employee must be employed in accordance with the provisions of Chapter 9.

Defendant also argued that the magistrate’s finding of disability was contrary to the medical evidence. The WCAC found the magistrate’s findings supported by Dr. McSwain’s testimony, concluding “We do not disagree with the magistrate’s selection of the medical testimony she found most persuasive, because Dr. McSwain advanced a reasonable basis for her choice.”

Defendant MHCC raises four arguments on appeal, none of which require reversal of the Commission’s decision.

I

First, defendant MHCC argues that the WCAC committed an error of law by finding the Second Injury Fund not liable for benefits under § 921. We find no error.

MCL 418.921; MSA 17.237(921) provides:

A person certified as vocationally handicapped who receives a personal injury arising out of and in the course of his employment and resulting in death or disability, shall be paid compensation in the manner and to the extent provided in this act, or in case of his death resulting from such injury, the compensation shall be paid to his dependents. The liability of the employer for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation and the cost of all medical care and expenses of the employee's last sickness and burial shall be the liability of the fund. The fund shall be liable, from the date of injury, for those vocational rehabilitation benefits provided in section 319.

MCL 418.905; MSA 17.237(905) provides:

An *unemployed* person who wishes to be certified as vocationally handicapped for purposes of this chapter shall apply to the certifying agency on forms furnished by the agency. The certifying agency shall conduct an investigation and shall issue a certificate to a person who meets the requirements for vocationally handicapped certification. The certificate is valid for 2 calendar years after the date of issuance. After expiration of a certificate an unemployed person may apply for a new certificate.

A certificate is not valid with an employer by whom the person has been employed within 52 weeks before issuance of the certificate. [Emphasis added.]

Under § 905, a person must be unemployed at the time of application to the certifying agency. *Tracer, supra* at 816. *Tracer* involved a plaintiff who began his employment and was subsequently certified as vocationally handicapped. The Court affirmed the WCAB's finding that he was never properly certified under § 905, so the defendant-employer was not protected from continuing liability under § 921:

Not only was plaintiff employed by the city within fifty-two weeks prior to the issuance of the certificate to him, he was also employed at the time he applied for the certificate on August 16, 1977. *Both* of these factors render the certificate invalid as to the city and, therefore, the city is not entitled to the limited liability provided for in § 921. [*Id.* (Emphasis added).]

Under *Tracer*, either factor – the plaintiff's previous employment with the defendant-employer, *or* the fact that the plaintiff was employed – renders the vocationally handicapped certification invalid. While plaintiff was not employed by defendant MHCC at the time she sought her vocational handicap certification, she was employed at that time, and this fact was known to MHCC. Nor does this result appear unfair; the MHCC should not be allowed to assert that it relied upon the certification when plaintiff applied for the certification at defendant-employer's urging and there was no evidence presented indicating that plaintiff suffered from an actual disability at the time she applied for the job.

II

Defendant MHCC argues that defendant Second Injury Fund is estopped from denying the validity of the vocational handicap certificate issued to plaintiff by the Department of Education. We disagree. In *Tracer, supra*, this Court rejected the argument that the Second Injury Fund could be estopped by the actions of the certifying agency, a completely separate entity:

[T]he city contends that the fund is estopped from claiming an invalid certification because the certifying agency, the vocational rehabilitation office, failed to perform its investigative task of ascertaining plaintiff's employment status. It does not appear this issue was addressed by the appeal board. Moreover, *as the fund points out, it was not its conduct which caused detrimental reliance, if any, on the part of the city; rather, it was the conduct of the certifying agency, whose agency and function is separate from that of the fund*, which may have caused the possible detrimental reliance to which the city alludes. [*Id.* at 817-818 (Emphasis added).]

III

Defendant MHCC argues that the word “unemployed” in §905 was meant to encompass people such as plaintiff who were minimally employed in part-time jobs, so plaintiff’s vocational handicap certificate was in fact valid under § 905. Defendant MHO has presented no legal authority or evidence supporting its assertion that the word “unemployed” in § 905, as interpreted by the certifying agency, would include persons who were employed less than full time. Courts and the WCAC should accord statutory words their ordinary and generally accepted meaning. *Bates v Mercier*, 224 Mich App 122, 125; 568 NW2d 362 (1997). In the absence of any persuasive authority supporting defendant MHCC’s argument, the WCAC did not err by concluding that “unemployed means unemployed.”

IV

Finally, defendant MHCC argues that the Commission erred as a matter of law by applying the wrong standard of causation when reviewing the magistrate’s finding that plaintiff’s injury was caused by injury rather than aging. Defendant MHCC attempts to frame an evidentiary argument as an issue of law, arguing that the magistrate erred by finding a work-related disability despite Dr. Higgenbotham’s testimony that plaintiff’s disability was caused by age-related degeneration of her spine and obesity. In contrast, Dr. McSwain believed that plaintiff’s current problems were a direct result of her April 1992 injury and explained the interrelationship between chronic lumbosacral strain and degenerative arthritis. The magistrate’s determination that plaintiff suffered from a work-related disability arising from the April 1992 injury was supported by competent, material, and substantial evidence on the whole record. The WCAC properly reviewed the record and the magistrate’s finding. *Goff v Bil-Mar Foods (After Remand)*, 454 Mich 507; 563 NW2d 214 (1997); *Holden v Ford Motor Co (After Remand, On Second Remand)*, 226 Mich App 138; 572 NW2d 268 (1997); *York v Wayne Co Sheriff’s Dep’t*, 219 Mich App 370; 556 NW2d 882 (1996); MCL 418.861a(14); MSA 17.237(861a)(14).

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Joseph B. Sullivan