

STATE OF MICHIGAN
COURT OF APPEALS

FAYE E. COTTONGIM, Personal Representative of
the Estate of JAMES N. COTTONGIM, deceased,

UNPUBLISHED
April 10, 1998

Plaintiff-Appellant,

v

No. 208725
WCAC
LC No. 91-000708

WALTER TOEBE CONSTRUCTION COMPANY
and TRANSPORTATION INSURANCE
COMPANY,

Defendants-Appellees.

ON REMAND

Before: Murphy, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

In an unpublished per curiam opinion dated April 19, 1996 (Docket No. 179696), this Court affirmed the decision of the Worker's Compensation Appellate Commission reversing the magistrate's award of benefits for a low back disability. In lieu of granting plaintiff's application for leave to appeal, our Supreme Court remanded this case to this Court for reconsideration in light of *Goff v Bil-Mar Foods, Inc (After Remand)* and *Dudley v Morrison Industrial Equipment Co*, 454 Mich 507; 563 NW2d 214 (1997). 456 Mich 891.¹ We again affirm.

The relevant facts and proceedings are summarized in this Court's previous opinion.

In *Goff/Dudley*, the Supreme Court discussed both the authority of the WCAC in reviewing magistrate decisions and the scope of judicial review of decisions of the WCAC. With regard to the WCAC's review, the Court noted that the WCAC does not review the factual record de novo but reviews the record to determine whether the magistrate's factual findings are supported by the requisite competent, material, and substantial evidence on the whole record. Only when the WCAC determines that the magistrate's findings are not so supported may the WCAC make contrary findings of its own. Moreover, when determining whether the magistrate's findings have the requisite evidentiary support, the WCAC must accord due deference to the magistrate's reasonable interpretation of the evidence, even if other reasonable interpretations of the evidence are possible:

Application of this standard often results in confusion because it is difficult to define. In the statute, “substantial evidence” is defined as “evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion.” MCL 418.861a(3); MSA 17.237(861a)(3). But it is quite possible that a reasonably minded magistrate could interpret a record differently than a reasonably minded WCAC. However, if the magistrate’s conclusion is derived from competent, material, and substantial evidence, then the WCAC may not substitute its judgment for that of the magistrate notwithstanding either the reasonableness or the adequacy of the commission’s conclusion. [454 Mich at 513-514 (footnote omitted).]

With regard to judicial review of WCAC decisions, the Supreme Court noted that the question in each case is “whether the WCAC acted in a manner consistent with the concept of administrative appellate review that is less than de novo review in finding that the magistrate’s decision was or was not supported by competent, material, and substantial evidence on the whole record.” *Id.* at 516, quoting *Holden v Ford Motor Co*, 439 Mich 257, 267-268; 484 NW2d 227 (1992). Reviewing courts must consider issues of credibility determined by the magistrate, evidence accepted and rejected by both the magistrate and the WCAC, and the care, reasoning and analysis employed by the magistrate and the WCAC in reaching their conclusions, but unless it is “manifest” that the WCAC exceeded its reviewing power, reviewing courts should ordinarily defer to the collective judgment of the WCAC. 454 Mich at 516.

For guidance, the Supreme Court adopted the four-part standard of judicial review previously articulated in *Holden*, whereby reviewing courts should uphold a decision of the WCAC reversing the findings of a magistrate if it appears that the WCAC: (1) carefully examined the record, (2) was duly cognizant of the deference to be given to the decision of the magistrate, (3) did not misapprehend or grossly misapply the substantial evidence standard, and (4) gave an adequate reason grounded in the record for reversing the magistrate. *Id.* at 516-517.

The Supreme Court also stated that the *Goff* and *Dudley* cases themselves may tend to serve as a functional guide for deciding future cases, as one case illustrates the WCAC’s proper exercise of its standard of review in reversing the findings of the magistrate whereas the other case provides an example of the WCAC exceeding its review authority. In the *Goff* case, the Supreme Court found that the WCAC did not exceed its authority by reversing the findings of the magistrate where the WCAC carefully reviewed the whole record, including the findings of the magistrate, and thoughtfully detailed the reasons for its reversal. 454 Mich at 525-528. Specifically, the Court found that the WCAC had properly determined that there was not substantial evidence on the whole record for the magistrate’s finding of continuing work-related disability, based upon the lack of objective evidence to corroborate the claimant’s complaints of pain, even though the lack of objective findings and the plaintiff’s apparent embellishment of his complaints was also noted in the decision of the magistrate. The WCAC concluded that the magistrate’s reliance upon the testimony of the claimant’s treating physician was misplaced and unreasonable because the accuracy of the information that the claimant supplied to his physician was suspect. 454 Mich at 526-527.

In *Dudley*, the Court found that the WCAC had exceeded its authority in reversing the findings of the magistrate, where the WCAC ignored certain important factors considered by the magistrate, ignored the medical opinions of the treating and examining physicians, rejected the magistrate's credibility determination in a wholesale manner, gave only "passing lip service" to the requirement of according due deference to the magistrate's judgment, and gave reasons for reversing the magistrate that were not adequate and did not reflect careful consideration of the whole record. 454 Mich at 533-537. Specifically, the Court found that the WCAC had improperly disregarded the magistrate's judgment that the claimant was a credible witness on grounds that the claimant gave inconsistent histories regarding his work injuries to his physicians, when the claimant's allegedly inconsistent histories could in fact reasonably be interpreted as consistent because they described two separate work injuries. The WCAC also incorrectly concluded that the claimant had tried to conceal his preexisting back problems, but the claimant had in fact discussed his previous back difficulties when questioned about them and had explained that his problems were not disabling until his work injuries.

The standards discussed in *Goff/Dudley* are perhaps best summarized in the following paragraph at the conclusion of lead majority opinion:

If the magistrate's decision is reasonably supported in the record by any competent, material, and substantial evidence, then it is conclusive and the WCAC must affirm. If it does not, it is exceeding the scope of its reviewing power and impermissibly substituting its judgment for the magistrate's. In reviewing the magistrate's decision, the WCAC must do so with sensitivity and deference toward the findings and conclusions of the magistrate in its assessment of the record. If in its review the WCAC finds that the magistrate did not rely on competent evidence, it must carefully detail its findings of fact and the reasons for its findings grounded in the record. If after such careful review of the record the WCAC finds that the magistrate's determination was not made on the basis of substantial evidence and is therefore not conclusive, then it is free to make its own findings. In such circumstances, the findings of fact of the WCAC are conclusive if the commission was acting within its powers. Ultimately, the role of the Court of Appeals and this Court is only to evaluate whether the WCAC exceeded its authority. [454 Mich at 538.]

The WCAC's decision in this case is more analogous to the WCAC decision in *Goff* than the WCAC decision in *Dudley*. Turning first to the magistrate's decision, it does not appear that the magistrate thoroughly analyzed the evidence with care. The magistrate made no express determinations regarding the credibility of plaintiff, or any other witness for that matter, although the magistrate obviously relied on plaintiff's testimony. The magistrate did note that after the May 27, 1987, incident, plaintiff first reported to Dr. Kellams symptoms of chest and arm pain only. However, the magistrate completely ignored other evidence tending to discredit plaintiff's claim that the May 27, 1987, incident involved a sudden injury to his back, such as the fact that plaintiff reported "heat exhaustion" rather than a back injury to the insurer and the fact that plaintiff reported back pain of one years' duration to Dr. DeBruin in October of 1987.

Contrary to plaintiff's contention that the magistrate "made due note of what he found to be the persuasive medical testimony," the magistrate never really resolved any of the conflicting medical testimony at all. For example, as noted in the magistrate's summary of the evidence, Drs. Kazmers and Corbett offered conflicting opinions as to whether plaintiff's symptoms were attributable to his nonoccupational vascular problems, but the magistrate never resolved that issue. Rather, the magistrate's only conclusion regarding plaintiff's vascular problems is his statement that the "medical proofs indicate that the plaintiff had . . . prior and subsequent underlying medical problems relating to his cardiovascular system."

As noted in this Court's previous opinion in this case, the WCAC "acted in a manner consistent with the concept of administrative appellate review that is less than de novo review by carefully examining the record and giving cogent and adequate reasons grounded in the record for reversing the magistrate." As in *Goff*, the WCAC identified record-based reasons for doubting the accuracy of plaintiff's testimony that something snapped in his back on May 27, 1987, some of which were completely ignored in the magistrate's decision. We discussed the WCAC's reasoning in our previous opinion as follows:

For example, the WCAC noted that the way plaintiff described his injuries to Dr. Kellams in May of 1987 and Dr. DeBruin in October of 1987 was inconsistent with his claim of sudden low back pain. The WCAC also correctly noted that plaintiff had initially described the injury as "heat exhaustion," that plaintiff's initial symptoms following the work incident were consistent with his pre-existing nonoccupational vascular problems, and that there was an absence of reliable diagnostic evidence of the disc herniation problem for more than a year after the work incident. Moreover, the WCAC noted that there was evidence that plaintiff had chronic back problems well before the work incident, arguably providing further support for the conclusion that the herniated disc developed gradually over time rather than as a result of a sudden work injury. [No. 179696, slip op, pp 4-5.]

Furthermore, as in *Goff*, the WCAC correctly noted that a finding of work-relatedness is dependent upon the accuracy of plaintiff's assertion of a "snap" in his back occurring on May 27, 1987, for as this Court explained in its previous opinion, the opinions of both Drs. Delacruz and Maxim regarding work-relatedness were premised upon plaintiff having suffered sudden "snap" in his back on May 27, 1987.

Unlike the situation presented in *Dudley*, we do not believe that this is a case where the WCAC has ignored important evidence, failed to accord due deference to the findings and conclusions of the magistrate, misapprehended or grossly misapplied the substantial evidence on the whole record standard, or improperly substituted its own judgment for that of the magistrate.

Accordingly, upon reconsideration of this case in light of *Goff/Dudley*, we again conclude that the WCAC did not exceed its authority by reversing the decision of the magistrate.²

Affirmed.

/s/ William B. Murphy

/s/ Richard Allen Griffin

¹ Pursuant to Court policy, Judge Smolenski has been substituted for visiting Judge Edward R. Post.

² For the reasons stated in our previous opinion in this case, we also reject plaintiff's argument that the panel of the WCAC that decided this case was not fair and impartial due to demonstrated pro-employer bias.