STATE OF MICHIGAN

COURT OF APPEALS

JIM ROBINSON, JR.,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
January 21, 2000

No. 215113
WCAC
LC No. 96-000271

Before: O'Connell, P.J., and Talbot and Zahra, J.J.

PER CURIAM.

Plaintiff appeals by leave granted from the September 16, 1998 opinion and order of the Worker's Compensation Appellate Commission (WCAC) affirming the magistrate's denial of specific loss benefits. We affirm.

Plaintiff was injured while working for defendant on October 8, 1993 when his glove became caught in a piece of machinery and bent his thumb back. Plaintiff sustained a fracture of the middle bone (the proximal phalanx) of his right thumb. Plaintiff also suffered some tendon damage. Plaintiff had out-patient surgery performed on the day of his injury and pins were inserted to set the fracture. After the fracture healed and the pins were removed plaintiff underwent physical therapy to increase the range of motion of the joints in the thumb.

Plaintiff, obviously an industrious and dedicated employee, returned to work the day after his injury and was assigned to jobs which he could perform without reliance on his right thumb. On April 13, 1994, plaintiff was placed on a permanent work restriction prohibiting plaintiff from doing work that requires the use of his right thumb. Plaintiff currently drives a hi-low or operates other machinery which does not require him to use his right thumb. Plaintiff testified that he drives the hi-low with his left hand and operates the hoists with his right hand using his fingers and palm to grip the controls. The magistrate also observed that plaintiff is able to sign his name fairly well with his right hand, keeping his thumb extended straight.

Appellate review by this Court of factual determinations is limited to "whether the WCAC acted in a manner consistent with the concept of administrative appellate review that is less than de novo

review in finding whether the magistrate's decision was supported by competent, material, and substantial evidence on the whole record." *Hagerman v Gencorp Automotive*, 457 Mich 720, 727; 579 NW2d 347 (1998) citing *Holden v Ford Motor Co*, 439 Mich 257, 267-268; 484 NW2d 227 (1992). However, whether the magistrate applied the correct legal standard is a question of law that is reviewed de novo by this Court. *Hagerman, supra* at 727.

Plaintiff first argues that the magistrate applied the wrong legal standard when finding that plaintiff has not suffered a specific loss of the industrial use of his thumb. More specifically, plaintiff contends that the magistrate equated loss of the industrial use of the thumb with a total disability or a loss equivalent to amputation. This standard, plaintiff argues, is inconsistent with *Pipe v Leese Tool & Die Co*, 410 Mich 510, 527; 302 NW2d 526 (1981), and therefore the WCAC should have reversed the decision of the magistrate and remanded for a determination under the appropriate standard. Defendant responds that specific loss benefits under MCL 418.361(2); MSA 17.237(361)(2) are only available when there is actually a physical anatomical loss of one of the body parts enumerated, i.e. amputation.[1]

As pointed out by defendant, a literal reading of subsection 361(2) strongly suggests that specific loss benefits are awarded only for physical anatomical loss of enumerated body parts. However, in *Pipe, supra*, the Michigan Supreme Court interpreted the term "loss" in MCL 418.361(2); MSA 17.237(361)(2) to mean not only amputation but also the loss of the industrial use of the body part:

> For purposes of determining an award of specific-loss benefits for the loss of a hand, there must be a showing of either anatomical loss **or loss of the industrial use of the hand as determined by the loss of the primary service of the hand in industry**. (Emphasis added.) [*Pipe, supra* at 527.]

In *Pipe*, the Supreme Court expanded subsection 361(2) in a manner that is arguably inconsistent with the plain meaning of subsection 361(2), which twice uses the word "amputation" to describe recoverable losses. Further, the Legislature used the phrase "loss of the industrial use" in subsection 361(3)(g) to describe the type of disability that gives rise to compensation under section 351 of the WDCA. The phrase "loss of industrial use" is conspicuously absent in subsection 361(2). Having used the phrase to describe a disability in subsection 361(3)(g), we should assume that had the Legislature intended to provide compensation for the loss of the industrial use of the body parts enumerated in subsection 361(2), it would have expressly provided for such recovery.

We are further mindful of our obligation to construe narrowly judicial interpretations that appear to be inconsistent with the plain meaning of the statutes they interpret. E.g., *Herbolsheimer v SMS Holding Co Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 204631, released 1/4/00), slip op, pp 6-7 (holding that where judicially created exceptions to general statutory law are arguably inconsistent with the plain language of such law, the judicial pronouncement should be interpreted more narrowly rather than more broadly in those cases in which the scope of the judicial doctrine is uncertain). Nonetheless, where the Supreme Court has considered a statute and in the process of interpreting and defining the statute created a clear rule of law, this Court and the trial courts are bound

to accept, apply, and follow the statutory interpretation advanced by the Supreme Court. Such is the case here. Notwithstanding our concern over the Supreme Court's interpretation of subsection 361(2), we are required to follow *Pipe* and hold that a claimant may recover benefits under subsection 361(2) of the WDCA upon establishing loss of the industrial use of a body part enumerated in that subsection.

