# STATE OF MICHIGAN

# COURT OF APPEALS

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EUGENE J. KRYWKO,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION SAGINAW STEERING GEAR,

Defendant-Appellee.

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UNPUBLISHED
May 21, 1999

No. 211978
WCAC
LC No. 00000185

Before: Jansen, P.J., and Sawyer and Markman, JJ.

JANSEN, P.J. (dissenting).

I respectfully dissent. There are several problems with this case, all relating to the tortuous appellate history. If the Worker's Compensation Appellate Commission (WCAC) was permitted to engage in de novo review, as it apparently was, then I would remand this case to the WCAC with specific instructions to allow the parties to reopen the proofs and for the WCAC to receive additional evidence so that this case may be properly decided pursuant to the Supreme Court's seminal decision in *Gardner v Van Buren Public Schools*, 445 Mich 23; 517 NW2d 1 (1994).

Plaintiff began working for defendant in 1966 and suffered "breakdowns" at work on July 2, 1976, December 4, 1981, and March 18, 1982. His last day of work was March 18, 1982, and plaintiff petitioned for worker's compensation benefits in September 1982, claiming a mental disability. Hearings were held on July 19, 1984 and September 25, 1984. The administrative law judge mailed his opinion and order granting plaintiff an open award of benefits on October 18, 1984. Defendant appealed to the Worker's Compensation Appeal Board (WCAB), and the WCAB affirmed the administrative law judge in an opinion and order mailed September 26, 1989. Defendant applied for leave to this Court, which vacated the order of the WCAB and remanded to the WCAB to reconsider the case in light of MCL 418.301(2); MSA 17.237(301)(2), in an unpublished order dated February 27, 1990. On remand, the WCAB affirmed its prior decision, awarding plaintiff open benefits, in a decision mailed June 27, 1990. Defendant again applied for leave to this Court, which was granted in an unpublished order dated December 3, 1990. This Court subsequently reversed the WCAB in an unpublished opinion issued on August 13, 1992 (Docket No. 131084). Plaintiff applied for leave to the

Supreme Court, which held the application in abeyance pending the decision in *Gardner* and its companion cases in an order dated November 11, 1993. The Supreme Court's decision in *Gardner* was issued on April 19, 1994, and the Supreme Court then issued an order, on August 29, 1994, remanding the case to the WCAC for reconsideration in light of *Gardner*. The WCAC, on de novo review, ruled that benefits should be denied in an opinion and order dated February 6, 1996. Plaintiff filed an application for leave to this Court, which was denied on June 17, 1997, and again filed an application for leave to the Supreme Court, which, in lieu of granting leave, remanded to this Court for consideration as on leave granted on May 27, 1998.

I recognize that remanding this case to the WCAC only continues the appellate cycle; however, this case is complicated by the statutory changes to the WCAB and WCAC, the various standards of review, and the Supreme Court's decision in *Gardner*. 1985 PA 103 brought significant changes to worker's compensation law in this state. Before this act became effective, the WCAB reviewed decisions of referees (administrative law judges) de novo. Beginning October 1, 1986, de novo review was eliminated. See *Holden v Ford Motor Co*, 439 Mich 257, 260-261; 484 NW2d 227 (1992). However, because of the change from hearing referees to magistrates and the WCAB to the WCAC, several transitional statutes were set in place. The WCAB was eliminated on July 1, 1989. MCL 418.266(1); MSA 17.237(266)(1). Pursuant to MCL 418.253(12); MSA 17.237(253)(12) (now repealed), cases remanded to the appeal board by a court after October 1, 1993 are to be decided by the WCAC. That is what happened in this case when the Supreme Court remanded to the WCAC on August 29, 1994. Under MCL 418.253(14); MSA 17.237(253)(14) (now repealed), the WCAC's review is according to the law applicable to reviews conducted by the appeal board. See also, MCL 418.266(4); MSA 17.237(266)(4). Because this case has its genesis with the WCAB, being filed with the appeal board before March 31, 1986, the WCAC could engage in de novo review.

That being said, however, it is difficult to properly call the WCAC's review as being de novo, because there was no decision of the magistrate for it to review. That is because the administrative law judge never determined whether the employment events contributed to, aggravated, or accelerated plaintiff's disability "in a significant manner." MCL 418.301(2); MSA 17.237(301)(2). Even if the WCAC properly engaged in de novo review, as the WCAB could, the WCAC should have reopened the proofs and permitted the parties to present additional evidence on this crucial issue of "significant manner." See MCL 418.859; MSA 17.237(859) (the WCAB was authorized to hear additional evidence in its review of referee decisions).

In this case, the WCAC simply had the evidence originally presented to the administrative law judge in 1984 and found as a factual matter that plaintiff could not show that his employment was a significant factor in aggravating his mental illness. However, this issue was never litigated in the first instance. Therefore, I believe that it was error for the WCAC to decide an issue on a record that did not initially include consideration of that issue. I would remand to the WCAC with the specific instruction that it reopen the proofs for the parties to present additional evidence on the "significant manner" issue.

/s/ Kathleen Jansen