STATE OF MICHIGAN

COURT OF APPEALS

EDWARD SAYERS,

Plaintiff-Appellant,

v

CITY OF SAGINAW and SECOND INJURY FUND,

Defendants-Appellees.

UNPUBLISHED
March 6, 1998

No. 198884
WCAC
LC No. 93-000054

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

This worker's compensation appeal was remanded to this Court for consideration as on leave granted. *Sayers v City of Saginaw*, 453 Mich 929; 554 NW2d 916 (1996). The issue before us is whether plaintiff satisfied the "claim" requirement in MCL 418.381(1); MSA 17.237(381)(1). The Worker's Compensation Appellate Commission found that plaintiff had not timely claimed benefits. We affirm. Because the "claim" issue is dispositive, we do not reach the other issues raised by plaintiff.

Plaintiff injured his back in 1977. He litigated a worker's compensation claim which resulted in an open award of benefits in April 1982. About five months later, plaintiff filed another application that claimed an aggravation of his back injury. This led to an ongoing series of applications and petitions by both plaintiff and his employer, the City of Saginaw. In 1983 Saginaw offered plaintiff favored work as a bridge tender. This was "seasonal" employment since a bridge tender was not used in the winter months. Plaintiff worked part of the 1983 season and the 1984 season, the last day of which was November 15, 1984. Plaintiff received his regular worker's compensation benefits when the favored work ended. Plaintiff's petition, which led to this appeal, was filed on September 22, 1988. In that petition plaintiff sought benefits due to an aggravation of his back condition based upon an injury date of November 15, 1984. Plaintiff subsequently amended the petition to claim total and permanent disability.

During 1983 and 1984, when plaintiff was employed as a bridge tender, he was represented by counsel with regard to the ongoing worker's compensation litigation. Plaintiff spoke on one or more occasions with Floyd Kloc, the assistant city attorney in charge of worker's compensation matters. Exactly what plaintiff said to Kloc is a matter of dispute, in part because the hearing in this case took place in May 1991, almost five years after the conversation or conversations took place.

Plaintiff's position is that he had more than one conversation with Kloc and that those conversations provided the notice and the claim for benefits required by MCL 418.381(1); MSA 17.237(381)(1). In particular, plaintiff claims that he told Kloc about an incident when he hurt his back in the summer of 1984 while removing a tailpipe assembly from the road surface and about a serious slip and fall that occurred on plaintiff's last day of work. Plaintiff's testimony, on which he now relies, was as follows:

> *Q.* Did you tell anyone on salary from the City of Saginaw about the problems you were having, sir?
>
> *A.* Yes.
>
> *Q.* Who did you tell, sir?
>
> *A.* Floyd Kloc.
>
> *Q.* And who is Floyd Kloc?
>
> *A.* He was the city attorney.
>
> *Q.* And can you tell me what did you tell Floyd Kloc?
>
> *A.* That I had mentioned about hurting myself when I picked up the muffler and tailpipe and he said, well, that's when you're done working, he says, you're getting paid until the job is done. When you're done you'll go back on workman's comp. He said that's all you're going to get so get out of here don't talk to me about it any more.
>
> *Q.* Can you – when did you talk to Mr. Kloc about that, sir?
>
> *A.* I believe that was in August of '84.
>
> *Q.* Did you talk to Mr. Kloc at any time after that, sir?
>
> *A.* Yes.
>
> *Q.* How many times did you talk to Mr. Kloc, sir, if you can recall?
>
> *A.* I talked to Mr. Kloc several times.

Q. Did you talk to Mr. Kloc about any other problems you had at work with the bridge tender's job?

A. I had mentioned about the slip and fall the last night I worked and he says, well, if you've got any problems just don't bring it to me. He says, see your attorney, you got what you're getting and as far as I'm concerned, that's all it's going to be. So don't talk to me in regard to this.

On cross-examination plaintiff acknowledged that he could not remember exactly what he told Kloc, other than that he believed he "mentioned" slipping and falling on his last day of employment:

Q. And did you specifically tell Mr. Kloc that you slipped and fell on the bridge on November 15th of 1984?

A. I can't remember the exact gist of the conversation. It was something to the effect and he told me that, you know, just that's what my attorney's for, to see my attorney.

