STATE OF MICHIGAN

COURT OF APPEALS

MARY L. TAYLOR,

Plaintiff-Appellant,

v

SCHOOLCRAFT COLLEGE,

Defendant-Appellee.

UNPUBLISHED
January 3, 2003

No. 239048
WCAC
LC No. 01-000273

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order of the Worker's Compensation Appellate Commission (WCAC) reversing the magistrate's finding that defendant failed to make plaintiff a bona fide offer of reasonable employment and granting plaintiff an open award of benefits. We reverse and reinstate the magistrate's open award of benefits.

Plaintiff began working for defendant in 1986 as a food service worker. In 1996, she became head cashier in the main cafeteria. This position included duties of stocking, cleaning and filling the ice machine. Plaintiff worked on her feet the majority of the time.

On April 11, 2000, plaintiff, a head cashier in the main cafeteria at Schoolcraft College, experienced a burning sensation in her right knee and pain in her back after squatting and bending down to clean up some spilled ice and water. Plaintiff was seen in a clinic, where she was given a knee brace and told to return in two days. However, the following day, plaintiff could not get out of bed due to "pain all across my back and down into my legs." Returning to the clinic the next day, plaintiff received treatment from Dr. Fritz for her knee, but was informed that her back problems were not work-related. Dr. Fritz instructed plaintiff that she alternate sitting and standing in any work that she performed and that she not lift more than twenty pounds.

On May 5, 2000, defendant sent plaintiff a letter requesting plaintiff to report to work on May 8, 2000. The letter listed plaintiff's duties as "food service worker," noting the job would be "within Dr. Fritz's restrictions." Attached to the letter was a second sheet noting the various positions that were included within the classification of food service worker, including pantry, assistant pantry, short-order cook, assistant short-order cook, cashier, and snack bar attendant. Plaintiff did not respond to this letter. She claims she did not know the restrictions Dr. Fritz imposed on her employment. Plaintiff testified that she could not have performed any of these

jobs because she is unable to sit or stand for an extended period of time. She explained that the jobs in question required bending, lifting and twisting, none of which she could do. Plaintiff also stated she would not have been able to work at the cash register.

On May 20, 2000, defendant sent a second letter offering plaintiff employment. This letter indicated the job would be "within Dr. Fritz's restrictions," and noted that the duties would be as food service worker. The letter stated, "Will sit at cash register and take money." Plaintiff did not respond to the letter. She testified that the cashier job could not be performed while sitting, explaining that the cash register was at chest level. Even if sitting in a chair, she stated, she would have to get off the chair to give people their money. She claimed that if the chair were adjusted to a sufficient height, her feet would not touch the ground.

In a decision released on June 6, 2001, the magistrate granted plaintiff an open award of benefits, finding compensable back and knee conditions that disabled her on a continuing basis from her prior employment. The magistrate noted that Dr. Fritz's restrictions did not accompany the letters and plaintiff was never informed of the nature of those restrictions. Plaintiff's own treating physician testified that he did not discuss work with plaintiff. Thus, the magistrate found that plaintiff had no factual basis on which to evaluate the reasonableness of the position with her doctor or attorney. Therefore, the magistrate concluded that the offer of work did not meet the requisite specificity for a bona fide offer of reasonable employment.

Defendant then appealed to the WCAC. In an order and opinion dated December 21, 2002, the WCAC affirmed the magistrate's finding of a compensable disability, but reversed as to the award of benefits, finding that defendant provided sufficiently specific information to give plaintiff a clear understanding of the work duties proposed by defendant. Specifically, the WCAC found that there was no reason to identify the physician's restrictions because the proposed work duties were precisely described. According to the WCAC, "Defendant's second letter provided all of the information necessary for plaintiff to understand her obligations and proposed job duties."

Plaintiff also argued that there existed a question whether she could perform the offered work. She asserted that the job could not have been performed without both sitting and standing, but the second letter referenced only sitting. The WCAC found:

> [B]y the very nature of the job, the second letter proposed a sit option. The plaintiff knew the setting in which the job was to be performed and cannot reasonably argue that the indicated job would have required her to stay seated at all times. The great weight of the medical evidence indicates that plaintiff was capable of performing the job offered on May 26 . . . .

