

STATE OF MICHIGAN
COURT OF APPEALS

KEITH A. WAGONER,

Plaintiff-Appellant,

v

NORTHWEST AIRLINES, INC., AMERICAN
MOTORISTS INSURANCE COMPANY,
REPUBLIC AIRLINES, and NORTH RIVER
INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED

December 14, 1999

No. 215532

WCAC

LC No. 96-000525

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

PER CURIAM.

Plaintiff appeals by leave granted from an opinion and order of the Worker's Compensation Appellate Commission (WCAC) affirming the magistrate's denial of worker's compensation disability benefits. We reverse.

Plaintiff was employed as a pilot by defendant Northwest Airlines and its predecessors. He began to experience back problems on March 13, 1986, when he injured himself while carrying his equipment on board a flight. He treated with a chiropractor and missed three or four weeks of work. He recovered and returned to work, and did not have any more problems until May of 1988, when he experienced radiating back pains after lifting his infant daughter. He was off work for approximately three months, and then returned to work without incident. Plaintiff had another unspecified incident of pain at home in May of 1989, and missed four months of work. At that time, a CT scan was taken, and surgery was recommended. Plaintiff declined to undergo surgery, and engaged in an exercise program to strengthen his back.

On May 16, 1993, plaintiff experienced severe back pain at work when he lifted a thirty-pound flight bag over an airline console. He received physical therapy, which worsened his condition. Plaintiff did not pass his FAA medical certification, and lost his license to fly. Plaintiff is presently receiving a disability pension from Northwest.

A hearing was held before the magistrate, and depositions were received from three medical experts, along with medical records of other treating physicians. Initially, the magistrate noted that the parties stipulated to injury dates of March 13, 1986, and May 14, 1993. Dr. Jack Belen, who examined plaintiff on April 17, 1996, opined that plaintiff suffered from chronic lumbosacral myofascitis, lumbosacral disc disease, and left lumbosacral radiculopathy resulting from his work-related injury in 1986. The repeated recurrences aggravated his condition, and resulted in disability. Dr. Belen believed that plaintiff's prognosis was poor, and that he could not return to work as a pilot.

Dr. Glafkos Theodoulou examined plaintiff on July 23, 1991. He found no clinical evidence of orthopedic impairment. His review of x-rays and a CT scan taken July 20, 1989, showed narrowing of the disc space at L5-S1, and a subtle central herniated disc at L4-L5, which explained plaintiff's chronic symptoms. He opined that there were no positive objective abnormalities that would preclude plaintiff from continuing to work. When presented with a hypothetical based on Dr. Alvin Brown's examination in November 1993, Dr. Theodoulou opined that there would be no change in his diagnosis. Notably, however, Dr. Theodoulou did not see plaintiff after the May 14, 1993, injury date.

Dr. Alvin Brown, who examined plaintiff on November 15, 1993, testified that although the MRI and x-rays showed degenerative disc disease and considerable disc space narrowing at L5-S1, those injuries could not have accrued between the May 14, 1993 injury date and the date of the examination. Dr. Brown opined that these conditions must have been pre-existing, but he could not opine as to the nature of their origin. No clinical findings supported an ongoing pathological condition. Dr. Brown believed that plaintiff could return to work as a pilot.

Additional medical records were admitted from physicians who had provided treatment to plaintiff. Dr. Donald Russell treated plaintiff from 1989 to 1994. Dr. Russell's notes of May 1989 reflected a definite indication of a herniated disc at L5-S1. An MRI taken on August 9, 1993, revealed a degenerative change at that site. After physical therapy was unsuccessful, Dr. Russell gave plaintiff two epidural injections, which provided some relief. Dr. Russell opined that plaintiff remained disabled, despite the improvement. Dr. Lasich took over Dr. Russell's practice and conducted an examination on November 15, 1994. Dr. Lasich believed that plaintiff's disability was a result of the May 14, 1993, injury. Further, plaintiff was evaluated at the Mayo Clinic on February 18, 1994, and Dr. Orford concluded that plaintiff has a chronic problem which disabled him from flying.

