STATE OF MICHIGAN

COURT OF APPEALS

ROBERT M. TALBOT,

Plaintiff-Appellant/Cross-Appellee,

v

DETROIT NEWSPAPER AGENCY,

Defendant-Appellee/Cross-Appellant,

and

TRAVELERS INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, and SECOND INJURY FUND,

Defendants-Appellants.

UNPUBLISHED
July 24, 2001

No. 224172
WCAC
LC No. 98-000643

Before: Markey, P.J., and Jansen and Zahra, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent. I would reverse the decision of the Worker's Compensation Appellate Commission (WCAC) and reinstate the magistrate's decision that granted an open award of benefits to plaintiff.

Plaintiff filed his application for mediation or hearing on April 28, 1998, and the hearing was held before the magistrate on August 13, 1998. In his application, plaintiff alleged dates of injury of September 5, 1992, January 31, 1994, May 31, 1995, and a last day of work of July 12, 1995. With respect to the injuries, plaintiff alleged (in chronological order) the following: (1) he fell in his truck, turned his knee, which required surgery, and now needs knee replacement; (2) he fell out of his truck and turned his knee and his right knee needs replacement; and (3) he injured his left foot, left shoulder, back, and sprained his ankle when he tripped and fell on newspaper racks. At the hearing, during plaintiff's direct examination, defense counsel raised an objection that the last day of work was not alleged as a date of injury. The magistrate overruled the objection, stating that the last date of work could be interpreted as a date of injury, as set forth on

the application for hearing. Indeed, an examination of the application of hearing reveals that the last day of work is listed in the box entitled "date(s) of injury."

The WCAC and the majority have erroneously concluded that the magistrate's decision was legal error and without support based on the "finding" that the May 31, 1995, date of injury did not relate to plaintiff's knees. The magistrate did *not* find that plaintiff's knee injury was based on a May 31, 1995, date of injury. I set forth the relevant findings of the magistrate here:

> The court finds that there is not clear and convincing testimony that plaintiff's prior knee injuries caused or contributed to the degeneration in his knees. There clearly is evidence that plaintiff is disabled from his normal work activity and cannot perform all the duties of his occupation. Defendant argues that plaintiff's weight is the cause and this court grants that as contributing. Plaintiff has established a disability and wage loss due to the injury. The remaining question is whether plaintiff suffered from a work place injury. The court concludes that plaintiff has. Plaintiff is grossly overweight and the bilateral knee problem is related to his weight. However, a more narrow question is whether the plaintiff has established a claim pursuant to [MCL] 418.301(2). This court finds that he has. Prior case law establishes the proposition that the employer takes the employee, at the gate, with all his frailties. The remaining question is whether the plaintiff's employment under [MCL 418.]301(2) contributed to or aggravated or accelerated his bilateral knee problem in a significant manner. Ambulation away from work clearly would accelerate plaintiff's problem, but comparing that to plaintiff's moderately heavy work and the significant difference in the nature of these exposures, this court finds most persuasive the testimony of Dr. Gordon that the heavy work was a factor. This court further concludes that because of the nature of the exposure while away from work when compared to work activities, that plaintiff has proven that his condition was contributed to or aggravated or accelerated in a significant manner.

The WCAC reversed the magistrate, finding that "the magistrate's decision to grant an open award for a knee related injury based on an injury date of May 31, 1995 where no knee injury was alleged is legal error."

Because the magistrate did not award benefits based on an injury date of May 31, 1995, I conclude it was the WCAC, and not the magistrate, that erred as a matter of law. As our Supreme Court has stated, one of the roles of the judiciary in reviewing decisions of the WCAC is to "ensure the integrity of the administrative process." *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). Thus, our role is to ensure that the WCAC did not misapprehend its administrative role in reviewing decisions of the magistrate. *Id.* at 703. "[A]s long as the WCAC did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law), then the judiciary must treat the WCAC's factual decisions as conclusive." *Id.* at 703-704.

Here, the WCAC's decision was based on erroneous legal reasoning because it incorrectly stated that the magistrate based the decision to grant benefits on an injury date of May 31, 1995. As had been set forth, the magistrate did not base the decision to grant benefits on an

injury date of May 31, 1995. Instead, the magistrate concluded that plaintiff's employment contributed to, aggravated, or accelerated his bilateral knee problem in a significant manner. This is in accordance with the rule that where the employee's underlying condition has been accelerated or aggravated by the employment, the employee is entitled to an open award of benefits. *Kostamo v Marquette Iron Mining Co,* 405 Mich 105, 116; 274 NW2d 411 (1979); *Cox v Schreiber Corp,* 188 Mich App 252, 259; 469 NW2d 30 (1991).

Accordingly, I would reverse the decision of the WCAC and reinstate the magistrate's decision.

/s/ Kathleen Jansen