Accordingly, the WCAC affirmed the magistrate's decision with modification. It modified the magistrate's decision to provide for the suspension plaintiff's weekly benefits as of May 30, 2000, but otherwise affirmed that decision. Plaintiff now appeals.

In reviewing an appeal of a claim under the Worker's Disability Compensation Act, MCL 418.101 *et seq*., this Court considers the WCAC's decision. If there is any evidence to support the WCAC's factual findings and if it did not misapprehend its administrative appellate role in reviewing the magistrate's decision, then this Court must treat the WCAC's factual findings as

conclusive. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614 NW2d 607 (2000). Providing the WCAC carefully examined the record, recognized the deference to be given to the magistrate, did not "misapprehend or grossly misapply" the substantial evidence standard and gave adequate reasons based on the record if it reversed the magistrate, this Court should deny leave to appeal or, if it is granted, affirm. *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992). This Court may review questions of law involved with any final order of the WCAC. MCL 418.861a(14). The WCAC's decision may be reversed if it operated within the wrong legal framework or based its decision on erroneous legal reasoning. MCL 418.861a(14); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000).

MCL 418.301(5) sets forth the manner for determination of weekly wage loss benefits if a plaintiff has established a work-related disability. MCL 418.301(5)(a) provides:

> If the employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.

"Reasonable employment" is defined in MCL 418.301(9) as

> work that is within the employee's capacity to perform that poses no clear and proximate threat to that employee's health and safety, and that is within a reasonable distance from that employee's residence. The employee's capacity to perform shall not be limited to jobs in work suitable to his or her qualifications and training.

The defendant bears the burden of proving that it made a bona fide offer of reasonable employment. *Price v City of Westland*, 451 Mich 329, 335 n 6; 547 NW2d 24 (1996). The Supreme Court explained that whether an employer made a bona fide offer of reasonable employment is generally a factual issue. *Id*. at 336. The WCAC's findings of fact are conclusive in the absence of fraud. Const 1963, art 6, § 28; *Mudel*, *supra* 462 Mich 698. "However, '[e]rror may be committed by basing a finding of fact on a misconception of law and by failing to correctly apply the law to the finding of fact.'" *Price*, *supra* 451 Mich 336-337, quoting *Braxton v Chevrolet Grey Iron Foundry*, 396 Mich 685, 692-693; 242 NW2d 420 (1976).

The *Price* Court explained that an employer's "bona fide offer of reasonable employment must describe with a fair degree of specificity the duties the disabled employee is to perform." *Id*. at 337. The employer must present specific employment with established responsibilities. *Id*. It cannot simply invite the disabled employee to work with an intent that something will be found for the employee to do. *Id*. "The offer must be for a 'specific restricted job,' not an 'unspecified grouping' of jobs, which may or may not accommodate the employee's limitations." *Id*. The employer must inform the employee of the kind of work she will be expected to perform and the nature of the job; the employee has a right to know of what the job consists. *Id*. at 338.

In this case, we agree with the magistrate that the offer of work did not meet the requisite specificity for a bona fide offer of reasonable employment because Dr. Fritz's restrictions did not

accompany the letters and plaintiff was never informed of the nature of those restrictions. As the magistrate properly found, plaintiff had no factual basis upon which to evaluate the reasonableness of the position with her doctor or attorney. In reversing the magistrate's open award of benefits, the WCAC erred because it failed to correctly apply the law to the facts of this case. *Price, supra* 451 Mich 336-337. Accordingly, we reinstate the magistrate's open award of benefits.

Reversed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio

STATE OF MICHIGAN

COURT OF APPEALS

MARY L. TAYLOR, Plaintiff-Appellant,	UNPUBLISHED January 3, 2003
v	No. 239048 WCAC
SCHOOLCRAFT COLLEGE, Defendant-Appellee.	LC No. 01-000273

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

Kelly, P.J. *(dissenting).*

I respectfully dissent. I disagree with the majority's opinion that defendant's second letter dated May 20, 2000 did not constitute a "bono fide offer of reasonable employment" pursuant to MCL 428.301(5).

In its opinion modifying the magistrate's open award of benefits, the WCAC reasoned:

> The law requires a defendant to provide sufficiently specific information such that the employee has a reasonably clear understanding of the work duties being proposed. Such information was provided in this case. Plaintiff was explicitly told what she would be doing in the proposed employment: Taking money at the cash register with the ability to sit. Plaintiff had full knowledge as to whether the proposed job constituted reasonable employment . . . .
>
> * * *
>
> . . . [T]here was a precise description of the proposed work duties. Since the actual work that was to be performed was detailed in the second employment offer, there was no need to identify the restrictions of the doctor. The letter simply informed plaintiff that the explicitly described proposed work duties were within the doctor's restrictions, a matter of surplusage to the key information already provided. Defendant's second letter provided all of the information necessary for plaintiff to understand her obligations and proposed job duties.

The WCAC addressed plaintiff's additional argument that there existed a question whether she could perform the offered work because the second letter referenced only sitting. The WCAC determined:

> [B]y the very nature of the job, the second letter proposed a sit option. The plaintiff knew the setting in which the job was to be performed and cannot reasonably argue that the indicated job would have required her to stay seated at all times. The great weight of the medical evidence indicates that plaintiff was capable of performing the job offered on May 26 . . . .

If there is any evidence supporting the WCAC's factual findings and if it did not misapprehend its administrative appellate role in reviewing the decision of the magistrate, then this Court must treat the WCAC's factual findings as conclusive. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614 NW2d 607 (2000). In this case, the evidence supports the WCAC's factual findings. Moreover, the record is devoid of any indication that the WCAC misapprehended it administrative appellate role. Thus, the WCAC's decision should be affirmed.

The second letter to plaintiff informed her that she would be performing a food service worker job, specifically as a cashier. This is precisely the job plaintiff performed before her disability. It indicated that the job would involve sitting and would be "within Dr. Fritz's restrictions." As noted by the majority, "Dr. Fritz instructed the plaintiff that she alternate sitting and standing in any work that she performed and that she not lift more than twenty pounds." Clearly, this information complies with the requirement that defendant inform plaintiff of the kind of work she will perform and the nature of the position. *Price v City of Westland*, 451 Mich 329, 337; 547 NW2d 24 (1996). Thus, the WCAC correctly determined that defendant made a sufficient bona fide offer of reasonable employment to plaintiff.

Furthermore, although plaintiff argues that the job could not be performed in a seated position and that she could not sit all day long, the WCAC correctly determined that, in light of plaintiff's knowledge of the position, defendant offered the option to alternate between sitting and standing. Although plaintiff asserts that this implication is improper, I believe that this implication is reasonable and is supported by the record.

Plaintiff also challenges the reasonableness of the offer on the grounds that even if it complied with Dr. Fritz's restrictions, Dr. Fritz considered only plaintiff's knee problems, not her back problems. However, plaintiff fails to present a discussion comparing Dr. Fritz's restrictions with those of any other physician to demonstrate that there is a difference in those restrictions and compliance with Dr. Fritz's restrictions is not sufficient. Moreover, Dr. Fritz, Dr. Grant Hyatt, and Dr. Michael Geoghegan all concluded that plaintiff should alternate between sitting and standing. Dr. Fritz additionally restricted plaintiff from lifting no more than twenty pounds. Dr. Hyatt indicated that plaintiff should perform sedentary work, with the capacity to sit, stand or change position at will. Dr. Geoghegan imposed restrictions precluding plaintiff from climbing stairs or ladders, squatting and kneeling, as well as requiring intermittent sitting and standing. Plaintiff has failed to discuss the fact that these doctors' restrictions were all similar, and the offered job clearly fits within those restrictions.

Finally, I disagree that Dr. Fritz's restrictions must be specifically set forth in the offer of employment. Plaintiff has provided no authority for the proposition that the physician's restrictions must be specifically stated, because no such authority exists. The determination of whether an offer of employment is reasonable is a factual issue. *Price, supra* at 336. The offer must be independently examined to determine if it meets the criteria of a bono fide offer. The

mere fact that the doctor's restrictions were not stated on the offer should not, and in this case does not, affect the reasonableness of that offer.

Because plaintiff fails to persuasively demonstrate that the WCAC erroneously concluded that that defendant made a bona fide offer of reasonable employment to plaintiff, I would affirm the decision of the WCAC.

/s/ Kirsten Frank Kelly