STATE OF MICHIGAN

COURT OF APPEALS

LARRY H. GOLDSTEIN,

Plaintiff-Appellant,

v

DAIRY MART and ROYAL INSURANCE COMPANY,

Defendants-Appellees,

and

MICHIGAN DEFENSE TRIAL COUNSEL,

Amicus Curiae.

UNPUBLISHED
December 13, 2002

No. 234330
WCAC
LC No. 99-000514

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

TALBOT, P.J. (*dissenting*).

I respectfully dissent.

As an initial matter, I would not remand because the parties agreed during oral argument that the record is adequate for review. Further, while I am mindful of this Court's holding in *McComber v McGuire Steel Erection, Inc*, 251 Mich App 491; 650 NW2d 416 (2002), lv pending, I believe that the facts of this case do not compel the same result and I would hold that the record evidence supports the WCAC's finding of a "willful failure to comply" with the disclosure requirements of MCL 418.222.

Plaintiff failed to state in his benefits application that he had undergone neck fusion surgery, after which he was disabled from working for eighteen months and received a settlement. Plaintiff did not list any of his medical providers in his application and neglected to produce his medical records until two years after he filed his application for benefits in this case. In contrast, the *McComber* plaintiff did not mention in his benefits application that he had been employed by another employer for four weeks after he had sustained his injury at his job with the defendant employer. The plaintiff had discussed that job with his legal counsel; however, counsel had not included that information on the plaintiff's application. *McComber*, *supra* at 493-494. The *McComber* Court decided that without evidence that the plaintiff had known of the omission, the plaintiff could have merely made a mistake or could have been careless in

reviewing the application. This Court decided that willful noncompliance was not present where no evidence supported the WCAC's finding that the plaintiff had willfully failed to reveal his later employment. *Id*. at 500-501.

The *McComber* facts do not correspond to those in the case at bar. Here, plaintiff attempts to rely on the magistrate's finding that his work-related disability was an aggravation of the very injury he neglected to disclose on his application for benefits. Further, the *McComber* plaintiff's nondisclosure involved merely a three- to four-week span of employment, and, unlike the facts here, did not involve a five-year course of medical treatment that included surgery, disability from work for more than a year, and a settlement.

Because *McComber* does not align with the circumstances here, earlier opinions from the WCAC may be relied upon for analysis regarding noncompliance under § 222(6).[1] In *Salyer v Corrigan Moving Systems*, 1997 Mich ACO 366, the plaintiff's petition did not disclose the name of one doctor with whom the plaintiff had treated. Even after the defendant received the records, however, the defendant did not depose the physician. The magistrate opined that he did not believe that the plaintiff intentionally had withheld the information. The WCAC ruled, in part, that it "believe[d] that word 'willful' implies an act (or non-act) more devious than merely forgetting." *Id.* That statement, however, does not lead to the conclusion that a party may avoid sanctions under § 222(6) by asserting, without more, that he merely forgot to provide the requisite documents or information. To hold otherwise would nullify the purpose of § 222(6).

In contrast is *Corrales v Tele-Communications, Inc*, 1998 Mich ACO 73, in which the WCAC found no evidence that the plaintiff willfully failed to disclose the name of one of his treating physicians. The WCAC ruled: "Having examined the record, we are not convinced that Dr. Mankoff was anything but a momentary blip on the screen of plaintiff's treatment history." Accordingly, a showing that a course of treatment was more than a "momentary blip" would weigh in favor of a finding of willfulness.

In *Hastie v Greater Detroit Physical Therapy & Rehabilitation*, 1999 Mich ACO 728, which the WCAC identified as "a classic and compelling example of why § 222 was placed into the Act," the plaintiff listed just two healthcare providers in her initial petition. One year later, the plaintiff amended her petition to add psychological claims and the names of two other physicians. The plaintiff never produced records from those doctors, although the defendant had requested such records, and the plaintiff never disclosed the names of at least four other treating doctors. The WCAC ruled:

> [T]he uncontested found facts in this matter reveal plaintiff's counsel never offered any excuse for failing to comply with § 222(3) other than to assert at trial that he offered to give defendant a medical authorization. We find such an offer insufficient to meet the requirements of § 222(3). We agree with defendant that such an authorization would not do defendant any good if it did not know who or

[1] The WCAC's opinions are helpful here, where "[l]ongstanding and invariant administrative agency interpretations of a statute that the agency is empowered to administer are entitled to great deference by the courts, absent a contrary logical reading of the statute." *Barker Bros Construction v Bureau of Safety & Regulation*, 212 Mich App 132, 136; 536 NW2d 845 (1995).

> where the doctors were. We note as previously pointed out that defendant made many requests for the medical records it was aware existed based on the information plaintiff provided on her original and amended petitions. We find plaintiff recognized and appreciated her burden pursuant to § 222(3) to reveal names and addresses of any doctors, etc., who had provided treatment for the injury complained of when plaintiff, after failing to list some doctor's names on the original petition, added two more names (but not all other known names) to the amended petition. We find the treatment at issue occurred before the filing of the last petition, the plaintiff knew the records existed and plaintiff knew defendant wanted them and appreciated the possibility that they could be material to defendant's trial preparation. We believe plaintiff's failure to add all known names to the amended petition, together with the other found facts listed, constitute a willful failure to comply with § 222(3). [*Id.*]

Under *Hastie*, plaintiffs assume the risk of the imposition of § 222(6) sanctions where they have failed to identify all known medical providers.