Q. Did you specifically tell Mr. Kloc about your injury in August of '84?

A. I didn't specifically tell him. I mentioned it.

Q. Well, how did you mention it, Mr. Sayers?

A. I – I can't recall. I can't recall every conversation I have. I'm sorry, I wish I could remember the exact words but I can't.

Q. But it's your testimony that you specifically advised Mr. Kloc that you suffered an injury as a bridge tender?

A. I believe so, yes.

Q. But you don't recall exactly what you told him?

A. I can't remember the exact gist of the conversation or that, no.

On cross-examination plaintiff further testified:

Q. Mr. Sayers, for clarification was it your testimony on redirect that you only advised Assistant City – or Chief Assistant City Attorney Floyd Kloc that you had a pain in your back while working as a bridge tender?

A. I can't remember the exact words of the conversation exactly. It – we discussed some different things different times. I mean it – it had been brought up and it – the gist of the conversation ended up being that what I was getting on workmans' comp is all I was ever going to see and if I had a problem with that to take it to my

attorney and not to bother him with it any more. That was the last time I talked to him.

Q. But did you – is it your testimony that you told him that you were – you had a pain in your back from doing the bridge tender job?

A. To that effect I believe so.

Q. But you did – and it's also your testimony that you never related any specific injury to Mr. Kloc?

A. As to a specific date or anything I don't believe so.

Q. Okay. And is it further your testimony that you did relate the pain in your back other than your back was hurting, is that what you told Mr. Kloc?

A. I said, again, I couldn't – exact words I can't remember. It was to the effect that, you know, I was having more problems as I worked on the bridge with my back and that's when he told me what he told me. (Tr, pp 123-124).

The gist of Kloc's testimony was that the only thing plaintiff might have told Kloc was that plaintiff had difficulties performing the bridge tender job. Kloc testified:

Q. But do you remember, sir, you talking to Mr. Sayers about problems he was having at work with regard to his employment in 1984?

A. Assuming that that's the year that he worked the full summer there were times that he said that he would have some trouble doing the work. The question would be were you able, you know, was he able to continue, the doctors indicated he could and he, in fact, did. He never said he could not, in fact, work.

Q. Was it your understanding the gist of this was that the – this type of work is bothering me and you told him listen, when it's all finished at the end you're going to get workers' compensation, you're not going to get any more, get the devil out of my office? Do you remember anything such as this?

A. No, not quite. I never dismissed Mr. Sayers of the – in any way like that. . . . The question of whether or not he – when we discussed when he came in and talked I don't recall what the purpose of his coming in to talk to me was. I know there was one time that he did come into the office, whether he came in more or not I don't recall whether I talked to him another time that wasn't in the office, I don't recall. I do – and I don't recall the exact conversation. Whether or not this happened at that time. There was a time he did say that doing the work – actually I think it had something to do with going along the–the walkway, something to do with the

walkway along the bridge, he had difficulty doing it he said because of the restriction.

Q. Did he tell you, sir, that his back was giving him – do you recall him telling you that his back was giving him more problems doing this?

A. I don't recall him saying more problems. I understand that he was having the same problems he had had but I don't recall the word more. Again, I don't recollect all of the words but I don't recall that.

Q. Do you recall Mr. Sayers telling you he was lifting a muffler and felt pain in his back?

A. Seems like this was – there was a mention at some point. I don't know if it was that conversation or what, that he had lifted a muffler and it may have bothered his back, yes, that's possible.

* * *

Q. Do you recall, Mr. Kloc, Mr. Sayers explaining to you that crawling over the guardrail caused his back to become more symptomatic?

A. I don't ever recall him using those kind of words. I do recall that he complained that getting to the levers, something to do with getting to the levers that he had to pull on the bridge would bother him. It was difficult for him to do. Whether it might have been something with the guardrail or some sort of thing he had to get by or through I don't recall the date, but there was something that did bother him.

* * *

A. My position as the workers' compensation administrator for the city as well as litigator involving workers' comp claims, my procedure when there was a work related injury reported was to file a claim with the bureau using the bureau forms. . . .

