

STATE OF MICHIGAN
COURT OF APPEALS

JOHN M. VINKLE, deceased, by GEORGIA
VINKLE, Personal Representative,

UNPUBLISHED
July 9, 1999

Plaintiff-Appellant,

v

No. 210759
WCAC
LC No. 94-000604

EMMET COUNTY, PINKERTON SECURITY &
INVESTIGATION SERVICES, HOME
INSURANCE COMPANY, and SILICOSIS, DUST
DISEASE, AND LOGGING INDUSTRY
COMPENSATION FUND,

Defendant-Appellees.

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Plaintiff appeals as on leave granted, after remand from the Supreme Court, the decision of the Worker's Compensation Appellate commission affirming the magistrate's denial of disability benefits. We reverse.

Plaintiff's decedent filed an application for hearing on September 1, 1992, alleging that he sustained a lung disability while in the course of his employment at the Emmet County airport. Emmet County filed petitions in June and July 1993 adding defendant Pinkerton Security and Investigation Services and the Silicosis, Dust Disease, and Logging Industry Compensation Fund (Fund) to the case. Depositions of plaintiff's expert, Dr Mark Drogowski, were taken before the addition of these parties. All defendants moved to exclude Drogowski's deposition from evidence based on lack of notice. Although the magistrate initially ruled that he would allow admission of the depositions, in his final decision he excluded the depositions, finding that their admission would deprive defendants of due process of law. Thus, the case was tried without any expert testimony to support plaintiff's claim. In addition, the magistrate found that plaintiff's decedent had failed to provide the notice required by the statute in effect at the time, MCL 418.381(1); MSA 17.237(381)(1).

The WCAC affirmed the magistrate's decision. Although it found that plaintiff's argument as to the deposition rang true, it deferred to the magistrate's discretion in procedural matters. It also erroneously found that the deposition testimony would be cumulative to that given by Dr. Joseph Kopmeyer, who was defendant's expert, not plaintiff's. The WCAC further concluded that adequate notice was not given,¹ and that in any event this finding was inconsequential where plaintiff's decedent failed to prove that his condition was work-related. This Court denied plaintiff's application for leave to appeal, and the Supreme Court remanded for consideration as on leave granted.

A decision of the appellate commission is subject to reversal if the commission operated within the wrong legal framework, or if the decision was based on erroneous legal reasoning. *Bates v Mercier*, 224 Mich App 122, 124; 568 NW2d 362 (1997). Here, it appears that the decision of the commission was based in large measure on the conclusion that there was no evidence to support a finding that plaintiff's decedent's condition was work-related. However, the lack of evidence was caused by the magistrate's exclusion of the depositions of plaintiff's expert witness.

The exclusion of the depositions was an abuse of discretion. Defendant Emmet County was not denied due process of law by the deposition process. Although it was not represented at the first deposition taken October 9, 1992, counsel appeared and cross examined Dr. Drogowski on May 28, 1993. Any defects in the first proceeding were cured through the cross-examination provided in the second deposition. A party's right to due process of law is not violated by the admission of a deposition for which that party had no notice and was not present if that party had an opportunity to schedule another deposition or subpoena the deponent as a witness at the hearing and failed to do so. Such a failure constitutes a waiver of the right to cross-examine. *Cooper v Chrysler Corp*, 125 Mich App 811, 819; 336 NW2d 877 (1983). In the instant case, Emmet County actually exercised its right to cross-examine the witness. Emmet County's arguments regarding the inadequacy of Dr. Drogowski's testimony should be addressed to the magistrate hearing the case on remand, there being adequate testimony to create a triable issue.

We do not address plaintiff's appeal as relates to Pinkerton or the Fund because plaintiff has made no claim that either is liable for benefits. We do not address any issues regarding Emmet County's claims against Pinkerton and the Fund, as they are not before us.

Reversed and remanded to the Board of Magistrates for resubmission of plaintiff's claim in proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Griffin
/s/ Gary R. McDonald
/s/ Helene N. White

¹ Defendant Emmet County has not addressed the notice issue in its brief on appeal and has apparently abandoned its claim that it failed to receive notice. Thus, we do not address this aspect of the

magistrate's and WCAC's decisions, except to note that plaintiff's decedent testified that he gave notice to one of his supervisors.