In *Jawad v Hamtramck School Dist*, 2001 Mich ACO 230, the WCAC imposed sanctions under § 222(6) where the plaintiff listed only one doctor, and failed to include several other doctors. The WCAC found that the plaintiff's violation was willful:

> At trial, plaintiff recalled the names of numerous doctors. Many of these doctors consulted plaintiff about her mental condition. That same condition was the central issue of the trial. The great importance of the names constitutes evidence of plaintiff's willful violation. Further, plaintiff's withholding of the doctors' names continued until her trial testimony. As previously mentioned, plaintiff filed several amended applications listing only one doctor and no witnesses. Plaintiff's efforts to conceal the information included keeping the names from her attorney. Finally, we note that plaintiff offered no alternative reason for her violation of the statute. Thus, we find her violation willful. [*Id.*]

This Court, in line with the above WCAC opinions, may use the failure to provide the names of medical providers as evidence of willfulness, particularly where those providers are crucial to the case.

Applying these authorities to the case at bar, the record here reveals evidence to support the WCAC's finding that plaintiff willfully failed to comply with § 222. Section 222 imposed the obligation on plaintiff, who possessed the medical records, to provide them to defendants. See *Snyder v General Safety Corp (On Remand)*, 200 Mich App 332, 335-336; 504 NW2d 31 (1993). Plaintiff, who was fully aware that he had undergone neck surgery, failed to provide his medical records regarding that surgery, or the names of the medical providers related to that surgery,[2] despite the fact that he was claiming benefits for an injury to his neck.

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[2] Plaintiff received treatment for his previous neck injury from at least ten doctors in California, New York, and Israel.

Plaintiff did not list the medical providers on his application, thereby providing no notice of the surgery to defendants. Given that the surgery disabled plaintiff for eighteen months and required follow-up treatment from at least ten providers for over five years, the record evidence does not suggest that plaintiff merely forgot to include the surgery. In contrast to *McComber*, *supra*, the withheld evidence here involved much more than four weeks of subsequent employment. Plaintiff's neck surgery was no "momentary blip on the screen" of his treatment history that he justifiably could have forgotten. See *Corrales, supra*. That conclusion finds support in plaintiff's argument on appeal, where he does not assert that he forgot the surgery, but instead contends that he honestly believed that the surgery was irrelevant.

Plaintiff's argument that he believed that his injury was limited to his upper extremities, and thus that the records of his prior neck surgery were irrelevant, should be rejected. Where plaintiff's application for benefits indicated injuries beyond his upper extremities and specifically identified neck injuries, plaintiff cannot credibly contend that he then believed his injuries were restricted to his upper extremities. Section 222 requires parties to provide "any medical records relevant to the claim." Parties who independently determine the relevance of medical records of prior surgery involving the injured area do so at their peril and risk sanctions pursuant to § 222(6).

This case is akin to *Hastie, supra*, in which the plaintiff did not reveal the names of some of her doctors and did not produce medical records from those doctors. As in *Hastie, supra*, plaintiff's reason for failing to provide the records, that he believed the surgery was irrelevant, is insufficient.[3] As noted in *Jawad, supra*, "[t]he great importance of the names constitutes evidence of plaintiff's willful violation." 2001 Mich ACO 230. Plaintiff not only failed to provide medical records regarding his surgery, but also failed to reveal the names of any of the ten doctors who treated him for his prior neck injury. That information was critical where plaintiff's prior neck injury is central to this case. Under the totality of the circumstances, the record supports the WCAC's finding that plaintiff's noncompliance was willful.

Plaintiff also contends that defendants were on notice of his prior neck surgery as of July 18, 1997, when plaintiff went to see Dr. Alvin Brown, M.D., at defendants' request. Assuming arguendo that defendants were on notice, defendants' knowledge of the surgery does not relieve plaintiff of his obligation to comply with the statutory requirements. A party is not excused from compliance with the statute where the party merely assumes that the opposing party is aware of treatment. *Snyder, supra*.

Plaintiff contends that the literal language of the statute does not require providing documentation for the aggravation of a prior injury. I do not agree with plaintiff's hypertechnical interpretation. The statute requires the production of "any medical records relevant to the claim." I do not read the statute as narrowly as plaintiff urges, particularly in light of the statute's goal of an open exchange of information. *McComber, supra*.

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[3] Plaintiff may not rely on the fact that his medical records were with his ex-wife given the analysis in *Lyes v Bechtel*, 1995 Mich ACO 443, regarding constructive possession.

Further, plaintiff seeks benefits for the aggravation of a prior injury. Michigan law regarding an aggravation of a prior injury holds:

> [W]here the primary compensable injury arises out of and in the course of employment compensability may be extended to a subsequent injury or aggravation of the primary injury where it has been established that the subsequent injury or aggravation is the direct and natural result of the primary injury and the claimant's own conduct has not acted as an independent intervening cause of the subsequent injury or aggravation. [*Feldbauer v Cooney Engineering Co (On Remand)*, 205 Mich App 284, 288; 517 NW2d 298 (1994) (citing 1 Larson, Workmen's Compensation Law, § 13.11, *Schaefer v Williamston Community Schools*, 117 Mich App 26, 37; 323 NW2d 577 (1982)).]

Given the necessary relationship between the prior injury and the subsequent aggravation, it defies logic that a plaintiff may claim benefits without providing medical documents relevant to the prior injury.

The totality of the circumstances, coupled with the applicable law, support the findings of the WCAC. Accordingly, I would affirm.

/s/ Michael J. Talbot