Q. Would there have been any deviation in your practice had Mr. Sayers come and reported to you that he had suffered a work related injury to you as bridge tender that you would not have filed that notice of injury?

A. If there was – was a report of injury I think I would have reported it.

Plaintiff's wife testified that after plaintiff was injured on his last day of employment, she drove him to Kloc's office so that plaintiff could "tell somebody what had happened." Plaintiff's wife did not relate the specifics of any conversation plaintiff had with Kloc. Other evidence relating to plaintiff "claiming" a November 15, 1984, injury included that plaintiff did not tell his supervisor about the injury

or about his back problem being aggravated and an absence of medical testimony reflecting a history of a November 15, 1984 back injury until medical examinations which occurred in 1989.

The magistrate found that plaintiff had provided sufficient notice. The magistrate stated:

> I believe the plaintiff's testimony as well as the cross examination of former Chief Assistant City Attorney Floyd Kloc indicates that notice of that incident, as well as several other incidents that occurred in the summer of 1984, gave sufficient notice to the defendant City of Saginaw to satisfy the Act. I do not find that the City of Saginaw was in any way prejudiced by lack of some formalized notice as asserted by the defendant.

The magistrate did not specifically discuss whether plaintiff presented a timely claim. The magistrate responded to the focus of the proofs, i.e., notice. The magistrate's reference to "prejudice" was an apparent reference to the provision in MCL 418.381(1); MSA 17.237(381)(1) that an employee's failure to provide notice shall be excused unless the employer can prove prejudice.

The WCAC, giving deference to the magistrate's findings as to credibility, affirmed the magistrate's conclusion that plaintiff provided the notice of injury required by the statute. However, the WCAC found that plaintiff never made a proper claim and further found that the claim requirement was not tolled. Consequently, the WCAC reversed and denied benefits. The WCAC found that plaintiff's testimony about what he said to Kloc contained no indication that plaintiff was claiming additional benefits.[1]

MCL 418.381(1); MSA 17.237(381)(1) provides in pertinent part:

> (1) A proceeding for compensation for an injury under this act shall not be maintained unless a claim for compensation for the injury, which claim may be either oral or in writing, has been made to the employer or a written claim has been made to the bureau on forms prescribed by the director, within 2 years after the occurrence of the injury. . . . A claim shall not be valid or effectual for any purpose under this chapter unless made within 2 years after the later of the date of injury, the date disability manifests itself, or the last day of employment with the employer against whom claim is being made. If an employee claims benefits for a work injury and is thereafter compensated for the disability by worker's compensation or benefits other than worker's compensation, or is provided favored work by the employer because of the disability, the period of time within which a claim shall be made for benefits under this act shall be extended by the time during which the benefits are paid or the favored work is provided.

"Notice" and "claim" are distinct concepts. *LaRosa v Ford Motor Company*, 270 Mich 365, 367; 259 NW 122 (1935). While, as the statute recognizes, a claim may be made either orally or in writing, a claim must provide the employer with the information the law intends in an "affirmative and unequivocal" manner. *Id.* at 369. In *Mauch v Bennett & Brown Lumber Company*, 235 Mich 496; 209 NW 586 (1926), the Court similarly recognized that a claim generally needs to be an "unequivocal demand for compensation" in order to be sufficient.

In *LaRosa* the plaintiff (who did not speak English well) was found not to have made a sufficient claim even though the plaintiff had talked to his employer about receiving medical care for a hernia the plaintiff apparently suffered on the job. *LaRosa*, *supra* at 369. In contrast, in *Mauch* the claim was unequivocal where the plaintiff sent a letter to the employer asking "about my compensation" in reference to an injury. *Mauch*, *supra* at 498. Similarly, in *Johnson v Motor City Sales Corp*, 352 Mich 56, 60; 88 NW2d 281 (1958), a sufficient claim was found where the dependents of a deceased employee specifically asked the employer whether they would receive compensation due to the employee's death.

Whether plaintiff made a timely claim depends upon what was said during plaintiff's conversations with Kloc. This presents a factual issue. *Id.* at 61. The magistrate found that plaintiff provided timely notice, but the magistrate did not make a finding regarding whether plaintiff properly made a claim. Under these circumstances, the WCAC acted within its authority when it made a factual determination as to whether plaintiff made a timely claim. *Williams v Chrysler Corp (On Remand)*, 209 Mich App 442, 445-446; 531 NW2d 757 (1995). The evidence needed for the determination was in the record and there was no need to remand for further development of the record. Somewhat similarly, in cases where a magistrate's findings are not supported by competent, material and substantial evidence, the WCAC has the power to assess the evidence on the whole record and to make its own findings. *Holden v Ford Motor Co*, 439 Mich 257, 275-278; 484 NW2d 227 (1992); *Gretel v Worker's Compensation Appellate Com'n (On Remand)*, 217 Mich App 653, 657; 552 NW2d 532 (1996). The WCAC was not faced with a situation like that in *Woody v Cello-Foil Products*, 450 Mich 588; 546 NW2d 226 (1996), where the magistrate's decision could not be meaningfully reviewed because the magistrate had not explained his reasoning or the subsidiary facts he relied on.

The WCAC found that plaintiff failed to make a proper, timely claim. Findings of the WCAC are conclusive if there is any competent evidence to support them. *Weems v Chrysler Corp*, 448 Mich 679, 688; 533 NW2d 287 (1995); *Holden*, *supra*, at 261-263. The evidence supporting the WCAC's finding is ample. Plaintiff's testimony was at best vague as to whether he asserted a new claim when he spoke to Kloc. Plaintiff's testimony could support a finding that plaintiff gave notice (which seems to have been the focus of plaintiff's testimony). But it takes considerable speculation to find that plaintiff asserted a claim. Plaintiff himself testified that he could not remember the gist of his conversation. Kloc's testimony suggested that plaintiff was only registering complaints about the favored work he had been assigned. Kloc did not recall plaintiff saying anything about "more" problems. Plaintiff's wife did not testify about what was said. Thus, the evidence falls far short of establishing an affirmative or an unequivocal claim.

The circumstances of the case also support the WCAC's finding. As of 1984 plaintiff had been in litigation regarding worker's compensation claims for several years. Plaintiff had already filed at least one application for increased benefits claiming that his prior back injury had been aggravated. Plaintiff had worker's compensation counsel. Plaintiff's delay in waiting four years to apply for benefits based upon a November 15, 1984 injury is inexplicable, particularly if plaintiff was, in fact, making a claim when he spoke with Kloc in 1984.

Plaintiff also argues that the time for making a claim was tolled by virtue of the last sentence of MCL 418.381(1); MSA 17.237(381)(1), which extends the time to make a claim in cases where an employee has already received compensation for the disability at issue. *Bieber v Keeler Brass Company*, 209 Mich App 597, 601; 531 NW2d 803 (1995). The period in which to file a claim is extended when an employee receives benefits "because of the disability" or because benefits are being paid for favored work. This tolling provision does not apply in plaintiff's case since plaintiff never received benefits because of "the disability" and never received favored work based upon "the disability." Plaintiff received benefits after he stopped working on November 15, 1984 based upon his 1977 injury and the 1982 open award for that injury. The "disability" which is the subject of the instant claim is the alleged aggravation that occurred in 1984.

It makes no sense to toll the claim requirement under the instant circumstances. We cannot attribute to our Legislature an intent to toll the time for filing a certain claim because an employee already receives benefits or favored work because of a different claim. That would be contrary to the statutory language which limits tolling to an employee being compensated "for *the* disability" (emphasis added). If plaintiff had lost his favored work and then been denied benefits, the tolling provision would have permitted plaintiff to claim benefits for the original injury and to avoid a defense based upon the failure to make a timely claim. *Bieber* is readily distinguishable because in the cases decided in that opinion there was only one injury and only one claim being made.

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Hilda R. Gage

[1] Two commissioners of the WCAC applied a then recently-devised standard to resolve notice and claim issues. Under this standard a claimant must make a formal claim no more than two years after the last event which triggered a tolling of the claim requirement. We express no opinion regarding the validity of this standard. The facts this opinion relies upon are not affected by the standard.