

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL J. MAGUSIN,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY and SECOND
INJURY FUND,

Defendants-Appellees.

UNPUBLISHED

January 20, 2004

No. 248633

WCAC

LC No. 01-000098

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

This case comes to this Court by way of remand order from the Supreme Court. Plaintiff appeals the Worker's Compensation Appellate Commission's (WCAC) order reversing a magistrate's open award of benefits to plaintiff for the loss of industrial use of both legs. We affirm.

I. BACKGROUND

This case arises out of a horrific accident that occurred while plaintiff, who was 45 years old at the time, was working as a machinist at defendant Ford's Woodhaven plant. On October 15, 1997, as plaintiff was setting a die, his tool belt became entangled in a press and the lower part of his body was pulled into a 5 ¼ inch opening in the machine. Plaintiff's pelvis was crushed, his right hip was pushed upwards, large portions of skin were sheared off his buttocks, thighs, and calves, and his bladder was ripped open. Plaintiff was hospitalized for over three months, and underwent seventeen surgeries. Following his hospitalization, plaintiff participated in six months of physical therapy.

Plaintiff uses a cane to walk. He is incontinent as a result of his bladder injuries, and also has problems controlling his bowels. Plaintiff wears a lift in his left shoe because his left leg is shorter than his right leg, and he also wears a brace, just below the knee, on the left leg. Plaintiff has skin grafts on his lower body, which, he contends, prevent him from sitting for more than twenty to thirty minutes at a time. According to plaintiff, while wearing his brace, he can walk approximately 500 feet, and can stand for twenty to thirty minutes.

Plaintiff returned to restricted duty at the Woodhaven plant in August 1998. Plaintiff was given no job title or specific duties, and was not required to punch in or out. Although plaintiff

is paid for a forty-hour workweek, he rarely works more than six hours per day. When it snows, he does not report to work, and when he is not feeling well at work, he either lies down in the medical department, or goes home. Plaintiff does not report to anyone.

Plaintiff filed a petition for benefits, claiming the loss of the industrial use of both legs. At the hearing on plaintiff's petition, plaintiff's medical expert opined that plaintiff could not function in a competitive work environment, and had lost the industrial use of both legs. Defendants' experts opined that plaintiff could not return to work as a machinist, or engage in physical labor, but could work, in other capacities, under certain restrictions.

Following the hearing, the magistrate granted plaintiff's petition. The magistrate found that plaintiff's physical condition severely limited the type of work he could perform, and that the restricted work plaintiff had been performing for defendant Ford was insufficient to establish that he could engage in employment related tasks on a regular work schedule.

Defendants appealed the magistrate's decision to the WCAC, which reversed the grant of benefits. The WCAC¹ opined that the magistrate's analysis was improper, and found that, because the record uniformly showed that plaintiff retained the ability to walk and stand, he consequently retained the industrial use of his legs.

Plaintiff filed an application for leave to appeal the WCAC's order in this Court. That application was denied. Subsequently, plaintiff filed an application for leave to appeal to the Supreme Court. In response to that application, the Supreme Court ordered that:

In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). On remand, the Court of Appeals should address whether the WCAC erred as a matter of law in reversing the magistrate's ruling that plaintiff suffers a total and permanent disability under MCL 418.361(3)(g). See *Paulson v Muskegon Hts Tile Co*, 371 Mich 312 (1963); *Martin v Ford Motor Co*, 401 Mich 607 (1977); *Burke v Ontonagon Co Rd Comm*, 391 Mich 103 (1974). [*Magusin v Ford Motor Co*, 468 Mich 904-905 (2003).]

II. ANALYSIS

The WCAC must review the magistrate's decision under the "substantial evidence" standard, while this Court reviews the WCAC's decision under the "any evidence" standard. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). Review by this Court begins with the WCAC's decision, not the magistrate's. *Id.* If there is any evidence supporting the WCAC's factual findings, and if the WCAC did not misapprehend its administrative appellate role in reviewing the magistrate's decision, then this Court should treat the WCAC's factual findings as conclusive. *Id.* at 709-710. This Court reviews questions of law in any WCAC order under a de novo standard. *DiBenedetto v West Shore Hosp*, 461 Mich 394,

¹ One commissioner dissented.

401; 605 NW2d 300 (2000). A decision of the WCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework. *Id.* at 401-402.

In this case, plaintiff sought benefits for the loss of industrial use of his legs. “Loss of industrial use” is a special category of total and permanent disability. *Cain v Waste Management Inc*, 465 Mich 509, 512; 638 NW2d 98 (2002). This category allows recovery for total and permanent disability where there is no anatomical loss, but where there is a loss of industrial use. *Id.* “Hence, for example, even if an employee does not suffer actual amputation of one or both legs so as to qualify for specific loss benefits, he may nevertheless be entitled to scheduled benefits for injury to both legs if he has lost the ‘industrial use’ of his legs.”² *Id.*

Paulson v Muskegon Heights Tile Co, 371 Mich 312; 123 NW2d 715 (1963) and *Burke v Ontonagon Co Rd Comm*, 391 Mich 103; 214 NW2d 797 (1974), which the Supreme Court referenced in its remand order in this matter, set forth the test for loss of industrial use. That test is:

There is a permanent and total loss of industrial use of both legs where, *inter alia*,

1. An employment-related injury in one or both legs causes pain or other condition that prevents use of both legs in industry.
2. The use of one or both legs, whether or not injured, triggers an employment-related injury or malady in any part of the body, including one or both legs, that causes pain or other condition that prevents use of both legs in industry. [*Burke, supra* at 114. (Emphasis in original.)]

In *Martin v Ford Motor Co*, 401 Mich 607; 258 NW2d 465 (1977), which is the other case referenced in the remand order in this matter, the Supreme Court applied the *Burke* test to a situation where the plaintiff claimed that, as a result of work-related aggravation of a non-work-related, back condition, she had lost the industrial use of her legs and arm. In discussing the evidence contained in the record, the Supreme Court stated:

There is substantial medical evidence that Harriet Martin, as a result of the employment-related aggravation of her back condition, has lost the industrial use of her legs and an arm. The WCAB quoted, with apparent approval, the testimony of both Drs. Cullis and Vaitos who alone testified on the central issue of loss of industrial use. It appears therefore that their testimony was deemed credible. There is no evidence tending to show that Martin has the industrial use of her legs and arm. The evidence that sometime *before* her employment terminated she went dancing and planted some rose bushes does not indicate that

² The workers compensation act specifically provides for the loss of the certain body parts. These are known as “scheduled” disabilities and result in the payment of “specific loss” benefits. *Cain, supra* at 511-512, citing MCL 418.361(2).

after the three post-employment operations she is able to perform employment-related tasks on a regular work schedule. [*Id.* at 620. (Emphasis in original.)]

The Supreme Court went on to indicate that the WCAB essentially committed an error of law in reversing the magistrate's decision.

It is undeniable on this record that when Harriett Martin uses one or both of her legs for more than a brief span of time she suffers severe pain that "prevents use of both legs in industry." [*Burke, supra* at] 114. In these circumstances the WCAB is not at liberty, through selective fact-finding, to substitute its judgment of what constitutes sound public policy regarding payment of differential benefits for loss of industrial use of limbs for the legislatively ordained policy as elucidated in the decisions of this Court. [*Martin, supra* at 621.]

The Supreme Court further noted:

"We do not weigh and measure conflicting testimony but where there is no conflict in the testimony, where it is all one way, where there is nothing in any way inconsistent in it, where but one inference can legitimately be drawn from it, the question then becomes one of law which upon certiorari we are bound to decide." [*Id.* at 621 n 15, quoting *Cacesa v Consumers Power Co*, 220 Mich 338, 341; 190 NW 279 (1922).]

Subsequently, in *Pipe v Leese Tool & Die Co*, 410 Mich 510, 527; 302 NW2d 526 (1981) (dealing with the loss of industrial use of a hand), the Supreme Court held that whether a plaintiff has lost the industrial use of a member depends on whether the plaintiff has lost the "primary service" of that member in industry.³

This Court, applying *Burke*, *Martin*, and *Pipe* to a claim involving the loss of the industrial use of both legs, has stated:

We find that [the *Pipe*] standard offers guidance in assessing a claim of total and permanent disability resulting from the loss of industrial use of both legs. The primary service of legs includes standing and walking. In determining what use plaintiff can make of his legs in industry, plaintiff's physical abilities

³ Recently, the Supreme Court held that, when determining whether an injured worker has lost the industrial use of a leg, the leg is to be evaluated in its "corrected" state. That is, as aided by braces or other corrective devices. *Cain, supra*. We note that in the *Cain* cases, after remand, a majority of this Court affirmed a magistrate's determination that the plaintiff suffered a specific loss of his left leg under MCL 418.361(2)(k) where the plaintiff lost the industrial use of his leg in its uncorrected state, and additionally found that the WCAC properly awarded the plaintiff total and permanent disability benefits under MCL 418.361(3)(b). *Cain v Waste Management, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No 242104, issued November 6, 2003) (*Cain II*). Our decision today in no way conflicts with that decision.

may be expressed in terms of his ability to perform a particular type of work. Thus, if plaintiff can perform a job which entails some walking and standing, as opposed to a sedentary job in which walking and standing are incidental to the performance of the job, then plaintiff has not lost the primary service of his legs. The fact that plaintiff may be restricted in the amount of walking and standing he can do does not mean that plaintiff has lost the primary service of his legs or that he is prevented from using his legs in industry. [*Villanueva v General Motors Corp*, 116 Mich App 436, 444; 323 NW2d 431 (1982).]

Similarly, in *Ettinger v Hooker Motor Freight*, 117 Mich App 246, 250-251; 323 NW2d 334 (1982), this Court held:

It is clear from these cases that the Supreme Court defines industrial use of both legs as the *ability to use both legs* to perform any reasonable employment on a regular work schedule. Industrial use of both legs is the ability to actually make some use of both legs, to do some walking and some standing in the performance of a job, rather than the more limited ability to perform a job only while seated in a wheelchair or while otherwise sitting. The question is not whether plaintiff can return to his old job of driving heavy semitrailers, but whether he is capable of reasonable or gainful employment in industry. [Emphasis in original.]

Applying the preceding principles to the case at bar, we are not persuaded that plaintiff is entitled to relief.

The Supreme Court directed this Court to address whether the WCAC erred as a matter of law in reversing the magistrate. In the remand order, the Supreme Court referred this Court to *Martin, supra*, which as discussed, concluded that the WCAB erred, as a matter of law, in reversing the magistrate. However, *Martin* is distinguishable from the instant case.

In this case, plaintiff's medical expert opined that plaintiff had lost the industrial use of both legs. However, in contrast to *Martin*, the evidence on the issue in this case was conflicting. Here, defendants' experts opined that, although plaintiff could not return to work as a machinist, plaintiff could work, in other capacities, with some restrictions. For example, one defense expert stated that plaintiff could work in a position that gave plaintiff the option to sit and stand as needed, did not require carrying objects with both hands, and did not require walking on slippery floors. That expert also indicated that if plaintiff worked in a job that allowed him to sit and stand as needed, plaintiff would be able to tolerate any pain. In *Villanueva, supra*, this Court noted that the "medical testimony presented was conflicting as to whether plaintiff had lost the practical use of his legs completely or whether plaintiff could perform a job which would involve no heavy lifting or bending and in which the plaintiff would have the option of sitting or standing," and that in light of this conflict, there was sufficient evidence to support the WCAB's finding that the plaintiff failed to prove that he had lost the industrial use of both legs. Accordingly, in this case, there was conflicting evidence on the loss of industrial use issue, and the error of law committed in *Martin* was not committed by the WCAC in this case. In other words, here, there was not but one legitimate inference, which could be drawn from the evidence.

In light of the conflicting evidence, the issue of whether plaintiff suffered the loss of industrial use of both legs was a question of fact. As previously mentioned, this Court reviews findings of fact made by the WCAC under the “any evidence” standard. Pursuant to *Villanueva*, there was sufficient evidence to support the WCAC’s finding that plaintiff did not lose the industrial use of both legs.

In addition to the evidence previously discussed, there was other evidence that supported a finding that plaintiff did not suffer the loss of industrial use of both legs. Plaintiff testified that he walked 500 feet from his car to his office at Ford, and walks 1/8 mile for exercise twice a week. One defense expert testified that plaintiff told him that he [plaintiff] could walk for up to two hours while wearing a brace. Plaintiff also stated that he walked up and down the stairs at home. Another defense expert opined that plaintiff could stand for up to one hour at a time. In our opinion, the preceding is evidence that plaintiff has the ability to do some standing and some walking in the performance of a job, and is not limited to performing a job only while seated. Also, in light of the fact that, as one defense expert indicated, under certain restrictions, any pain suffered by plaintiff would be tolerable, there is evidence that plaintiff could perform such a job on a regular work schedule. Consequently, the WCAC’s finding that plaintiff did not lose the industrial use of both legs was supported by “any evidence” in the record.

The question then becomes whether the WCAC misapprehended its administrative role in reviewing the magistrate’s decision. Plaintiff claims that because there was competent, material and substantial evidence to support the magistrate’s finding of loss of industrial use, the WCAC was precluded from making its own finding of fact in this regard. We find no error.

This Court’s role in reviewing the WCAC’s decision is limited. While plaintiff correctly asserts that the WCAC was to review the magistrate’s decision under the substantial evidence standard, this Court will not engage in an independent review to determine whether there is competent, material, and substantial evidence on the whole record supporting each of the magistrate’s findings of fact. *Mudel, supra* at 706. This Court’s responsibility is simply to ensure the integrity of the administrative process. *Id.* at 701. As stated by the Supreme Court:

“If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not ‘misapprehend or grossly misapply’ the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal.” [*Id.* at 703, quoting *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992).]

With these principles in mind, we find no error on the part of the WCAC.

In reversing the award of benefits, the WCAC concluded that the magistrate analyzed plaintiff’s claim from an incorrect, and incomplete, perspective. We agree.

In deciding to grant plaintiff’s petition, the magistrate cited the fact that the jobs plaintiff had been performing for Ford after his accident were not performed on a regular work schedule, and that plaintiff had been unable to perform all the tasks necessary for those jobs. The magistrate then found that the restricted work plaintiff had been performing was insufficient to

establish that plaintiff could perform employment tasks on a regular work schedule. Such an analysis was incorrect.

First, the burden was on plaintiff to show that he lost the industrial use of his legs. The magistrate essentially found that plaintiff met his burden because it was not established that plaintiff could perform on a regular work schedule. In other words, the magistrate concluded that plaintiff lost the industrial use of his legs because it was not established that plaintiff retained the industrial use of his legs. Such an analysis improperly shifted the burden of proof. Further, we agree with the WCAC that the magistrate's analysis was incomplete. The question is whether plaintiff has the "ability to actually make some use of both legs, to do some walking and some standing in the performance of a job." *Ettinger, supra* at 250-251. Therefore, as the WCAC noted, the magistrate's analysis should have included a determination of the "remaining usefulness" of plaintiff's legs in industry. However, in this case, the magistrate only concentrated on the "jobs" plaintiff had been performing for Ford, and not on what type of employment plaintiff could be performing for any employer. We agree with the WCAC that the magistrate's analysis in this matter was incomplete and improper, and therefore find no error of law in the WCAC's decision to reverse the magistrate.

In our opinion, the action of the WCAC does not display a misunderstanding of its role or a misapplication of the substantial evidence standard. The WCAC soundly executed its appellate duty, and this fact, along with the fact that there was some evidence to support the WCAC's finding that plaintiff did not suffer the loss of industrial use of his legs, leads to the conclusion that this Court should not reverse the decision reached below.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage