# STATE OF MICHIGAN

# COURT OF APPEALS

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MICHAEL EDWIN,

Plaintiff-Appellant Cross-Apellee,

v

OAKLAND COUNTY,

Defendant-Appellee Cross-Appellant.

UNPUBLISHED
December 14, 1999

No. 210635
WCAC
LC No. 94 000219

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

PER CURIAM.

Plaintiff, a deputy sheriff, appeals from a decision of the Worker's Compensation Appellate Commission (WCAC) reversing the magistrate's closed award of benefits on the basis that defendant adequately rebutted a statutory presumption that plaintiff's heart attack was work-related. Defendant cross appeals, asserting that the magistrate erred in concluding that plaintiff satisfied a condition precedent for application of the presumption. We reverse the WCAC's reversal of the magistrate's award. We also hold that plaintiff was not required to apply for a pension as a condition precedent under the circumstances of this case.

I

Plaintiff works as a deputy sheriff for defendant Oakland County. On August 29, 1991, at the age of 40, plaintiff suffered a heart attack while pursuing a driver to effect a traffic stop. Plaintiff returned to work on January 15, 1992. He received sickness and accident benefits while off work.

Plaintiff sought worker's compensation benefits for the period he was off work. At trial, plaintiff testified that his father had died from a heart attack at age 70, and that his mother had died during by-pass surgery at age 77. His brother had undergone by-pass surgery. Plaintiff testified that he had been under the care of a cardiologist for six or seven years prior to his heart attack. He had undergone an angioplasty in 1987. He took medicine for high blood pressure, and medicine to reduce his cholesterol, and took an aspirin each day to thin his blood. Plaintiff stated that he was 5'6" tall and weighed 180 pounds. Medical records entered into evidence indicated that plaintiff, in fact, suffered a heart attack on August 29, 1991, and that he suffers from generalized coronary artery disease.

The magistrate granted plaintiff benefits for the period he was off work. The magistrate stated that if plaintiff's claim were analyzed under MCL 418.301(2); MSA 17.237(301)(2) and *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993), it would fail. However, the magistrate found that § 405(2) of the Worker's Disability Compensation Act, MCL 418.405(2); MSA 17.237(405)(2), applied. That section establishes the presumption that for various safety officials, including deputy sheriffs, heart disease arises out of and in the course of employment. The magistrate noted that in *Schave v Dep't of State Police*, 58 Mich App 178, 184-185; 227 NW2d 278 (1975), this Court held that in order to rebut § 405(2)'s presumption, a defendant must produce evidence of nonwork-related causation, and that merely presenting evidence of preexisting heart disease, or medical opinion that the occupation had no effect on the heart, is not sufficient. The magistrate concluded that under § 405(2) and *Schave*, plaintiff was entitled to benefits.

Defendant appealed, and the WCAC reversed the decision of the magistrate and denied benefits. The WCAC found that the magistrate's finding that defendant did not present evidence to rebut the presumption was not supported by the record. The WCAC noted that the record showed that plaintiff had a family history of heart trouble, was overweight, and was undergoing treatment for heart problems, and that the presence of these nonoccupational factors caused the magistrate to conclude that plaintiff's claim would fail under § 301(2) and *Farrington*. The WCAC found that evidence of nonwork-related causation was presented as required by *Schave*, and the evidence rendered the presumption inapplicable.

This Court denied plaintiff's application for leave to appeal. However, in lieu of granting leave, the Supreme Court remanded to this Court for consideration as on leave granted. Defendant then cross appealed, contending that the magistrate erred in finding that plaintiff satisfied a condition precedent to application of the statutory presumption.

II

Section 405(1) provides that in the case of certain firemen and policemen, "personal injury" includes "respiratory and heart diseases or illnesses resulting therefrom which develop or manifest themselves during a period while the member of the department is in the active service of the department and result from the performance of duties for the department." Section 405(2) provides that such respiratory and heart diseases or illnesses "are deemed to arise out of and in the course of employment in the absence of evidence to the contrary."

Section 301(1) of the Act provides that an employee who receives a personal injury "arising out of and in the course of employment" is entitled to compensation. However, section 301(2) provides, in part, that heart and cardiovascular conditions "shall be compensible if contributed to or aggravated or accelerated by the employment in a significant manner." In *Farrington, supra* at 216-217, the Supreme Court held that the factfinder must determine the causal significance of work-related events in light of "the totality of all the occupational factors and the claimant's health circumstances and nonoccupational factors."

Relying on this Court's decision in *Schave, supra*, plaintiff contends that the WCAC erred in applying *Farrington* to defeat section 405(1)'s presumption. In *Schave,* this Court discussed the statutory phrase "in the absence of evidence to the contrary":

> There is little doubt that the Legislature, in enacting this statute, made the determination that policemen and firemen were particularly vulnerable to respiratory and heart diseases, and that medical learning was insufficient to ascribe causes to these diseases. The obvious legislative intent was to afford compensation to policemen and firemen suffering from respiratory and heart diseases in that very limited situation where no doctor was able to diagnose etiology.
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> Since the interpretation of this statute is a matter of first impression in this state, we find the comments of Larson, perhaps the leading authority in the field of workmen's compensation, persuasive in this matter. In 1A Larson, Workmen's Compensation Law, § 41.70 pp. 311--313, the author discusses the type of medical testimony necessary to establish "evidence to the contrary" in statutes similar to the one at bar:
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> "An interesting recent phenomenon has been the burgeoning in all parts of the country of statutes granting special compensation coverage to firemen or policemen or both, for respiratory and heart diseases connected with the exertions of the employment. No two are quite identical. Most establish a presumption of work connection when these diseases result from performance of active service, *a presumption that cannot be rebutted merely by evidence of preexisting heart disease nor by medical opinion that the occupation had no effect on the weakened heart."* (Emphasis added.)
>
> We therefore interpret the meaning of "evidence to the contrary" in the context of this statute to require that in order to rebut the presumption, the defendant is required to produce evidence of nonwork-related causation. The presumption cannot be rebutted merely by evidence of preexisting heart disease, nor by medical opinion that the occupation had no effect on the weakened heart. [58 Mich App 184-185.]

Plaintiff asserts that in the instant case, the other risk factors presented by defendant and relied on by the WCAC amount to nothing more than evidence that plaintiff suffers from preexisting heart disease or other cardiovascular malady, and do not establish evidence of nonwork-related causation. We agree that the factors relied on by defendant and the WCAC are in the nature of a preexisting condition or conditions, rather than events or sequences of events, and thus, under *Schave,* they are not evidence of nonwork-related causes of the heart attack. The WCAC therefore erred in reversing the magistrate's award of benefits for a closed period.

III

Defendant, as cross-appellant, argues that both the magistrate and WCAC erred in holding that plaintiff satisfied a condition precedent for application of the presumption. Section 405(3) provides:

> (3) As a condition precedent to filing an application for benefits, the claimant, if he or she is one of those enumerated in subsection (1), shall first make application for, and do all things necessary to qualify for any pension benefits which he or she, or his or her decedent, may be entitled to. If a final determination is made that pension benefits shall not be awarded, then the presumption of "personal injury" as provided in this section shall apply. The employer or employee may request 2 copies of the determination denying pension benefits, 1 copy of which may be filed with the bureau.

In this case as in *Schave,* the claimant returned to work and sought benefits for a closed period only. In *Schave,* this Court noted that the plaintiff was not entitled to a regular pension because he had not served a sufficient number of years, and was not entitled to a disability pension because he was no longer disabled and had returned to work. *Schave* at 182. This Court therefore held that the plaintiff satisfied the condition precedent of subsection (3) and that his failure to file for a pension was excused because a claimant is not required to perform a useless act. *Id.* at 183. In the instant case, defendant notes that plaintiff offered no evidence that he was not eligible for a pension. Defendant therefore concludes that plaintiff is not entitled to the statutory presumption because he did not even attempt to satisfy the condition precedent.

We disagree. Because plaintiff has returned to work, he is clearly not eligible either for a disability pension or a regular pension. He is not eligible for the former because he is not disabled; he is not eligible for the latter because he has not retired from his job. Moreover, if defendant's argument were accepted, then policemen, firemen and others covered by section 405 would lose the benefit of the statutory presumption in all cases where they are only temporarily disabled and are able to return to work. Because this Court in *Schave* recognized that the legislative intent in enacting section 405 was remedial in nature in order to assist policemen, firemen, and others to obtain benefits, and because defendant offers no reason for concluding that the Legislature intended the statutory presumption to apply only in cases where the claimant is seeking lifetime benefits and not where claimant is seeking benefits for a closed period, defendant's argument is without merit.

Defendant argues in the alternative that because plaintiff received sickness and accident benefits during his period of disability, the policy underlying section 405 was satisfied here, with sickness and accident benefits substituting for pension benefits. Defendant argues that under such circumstances the receipt of benefits similar to pension benefits should defeat the statutory presumption.

We disagree for a number of reasons. First, as the WCAC noted, however attractive the argument may be as a matter of public policy, it is properly directed the Legislature, and not to the courts, which are charged with interpreting statutes, not amending them. Second, in *Achtenberg v East Lansing*, 421 Mich 765, 771-772; 364 NW2d 277 (1985), the Supreme Court rejected the argument that receipt of regular, as opposed to disability, pension benefits did not preclude application of the presumption in section 405 because regular pension benefits are not similar to worker's compensation disability benefits. The Court held that the statute is clear on its face, requiring a claimant to apply for "<u>any</u> pension benefits" to which he may be entitled. Similarly, the statutory language at issue here is clear on its face, referring to "pension benefits" and not to other or similar benefits, such a sickness and

accident or long term disability benefits. Third, as plaintiff notes, any concern defendant may have regarding double recovery may be satisfied by the coordination provisions of the Act.

We reverse the decision of the WCAC and reinstate the closed award of the magistrate.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Helene N. White