The magistrate denied plaintiff's claim, finding that plaintiff failed to meet his burden of proving a work-related disability. The magistrate stated that he had concerns and suspicions about plaintiff's problems being associated with the May 14, 1993 injury. He accepted the opinions of Dr. Theodoulou and Dr. Brown over those offered by plaintiff, and found that plaintiff had completely recovered from his previous injuries by the time of the 1993 incident. The magistrate believed that plaintiff's positive objective findings were not attributable to the May 1993 incident. The magistrate accepted Dr. Theodoulou's opinion that plaintiff had no work-related disability. Although plaintiff may have a debilitating condition, as reflected by his receipt of a Social Security disability pension, the magistrate found that there was no work-related causal effect between the injury and plaintiff's employment.

Plaintiff appealed to the WCAC. The WCAC noted that there was as much, if not more, competent, material, and substantial evidence to support the plaintiff's position as there was to support the magistrate. Although the WCAC was not convinced that it agreed with the magistrate's interpretation of Dr. Theodoulou's testimony, the WCAC found there was evidence to support the magistrate's decision, and the WCAC was not permitted to perform its own fact finding. Although the WCAC stated that it did not necessarily agree with the magistrate's analysis, there was competent, material, and substantial evidence to support the magistrate's findings, and it was bound by law to affirm. The WCAC affirmed the magistrate's decision.

Worker's compensation magistrates determine the facts pertaining to a worker's compensation claim. MCL 418.851; MSA 17.237(851). The magistrate's findings are conclusive if they are supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3); MSA 17.237(861a)(3).

On judicial review, this Court will inquire whether the WCAC acted in a manner consistent with the concept of administrative appellate review. *Goff v Bil-Mar Foods (After Remand)*, 454 Mich 507, 511; 563 NW2d 214 (1997); *Holden v Ford Motor Co*, 439 Mich 257, 267-269; 484 NW2d 227 (1992). This Court must affirm the findings of fact of the WCAC if they are supported by any competent evidence, and the WCAC acted within its powers. *Goff, supra* at 516. A decision of the WCAC is subject to reversal if the WCAC 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).

There was no competent evidence to support the finding that plaintiff's back condition was not work related. Plaintiff testified that he had no back problems before his 1986 injury. Defendants introduced no evidence that would place this testimony in question. Plaintiff related incidents of back pain in 1988 and 1989, relating to the 1986 injury. When Dr. Brown examined plaintiff in 1993, he found that the 1993 incident could not have been the cause of plaintiff's problems because the disc condition could not have formed so quickly. Dr. Brown was unable to give an opinion as to the cause of the original injury. Dr. Brown's conclusion was that plaintiff was not disabled, not that his injury was not work related.

Dr. Theodoulou's conclusion was in a similar vein. He examined plaintiff in 1991, and found that he was not disabled, as plaintiff was continuing his work as a pilot at that time. Based on a hypothetical from Dr. Brown's examination, he opined that there would be no change in his diagnosis.

The magistrate accepted the opinions of these two experts, but rather than finding that plaintiff was not disabled, he found that any disability was not work related. The magistrate noted that plaintiff was receiving a Social Security disability pension, and may have a debilitating condition.

The finding that plaintiff's condition is not work related is not supported by any competent evidence. The fact that plaintiff was able to return to work after his 1986 injury does not preclude an award of benefits when a subsequent work injury aggravates the initial condition. An employee is entitled to compensation when the nexus between the employment and the injury is sufficient to conclude that the injury was a circumstance of the employment. *Illes v Jones Transfer Co (On Remand)*, 213

Mich App 44, 51; 539 NW2d 382 (1995). Benefits are payable not only for a disability caused solely by working conditions, but also for any preexisting condition accelerated or aggravated by the workplace and for any injury that was caused by work coupled with a preexisting condition. *Kostamo v Marquette Iron Mining Co*, 405 Mich 105, 116; 274 NW2d 411 (1979); *Cox v Schreiber Corp*, 188 Mich App 252, 256-259; 469 NW2d 30 (1991). Here, the evidence showed that plaintiff was disabled, and his condition was at the very least aggravated by his employment.

The decision of the Worker's Compensation Appellate Commission is reversed, and this matter is remanded to the Board of Magistrates for computation of benefits. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Hilda R. Gage