STATE OF MICHIGAN

COURT OF APPEALS

EDWARD MULARCZYK, Plaintiff-Appellant,	UNPUBLISHED January 26, 2010
v	No. 289140 WCAC
DAIMCO CONTRACTING, INC., and SECURA INSURANCE COMPANY, Defendants-Appellees.	LC No. 08-000052

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals by leave granted[1] an order of the Workers' Compensation Appellate Commission (WCAC), reversing the magistrate's decision to grant plaintiff an open award of benefits. We reverse.[2]

I. Facts and Procedural History

Plaintiff is a carpenter who worked for defendant Damico Contracting, Inc. On October 21, 2005, plaintiff was working for defendant at a condominium complex building project when he fell and injured himself. Plaintiff filed a petition seeking workers' compensation benefits as a result of his injury. The magistrate granted plaintiff an open award of benefits from the date of his injury. In coming to this decision, the magistrate made the following findings of fact and conclusions of law:

> Plaintiff testified that on 10/21/05, he arrived at the job site approximately 20 minutes before starting time and went to the porta-potty. He caught his foot on a silk fence which was partially buried under ground and fell on his right side and back. He fell in banding straps which cut his face and right leg. [Plaintiff] admitted that the injury occurred at about 6:45 am; 15 minutes before starting

[1] *Mularczyk v Daimco Contracting, Inc*, unpublished order of the Court of Appeals, entered April 3, 2009 (Docket No. 289140).

[2] This appeal has been decided without oral argument pursuant to MCR 7.214(E).

> time (7:00 am). He indicated it was customary that the workers would gather on the job site, before work and socialize. [Plaintiff] recalled that the job site was in Walled Lake at the condo/apartment building project. The work site for the day was inside of one of the buildings. The crew would congregate on the street before work. [Plaintiff] admitted that the injury occurred before the work day began. He did not know who owned the property upon which the job site was situated. Plaintiff's testimony is unrebutted. His rendition of the events is reinforced by the histories taken by the various physicians in their respective records and reports which are in evidence. I find [plaintiff] to be a credible witness on his own behalf. [Plaintiff's] testimony was unrebutted by the defense. I accept his account of the facts and circumstances surrounding his back injury as true, and I adopt his testimony.
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> Defendant makes the legal argument that [plaintiff's] injury should not be deemed arising out of or in the course of employment because by his own admission, [plaintiff] was injured at approximately 6:45 am, about 15 minutes prior to his normal starting time; and, at the time of his injury [plaintiff] was on his way to the porta-potty and not engaged in any of his work duties as a carpenter. *I disagree*.
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> The statute is clear and sets forth the presumption that, *[a]n employee going to or from his or her work, while on the premises where the employee's work is to be performed and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment*. Under the circumstances, I find it reasonable that [plaintiff] would arrive at the construction site 15-20 minutes early for his work day. From his testimony, it appeared that it was common practice for the workers to arrive early to the job site, "*it was customary that the workers would gather on the job site, before work and socialize*." His use of the word "socialize" does not affect my reasoning since [plaintiff's] injury was not incurred in the pursuit of an activity the major purpose of which is social or recreational, but in the course of answer nature's call at a porta-potty presumably provided for the construction employees.

On appeal, the WCAC reversed the award in a split decision. It found that plaintiff failed to present sufficient evidence that his injury arose out of his employment because plaintiff had offered no evidence that: (1) defendants owned or controlled that street; (2) he fell on the jobsite where he would be working; (3) defendants owned the porta-potty or the land on which it sat; or (4) the porta-potty sat on the property where he would be working. This Court granted plaintiff's application for leave to appeal.

II. Standards of Review

Two separate levels of review are involved in workman's compensation cases. The WCAC reviews the magistrate's findings under the "substantial evidence" standard. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 698; 614 NW2d 607 (2000). In other words, the WCAC's review is limited to "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. However, the WCAC may, in limited instances,

"substitute its own findings of fact for those of the magistrate, if the WCAC accords different weight to the quality or quantity of evidence presented." *Id*. at 700.

Upon appeal to this Court, we must treat the WCAC's findings as conclusive if there is any competent evidence to support them, and in the absence of a finding of fraud. *Id*. at 701; *Holden v Ford Motor Co*, 439 Mich 257, 263; 484 NW2d 227 (1992). Stated more broadly,

> If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, *did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate*, the judicial tendency should be to deny leave to appeal or, if it is granted, to affirm, in recognition that the Legislature provided for administrative appellate review by the seven-member WCAC of decisions of thirty magistrates, and bestowed on the WCAC final fact-finding responsibility subject to constitutionally limited judicial review. [*Id*. at 269 (emphasis added).]

In other words, our role is to simply "ensure that the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate." *Mundel*, *supra* at 703.

III. Analysis

On appeal, plaintiff argues that the WCAC erred in concluding that no evidence exists to support the magistrate's finding that plaintiff fell on the premises where he worked. We agree with plaintiff.

Generally, an employee who suffers an injury "out of and in the course of employment" will be eligible for compensation regardless of whether his employer was at fault. MCL 418.301(1). Typically, employees injured while coming or going from work are not allowed workman's compensation benefits. However, MCL 418.301(3) states an exception to this general rule. It provides:

> An employee going to or from his or her work, *while on the premises where the employee's work is to be performed*, and within a reasonable time before and after his or her working hours, is presumed to be in the course of his or her employment. Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act. [Emphasis added.]

The only issue on appeal with regard to this provision is whether any evidence supports the WCAC's finding that no evidence supported plaintiff's contention that he fell on the premises where he worked. Here, the WCAC reversed the magistrate's decision on the ground that plaintiff failed to sufficiently prove that his injury arose out of his employment. It reasoned:

> [Plaintiff] offered no proof that defendants owned or controlled the street. He also offered no evidence that defendants owned the property where he fell or that he fell on the jobsite where he would work. Plaintiff offered no evidence that

> defendants owned the porta-potty or the land where the porta-potty sat. Likewise plaintiff offered no proof that the porta-potty sat on the property where he was going to perform work. Thus on this record, plaintiff offered nothing to connect his fall to his work.
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> [N]othing connects the porta-potty or the construction site to defendants.

We agree with the WCAC that no evidence supports a finding that defendant *owned* the street, the property on which plaintiff fell, the porta-potty itself or the property on which it sat. However, plaintiff's failure to provide evidence with regard to these matters is immaterial. Plaintiff's unrebutted testimony indicated that he worked all over the condominium complex, including in the street where he would build materials that would then be transported to the buildings. He testified that on the day of his injury, he had parked one street over from the location of the building in which he was to work. According to plaintiff, when he exited his vehicle, he proceeded to walk to the porta-potty. On the way, he caught his foot in a silk fence and fell on banding straps, suffering an injury. It can be inferred from this testimony that the porta-potty was located on the construction site where plaintiff performed his work given the presence of the porta-potty, the buried silk fence, and the banding straps.

Given the foregoing, the WCAC's finding that no evidence supported plaintiff's position that the injury occurred while he was on the construction site and that he failed to provide any evidence connecting his injury to his worksite is completely unsupported by the record. Accordingly, it is our view that the WCAC grossly misapplied the substantial evidence test and wrongfully displaced the magistrate's factual findings with its own factual findings that were unsupported by the record evidence. Under these circumstances, we are not bound to uphold the WCAC's decision.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck