STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY VULCANO

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION, CPC PONTIAC,

Defendant-Appellee.

UNPUBLISHED
August 9, 1996

No. 180477
WCAC No. 91-113
ON REMAND

Before: Smolenski, P.J., and Markey and P.J. Sullivan,* JJ.

PER CURIAM.

Plaintiff applied for leave to appeal the November 8, 1993 order of the Worker's Compensation Appellate Commission (WCAC) that reversed the decision of a magistrate and denied plaintiff's claim for benefits. Although this Court denied plaintiff's application, our Supreme Court has remanded for consideration as on leave granted. 447 Mich 1005 (1994). We affirm in part and remand in part.

I.

Plaintiff began working for defendant in 1978. Until April 2, 1985, plaintiff operated a press machine in defendant's plant fourteen. However, on that date, the plant doctor restricted plaintiff from using power or grip tools and from operating palm buttons because of numbness in plaintiff's hands. Plaintiff was then given work falling within his medical restrictions. For approximately five months he did inspection work at plant fourteen. He was then transferred to the sanitation department where he operated a "ride and glide" sweeper for approximately fifteen months in defendant's warehouse. Plaintiff was then transferred to defendant's foundry where he again performed sanitation work for five months, including operating the "ride and glide" sweeper, cleaning the lavatories and lunchroom, and emptying trash cans. When the foundry closed, plaintiff was transferred to defendant's plant eight (the assembly line) where he performed general maintenance, including emptying trash cans, for eight months. Plaintiff was laid off on January 20, 1988, when plant eight closed. Plaintiff never returned to work for

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

defendant. Although plaintiff attempted to work as a carpet installer in October 1988, plaintiff testified that he discontinued this effort because of pain in his hands and arms.

Plaintiff sought worker's compensation benefits based on disability caused by work-related injuries to his hands and arms. In an opinion and order mailed January 10, 1991, the magistrate found plaintiff disabled as a result of a work-related injury occurring on January 20, 1988, and ordered that defendant pay plaintiff worker's compensation benefits. Defendant appealed. In an opinion and order dated March 6, 1992, the WCAC remanded the matter to the magistrate for a supplemental opinion. The WCAC instructed the magistrate to make specific findings on several issues raised on appeal by defendant. As relevant to this case, the WCAC ordered the magistrate to consider the factors set forth in *McNairnie v General Motors Corp*, 1992 WCACO 21, for the purpose of determining whether plaintiff had established a new wage-earning capacity pursuant to § 301(5), MCL 418.301(5)(d)(i); MSA 17.273(301)(5)(d)(i), of the Worker's Disability Compensation Act, MCL 418.101 *et seq.*; MSA 17.273(101) *et seq.*. The WCAC also instructed that pursuant to *McNairnie* "the burden of proof is plaintiff's to establish by the preponderance of the evidence that he has not established a new wage-earning capacity." The WCAC further found as a matter of law that plaintiff's injury date was April 2, 1985, and that, accordingly, benefits, if awarded, must be awarded in accordance with 1985 rates.

On remand, the magistrate found, in relevant part, that plaintiff had not established a new wage-earning capacity between April 1985 and January 1988 for the following reasons:

> Based on a careful review of the record, it appears to the undersigned that the Plaintiff was placed on restricted work after April 2, 1985, and positions [sic] within the Plaintiff [sic] restrictions. Initially, the Plaintiff worked five months as an inspector and subsequently worked in the sanitation department. While the Plaintiff worked in the sanitation department the Plaintiff performed various jobs which included operating a ride and glide sweeper as well as emptying trash and cleaning laboratories [sic]. During this time the Plaintiff's disability relating to bilateral carpal tunnel syndrome was not corrected and the Plaintiff was laid off on January 20, 1988, as [sic] result of a plant closing which was not the fault of the Plaintiff. If [sic] further appears to the undersigned that the Plaintiff's favored work positions as an inspector and working in the sanitation department were not permanent in nature as it appears from the record that the Plaintiff [sic] was in the process of closing down the plant. It does not appear to the undersigned that the Plaintiff's favorite [sic] work positions were regular and recognized employment with ordinary conditions of permanency.
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> Therefore, the undersigned finds that the Plaintiff did not establish a new wage earning capacity during the last 33 months of his employment for the Defendant, General Motors Corporation within the meaning of Section 301(5)(d) of the Act.

In an opinion and order dated November 8, 1993, the WCAC reversed the magistrate's award of benefits but held that defendant remained responsible for medical expenses attributed to plaintiff's carpal tunnel condition. Concerning the magistrate's finding of no new wage-earning capacity, the WCAC stated in relevant part as follows:

> Upon our review, we conclude that the magistrate's finding that plaintiff had not established a new wage earning capacity during the last 33 months of his employment is not supported by competent, material and substantial evidence on the whole record. MCL 418.861a(3)[; MSA 17.273(861a)(3)]. The work plaintiff performed posed no clear nor proximate threat to his health and/or safety. Plaintiff's work was regular, reasonable employment which we conclude would have been permanent in nature, but for the plant closing on January 20, 1988.
>
> As discussed in the original Commission opinion, plaintiff performed various positions with defendant, albeit, at different locations. However, the fact remains that plaintiff continued to perform the same and would have continued, but for the plant closing. Plaintiff was spared an earlier layoff due to his seniority status, thus, [sic] was able and continued to perform his "regular" jobs.
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> We also refer to *Miles v General Motors Corp*, 1992 ACO #604, as did defendant. In *Miles*, the Commission determined that plaintiff had not shown that the performance of reasonable employment did not establish a new wage earning capacity. Thus, the provisions of MCL 418.301(5)[; MSA 17.273(301)(5)] rendered empty, [sic] plaintiff's entitlement to weekly benefits pursuant to MCL 418.301(4)[; MSA 17.273(301)(4)] p. 1889.
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> This case is very similar to the situation the Commission faced in *Miles*. Plaintiff simply has failed to prove a limitation of his wage earning, section 301(4), which would entitle him to, section 301(5), benefits. Rather, plaintiff's performance of the same should have been considered a regular position with ordinary conditions of permanency.

II.

Findings of fact by the magistrate are conclusive on review by the WCAC if they are supported by competent, material, and substantial evidence on the whole record. *Michales v Morton Salt Co*, 450 Mich 479, 484; 538 NW2d 11 (1995). This Court's review is likewise limited because findings of fact made by the WCAC are conclusive if there is any competent evidence to support them. *Id.* At 484-485. However, this Court has the power to review questions of law of any final order of the WCAC. *Id.* At 485.

III.

Plaintiff first argues that the WCAC erred in holding that plaintiff bore the burden of proving that his employments since the time of his injury did not establish a new wage-earning capacity. We agree. In *Brown v Beckworth Evans Co*, 192 Mich App 158, 167-171; 480 NW2d 311 (1991), this Court provided some general guidance concerning when an employer should have the burden of proof relevant to a given issue in a worker's compensation case. In particular, this Court noted the venerable if somewhat mechanistic rule that where a party relies upon a statute for a claim and the statute contains an exception found in a later section or separate statute, the party need not plead and prove that the case does not come within the exception. Rather, the opposing party must raise the exception, it being defensive in nature. *Id.*

At 169. This rule appears to apply here. Plaintiff has demonstrated a continuing disability pursuant to § 301(4). Plaintiff is therefore entitled to wage-loss benefits under § 301(d)(i) unless he was employed at favored work for more than one hundred weeks and the favored work[1] did not establish a new wage-earning capacity. This rule is also in accord with prestatutory case law stating that the employer has the burden of proof concerning the development of a new and different wage-earning capacity. *Aquilana v General Motors Corp*, 403 Mich 206, 211, n 2; 267 NW2d 923 (1978); see also *Brown, supra* at 168; Welch, Worker's Compensation in Michigan: Law and Practice (Institute of Continuing Legal Ed, 1991), § 10.16, p 10-20. Nevertheless, we hold that the error was harmless. The WCAC found as a fact that the favored work performed by plaintiff evidenced the existence of a new wage-earning capacity, and neither the WCAC's analysis nor its result was affected by the allocation of the burden of proof.

IV.

Next, plaintiff argues that regardless of the burden of proof there was no substantial evidence to support a finding of a new wage-earning capacity. We disagree. The WCAC found that plaintiff's work from April 1985 to January 1988 was "regular, reasonable employment which we conclude would have been permanent in nature, but for the plant closing on January 20, 1988." This finding was supported by competent evidence and thus must be deemed conclusive by this Court. *Michales, supra* at 484-485. Although plaintiff contends that the result should be otherwise because defendant knew from the first that the jobs to which it assigned plaintiff were in plants scheduled to be closed, we do not believe this requires a different result. If plaintiff's argument were accepted, then employees doing favored work in a plant about to be closed would be accorded special treatment and would not be treated on par with those employees who faced the same uncertainties associated with the shut down, but who are performing restricted work. We find no legal error in the analysis employed by the WCAC in determining that a new wage-earning capacity was established. *Doom v Brunswick Corp*, 211 Mich App 189, 197-199; 535 NW2d 244 (1995); *Wade v General Motors Corp*, 199 Mich App 267, 270; 501 NW2d 248 (1993).

V.

Finally, plaintiff argues that even if a new wage-earning capacity was established, defendant should not be relieved from all liability for weekly benefits because plaintiff's new wage-earning capacity is less than it was before his injury. Although the record appears to be silent in this regard, we agree that the WCAC has a duty to determine whether plaintiff is entitled to benefits pursuant to § 301(5)(d)(ii). Under § 301(5)(d)(i), plaintiff would have been entitled to benefits based on his wage on the original date of injury if no new wage-earning capacity had been established. Because the WCAC held otherwise, plaintiff is entitled to benefits under § 301(5)(d)(ii) if the normal and customary wages paid to persons performing the same or similar work that plaintiff was performing at the time of his termination, determined as of that date, is less than the wages plaintiff earned at the time of his injury. See Welch, § 10.16, p 10-19.

We therefore remand to the WCAC for a decision concerning whether plaintiff is entitled to benefits pursuant to § 301(5)(d)(ii). We otherwise affirm. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Paul J. Sullivan

[1] In this opinion, we use the statutory term "reasonable employment" interchangeably with the judicially created terms "favored work" or "restricted work." Although these terms are not necessarily synonymous, the statute is consistent with the prior case law, and for purposes of this opinion there is no relevant difference. *Lee v Koegel Meats*, 199 Mich App 696, 702-703; 502 NW2d 711 (1993).