Having determined that a claimant may recover for loss of industrial use of a body part enumerated in subsection 361(2) of the WDCA does not resolve the issue of whether the magistrate applied the wrong legal standard, as claimed by plaintiff. While there exists some ambiguity in the magistrate's opinion and findings, when considered in its totality, the magistrate's opinion establishes that he was aware of *Pipe, supra,* and applied the proper legal standard to plaintiff's claim. The magistrate opined:

> **Plaintiff has not persuaded me by a preponderance of the evidence presented that he has lost the industrial use of his thumb**, thus, [plaintiff is] not entitled to specific loss benefits for that injury.
>
> * * *
>
> While plaintiff clearly had and continues to experience some disability as a result of the October 8, 1993 injury to his right hand and thumb, **this disability is not sufficiently severe to be considered a loss of industrial use for the purposes of workers' compensation**. He does have some restrictions, recognized and accepted by defendant. He did not suffer an amputation, either complete or partial, and **continues to have some mobility and range of motion observed at trial and acknowledged in the medical documentation**. The most apparent and restricting problem would appear to be grip strength in the right hand which creates his current limitations. **The fact that defendant recognizes a permanent restriction is not sufficient, as claimed by plaintiff, to give rise to the loss of industrial use.**
>
> In reaching my decision that **plaintiff retained sufficient use of the thumb to perform work in the industrial setting, albeit restricted, I rely on the test or standard set in *Pipe v Leese Tool & Die Company*, 410 Mich 510; 302 NW2d 526 (1981). Loss of industrial use of the thumb is sufficient to grant specific loss benefits, but we must look further to define what constitutes loss of industrial use. For this we look also to *Pipe* which states that loss of industrial use is demonstrated by showing "the loss of primary service of the hand in industry." Plaintiff has not demonstrated a loss of service of the thumb.** His continuing work, with restrictions, doing many of the jobs he did before, albeit with restricted motion and grip as well as some sensation loss, does not sufficiently demonstrate disability equivalent to amputation or total loss of serviceability, thus my finding. **I believe he retains significant and industrially useful capability in the hand and thumb that was injured**. (Emphasis added.)

The magistrate at one point did indeed overstate the standard applicable under subsection 361(2) by stating that plaintiff's disability was not "equivalent to amputation or total loss of serviceability." However, the magistrate cited *Pipe, supra,* and stated the correct standard numerous times throughout the written opinion and ultimately found that plaintiff retained significant and industrially useful capability in the hand and thumb that was injured. This factual finding is consistent with the standard set forth in *Pipe, supra* at 527. Therefore, we find that the magistrate did not apply the wrong legal standard in making its determination.

We further find that the magistrate's factual findings were supported by competent, material and substantial evidence on the record. The magistrate observed first hand plaintiff's ability to move his thumb and sign his name. More significantly, the medical evidence showed that plaintiff retained significant grip and pinch strength with his injured thumb and had significant range of motion in both joints of the thumb. As noted in *Pipe, supra* at 519, grasping is the primary service provided by thumbs. Therefore, we find that the WCAC did not err in affirming the magistrate's findings of fact.

Plaintiff also claims on appeal that the magistrate erred by not making a determination that plaintiff suffered the loss of the industrial use of half of his thumb. The WCAC stated that it was not certain that such a claim existed, but in any event, the issue was never raised before the magistrate and is therefore waived on appeal.

Having reviewed the record and briefs filed before the magistrate, we find no evidence that this issue was ever expressly raised before the magistrate. In fact, plaintiff clearly indicated in his memorandum of law presented to the magistrate that the loss of use alleged was for the entire thumb:

> Mr. Robinson's loss of use extends to the proximal phalanx which is well below the first phalange. [Plaintiff's Memorandum of Law, p 8.]

Moreover, as pointed out by the WCAC, at the beginning of the hearing the magistrate asked the parties to state their positions on the record. Plaintiff's counsel stated that plaintiff had suffered the "industrial loss of use of his right thumb." Plaintiff's counsel made no reference to some partial loss.

Plaintiff argues that since subsection 361(2) recognizes a claim for partial loss, a logical extension of *Pipe, supra,* would allow for such a claim. Since claims for the loss of the thumb and loss of one-half of the thumb are made pursuant to the same statute, plaintiff argues, one claim is a lesser included claim of the other. However, we have found no case in Michigan addressing a claim of loss of industrial use of only a portion of a body part. Since there is no existing case recognizing a partial loss of industrial use claim, we find that it was incumbent upon plaintiff to expressly present his claim to the magistrate, thereby allowing plaintiff's argument to extend the law to be fully developed before review by this Court. Plaintiff's failure to expressly raise this issue before the magistrate precludes consideration of the issue both by the WCAC and by this Court. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 7; 535 NW2d

215 (1995); *Rutherford v Department of Social Services*, 193 Mich App 326, 330; 483 NW2d 410 (1992). Accordingly, we conclude that this issue has not been preserved for appeal.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] Defendant contends that the loss of the industrial use of a body part only comes into play when determining total and permanent disability under MCL 418.361(3)(g); MSA 17.237(361)(3)(g).