STATE OF MICHIGAN

COURT OF APPEALS

RALPH E. BEAUBIEN, Plaintiff-Appellant,	UNPUBLISHED May 3, 2002
v	No. 234416 WCAC
DAIMLERCHRYSLER CORPORATION, Defendant-Appellee.	LC No. 00-000353

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the order of the Worker's Compensation Appellate Commission (WCAC), reversing the magistrate's open award of benefits. We affirm.

I. Basic Facts and Procedural History

Plaintiff began working for defendant as a general laborer on the assembly line in 1972. He worked at a variety of jobs for about five years before being assigned the job of installing windshields, which job he held for the remainder of his employment. Plaintiff was required to lift the windshield, properly situate it and then secure it. Plaintiff testified that each windshield weighed about forty pounds, and that he had to install approximately one windshield per minute.

Although plaintiff was able to continue performing his specific job, he began to experience difficulty with his back sometime in 1979. In September, 1992 while carrying a windshield, plaintiff slipped on an oily floor and fell about two to three feet into a pit on the assembly line. Personnel working in the medical department applied heat to plaintiff's back before returning him to the line. About a month later, he began to experience numbness in his right leg and his back pain worsened over time. On the advice of a friend, he saw Dr. Herkowitz, who eventually performed spinal fusion surgery in August 1993. Plaintiff was off work for about six months before returning with restrictions against twisting, bending or heavy lifting. Notwithstanding plaintiff's specific limitations, defendant placed him back on the line installing windshields. Plaintiff admitted that after the surgery, the numbness in his leg was gone, although he still experienced pain in his middle back.

In May, 1994 plaintiff fell into a pit a second time. When Dr. Herkowitz was unable to treat him further, plaintiff went to see several other doctors on his own. Plaintiff testified that he

was on and off disability for two weeks to several months at a time. Although defendant sent plaintiff to a "work hardening" program in 1996, plaintiff claimed that he could not tolerate the pain.

Plaintiff filed a petition for hearing claiming work-related disability to his back, legs, and other body parts and areas. At the hearing, plaintiff testified that he could not return to regular work because it would cause too much pain. Although plaintiff conceded that he can do limited amounts of bending, twisting and lifting, he estimated that he could only work for about ten minutes at a time before he would need to take a break and relieve his back. Plaintiff also testified that the difficulty with his back also restricted his ordinary non-work activities.

Plaintiff further offered the deposition testimony of Dr. Shapiro, who opined that based on plaintiff's history and his medical reports, plaintiff continues to suffer because of injuries sustained from his falls at work, which have aggravated underlying nonwork-related degenerative processes in his spine. Dr. Shapiro would restrict plaintiff from squatting, bending and lifting more than fifteen pounds. In his opinion, plaintiff is unable to return to unrestricted work activities.

To the contrary, defendant's expert, Dr. Mendelson, testified that plaintiff has made an excellent recovery from his fusion surgery and that he could find no objective evidence of weakness. In his opinion, plaintiff is able to return to normal work duties without restrictions. Defendant also offered the testimony of a private investigator, who in turn produced five videotapes comprising nine hours of surveillance. The videotapes apparently show plaintiff bending, stooping, working around the house, hammering, climbing ladders, and lifting something described as a long wooden pole approximately fifteen feet long and weighing two hundred pounds, without any apparent difficulties.

At the conclusion of the hearing, the magistrate entered an open award of benefits. Although the magistrate noted that plaintiff's testimony regarding his complete inability to do certain things was rebutted by the videotape evidence, the magistrate nevertheless found that plaintiff was a credible witness. In accord with plaintiff's testimony and that of his expert, Dr. Shapiro, the magistrate found that plaintiff suffered work-related injuries as a result of which he continues to be partially disabled, i.e., he cannot return to work without restrictions.

Defendant appealed and the WCAC reversed. The WCAC held that the magistrate's reliance on the testimony and opinion of Dr. Shapiro was misplaced because he wholly relied on plaintiff's reports regarding his inability to accomplish his day-to-day activities without pain, which were contradicted by the videotape evidence. The WCAC stated:

> We are persuaded that Dr. Shapiro's stating that plaintiff is still unable to return to unrestricted work is without substantial support. As noted above, Dr. Shapiro had not seen or viewed any other evidence or heard testimony to refute plaintiff's complaints to him concerning his alleged physical limitations. Rather, Dr. Shapiro's opinion concerning what plaintiff could or could not do was based on the history plaintiff related to him.
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> * * *

> We find the videotape evidence is compelling and overwhelming[ly] refutes plaintiff's testimony that he is restricted in his everyday activities. Videos one and four, in particular, reveal plaintiff consistently bending and twisting. We agree with defendant that the most significant video evidence is video one in which plaintiff can be seen pulling and lifting what appears to be a very large piece of heavy wood to the top of a motor home without any assistance in addition to climbing up and down a ladder. Video three shows plaintiff constantly bending, often on all fours, and hammering over a long period of time without any sign of physical discomfort. The video evidence clearly indicates that plaintiff could and can do far more than what he related to Dr. Shapiro.

Plaintiff's only issue on appeal is that the WCAC misapprehended its administrative appellate function by conducting a de novo review of the evidence and by failing to properly apply the substantial evidence test to the magistrate's findings of fact. We disagree.

II. Standard of Review

In *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000), our Supreme Court iterated, "the WCAC's review of the magistrate's decision involves reviewing the whole record, analyzing all the evidence presented, and determining whether the magistrate's decision is supported by competent, material, and substantial evidence." *Id*. at 699. According to MCL 418.861a(3), substantial evidence is "such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion."

While the standard of review applicable to the WCAC in its decision making process is highly fact intensive, judicial review of the WCAC's decision is much more restrained. *Mudel, supra* at 701. According to the Legislature's directive, absent fraud, findings of fact made by the WCAC acting within its prescribed role are conclusive. *Id*. Indeed, "[a]s long as there exists in the record any evidence supporting the WCAC's decision, and as 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. Consequently, this Court does not independently review the question whether the magistrate's findings of fact are supported by substantial evidence. On the contrary, this Court's review terminates if we are satisfied that the WCAC properly understood and applied its own standard of review.

III. The WCAC'S Decision

In the instant case, the WCAC did not simply substitute its opinion for that of the magistrate. Instead, the WCAC evaluated defendant's argument on appeal and ultimately agreed with defendant that the magistrate's reliance on Dr. Shapiro's testimony was unfounded. Although it is true that a magistrate is entitled to select the medical expert he or she finds most persuasive, *Miklik v Michigan Special Machine Co*, 415 Mich 364, 367; 329 NW2d 713 (1982), the WCAC provided ample reasons grounded in the record for finding that Dr. Shapiro's opinion was unreliable. The WCAC noted that Dr. Shapiro's opinion concerning plaintiff's inability to work without restrictions was based solely on plaintiff's *own* reports to Dr. Shapiro describing the pain and discomfort he felt when stooping, bending, and lifting. In addition, the WCAC found that the videotape evidence submitted by defendant provided compelling reasons for

concluding that plaintiff was at the very least, greatly exaggerating the pain and discomfort he experiences when engaged in such activities.

Plaintiff implies that the WCAC's appellate role is limited solely to a determination as to whether there is substantial evidence to support the magistrate's findings, in the sense that the WCAC must scour the record with an ultimate purpose of affirming the magistrate whenever possible. Plaintiff is misguided in his belief. The WCAC is required to review the whole record, including evidence against a certain determination as well as evidence in favor of it. MCL 418.861a(4). The WCAC is also required to review the quality as well as the quantity of the evidence presented. MCL 418.861a(13).

Because the WCAC's analysis does not reveal a misunderstanding of its administrative appellate function, we must treat the WCAC's factual findings as conclusive. We thus affirm the WCAC's determination.

Affirmed.

/s/ Jessica R. Cooper
/s/ Harold Hood
/s/ Kirsten Frank Kelly